

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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TRUSTEES OF THE NORTHEAST CARPENTERS,
HEALTH, PENSION, ANNUITY, APPRENTICESHIP,
and LABOR MANAGEMENT COOPERATION
FUNDS,

**ORDER ADOPTING
REPORT AND
RECOMMENDATION
16-CV-4487 (DRH)(ARL)**

Petitioners,

-against-

TIKI INDUSTRIES, INC.

Respondent..

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HURLEY, Senior District Judge:

Presently before the Court is the Report and Recommendation, dated May 4, 2017 (“R&R”), of Magistrate Judge Arlene R. Lindsay recommending that Petitioners’ motion to confirm the April 16, 2016 arbitration award in the amount of \$6,637.24 be granted together with attorneys’ fees in the amount of \$372.50 and costs of \$400.00 for a total award of \$7,409.74. More than fourteen days have elapsed since service of the R&R and no objections have been filed.

Pursuant to 28 U.S.C. § 636(b) and Fed. R. Civ. P. 72, this Court has reviewed the Report and Recommendation for clear error, and finding none, now concurs in both its reasoning and its result. The Court therefore adopts the May 4, 2017 Report & Recommendation of Judge Lindsay as if set forth herein. Accordingly,

IT IS HEREBY ORDERED that the petition to confirm the arbitration award dated April 16, 2016 is granted. The Clerk of Court shall enter judgment in favor of Petitioners and against Respondent confirming the April 16, 2016 arbitration award and awarding Petitioners the

full amount of the arbitration award (\$6,637.24) plus attorneys' fees and costs in the amount of \$772.50 for a total award of \$7,409.74.

SO ORDERED.

Dated: Central Islip, N.Y.
June 6, 2017

/s/ Denis R. Hurley
Denis R. Hurley
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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TRUSTEES OF THE NORTHEAST CARPENTERS
HEALTH, PENSION, ANNUITY, APPRENTICESHIP,
and LABOR MANAGEMENT COOPERATION
FUNDS,

Petitioners,

-against-

**REPORT AND
RECOMMENDATION**
CV 16-4487 (DRH)(ARL)

TIKI INDUSTRIES, INC.,

Respondent.

-----X
LINDSAY, Magistrate Judge:

By way of Petition dated August 11, 2016, Petitioners Trustees of the Northeast Carpenters Health, Pension, Annuity, Apprenticeship, and Labor Management Cooperation Funds (“Petitioners”) commenced this action pursuant to Section 502 of the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. § 1132; Section 301 of the Labor Management Relations Act of 1947 (“LMRA”), 29 U.S.C. § 185; and Section 9 of the Federal Arbitration Act, 9 U.S.C. § 9, seeking to confirm an arbitration award. To date, respondent Tiki Industries, Inc. (“Respondent”) has not appeared in this action or otherwise moved in connection with the Petition. By letter filed on November 7, 2016, Petitioners requested that the Petition be treated as a motion to confirm the arbitration award and deemed unopposed. On November 8, 2016, the Honorable Denis R. Hurley referred Petitioners’ letter request to the undersigned. For the reasons set forth herein, the Court respectfully recommends that the unopposed Petition be treated as an unopposed motion for summary judgment, and Petitioners’ motion to confirm the arbitration award be granted. The Court further recommends that judgment be entered in the amount of \$6,637.24, plus attorneys’ fees in the amount of \$372.50 and \$400.00 in costs, for a

total award of \$7,409.74.

BACKGROUND

The following facts are taken from the Petition and the exhibits attached thereto, and are assumed to be true for purposes of this Report and Recommendation.

Petitioners Trustees of the Northeast Carpenters Health, Pension, Annuity, and Apprenticeship Funds (the “Funds”) are employer and employee trustees of multiemployer labor-management trust funds organized and operated in accordance with ERISA. Pet. ¶ 4. Petitioners Trustees of the Northeast Labor Management Cooperation Fund (the “Labor Management Fund”) are employer and employee trustees of a labor-management cooperation committee established under the LMRA. *Id.* ¶ 5. At all relevant times, Respondent was an employer within the meaning of ERISA Section 3(5). *Id.* ¶ 6.

Respondent is bound to a CBA with the Union. *Id.* ¶ 7, Ex. A. The CBA requires Respondent, *inter alia*, to make contributions to the Funds for all work within the trade and geographical jurisdiction of the Union. *Id.* ¶ 8. The CBA further provides that, “the Employer shall be bound by and shall comply with the agreements, declarations of trust, plans and/or regulations of the fringe benefit funds, and the labor management cooperation committees, so designated.” *Id.* ¶ 9, Ex. A. One such agreement by which Respondent was bound was a Joint Policy for the Collection of Delinquent Contributions (“Collection Policy”). *Id.* ¶ 10, Ex. B. Employers bound by the Collection Policy are required to submit to an audit at Petitioners' request in order to ensure that the employer has made all required contributions for the relevant audit period. *Id.* Pursuant to the Collection Policy, interest on delinquent contributions is to be calculated at the rate of 0.75% per month. *Id.* ¶ 12, Ex. B. The Collection Policy provides that, “[I]iquidated damages shall be calculated from the Due Date, and shall become due and owing if

suit is commenced. The amount of the liquidated damages shall be 20% of the delinquent Contributions.” *Id.* ¶ 13, Ex. B.

Pursuant to the Collection Policy, Petitioners conducted an audit of Respondent for the period January 1, 2012 through September 30, 2015 in order to determine whether Respondent had complied with its obligations under the CBA. *Id.* ¶ 14. The auditor determined Respondent failed to remit contributions in the amount of \$2,949.98. *Id.* ¶ 15. A dispute arose when Respondent failed to remit the delinquent contributions uncovered during the audit and that dispute was submitted to arbitration pursuant to the arbitration clause in the CBA. *Id.* ¶¶ 16-19.

Upon notice to all parties, an arbitration hearing was held on March 24, 2016 before the designated arbitrator, J.J. Pierson. *Id.* ¶ 20, Ex. D. Thereafter, on April 16, 2016, the arbitrator rendered a written award. *Id.* Respondent did not appear at the hearing. *Id.* Ex. D. The arbitrator found that Respondent was in violation of the terms of the CBA and ordered Respondent to pay the Funds the sum of \$6,637.24, consisting of (1) the principal deficiency of \$2,949.98; (2) interest in the amount of \$257.26; (3) liquidated damages in the amount of \$590.00; (4) audit costs in the amount of \$1,190.00; (5) \$900.00 in attorneys’ fees; and (6) the arbitrator’s fee of \$75.000 pursuant to the CBA. *Id.* ¶ 21, Ex. D.

After Respondent failed to abide by this award, Petitioners commenced this action on August 11, 2016 seeking to confirm the award and additionally seeking the attorneys’ fees and costs expended in filing this Petition. ECF No. 1. Respondent was duly served with the Petition on August 26, 2016. ECF No. 8. Following Respondent’s failure to appear, on November 7, 2016, Petitioners requested that their Petition be deemed unopposed. ECF No. 9. The next day, on November 8, 2016, Judge Hurley referred Petitioners’ request to the undersigned. Electronic Order dated Nov. 8, 2016.

DISCUSSION

The Second Circuit has instructed district courts to treat an unanswered petition to confirm an arbitration award “as an unopposed motion for summary judgment,” since a petition to confirm an arbitration award is typically accompanied by a record. *D.H. Blair & Co. V. Gottdiener*, 462 F.3d 95, 110 (2d Cir. 2006). As such, a court “may not grant the motion without first examining the moving party’s submission to determine if it has met its burden of demonstrating that no material issue of fact remains for trial.” *Id.* (citations and internal quotation marks omitted).

“It is well established that courts must grant an [arbitrator’s] decision great deference.” *Duferco Int’l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 388 (2d Cir. 2003); *see Local 339 United Service Workers Union v. Advanced Ready Mix Corp.*, No. 12-CV-4811, 2013 WL 685447, at *2 (E.D.N.Y. Feb. 24, 2013) (noting that 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”) (citations and internal quotation marks omitted). Thus, “confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court, and the court must grant the award unless the award is vacated, modified, or corrected. The arbitrator’s rationale for an award need not be explained, and the award should be confirmed if a ground for the arbitration decision can be inferred from the facts of the case.” *D.H. Blair*, 462 F.3d 95 at 110 (citations and internal quotation marks omitted). “[I]n evaluating the petition to confirm the result of the arbitration, the Court need only ensure that the arbitrator had some grounds on which to grant the damages spelled out in the Award.” *Trustees of the Local 807 Labor Mgmt. Health Fund v. Express Haulage Co.*, No. 07 CV 4211, 2008 WL 4693533, at *5 (E.D.N.Y. Oct. 23, 2008).

“Only a barely colorable justification for the outcome reached by the arbitrators is necessary to confirm the award.” *D.H. Blair*, 462 F.3d 95 at 110 (citation omitted). “[T]he federal policy in favor of enforcing arbitration awards is particularly strong with respect to arbitration of labor disputes,” *Supreme Oil Co. v. Abondolo*, 568 F. Supp. 2d 401, 405-06 (S.D.N.Y. 2008), and under the LMRA an arbitration award should be upheld as long as it “draws its essence from the collective bargaining agreement and is not merely an exercise of the arbitrator’s own brand of industrial justice.” *Beth Israel Med. Ctr. v. 1199/S.E.I.U. United Healthcare Workers E.*, 530 F. Supp. 2d 610, 614 (S.D.N.Y. 2008) (internal quotation marks and citations omitted).

Applying the foregoing principles, the undersigned concludes that Petitioners have satisfied their burden in establishing that the arbitration award should be confirmed. Prior to issuing the award, the arbitrator held a hearing and determined that Respondent was bound to the CBA, and, based on the record presented, found that Respondent was required to pay \$2,949.98 in deficient contributions to the Funds for the period January 1, 2012 through September 30, 2015. *See* Pet., Ex. D. This award draws its essence from the CBA, which establishes liability for the amount awarded, as well as from the audit performed and the testimony given at the arbitration hearing. Moreover, the Collection Policy entitles Petitioners to recover additional amounts for interest, liquidated damages, attorneys’ fees, audit costs, and the arbitrator’s fee. *See* Pet., Ex. B. Accordingly the arbitrator also concluded that Respondent was required to pay Petitioners “interest in the amount of \$257.26; liquidated damages in the amount of \$590.00; audit costs of \$1,190.00; reasonable attorneys’ fees in the amount of \$900.00; and the arbitrator’s fee of \$750.00.” *See* Pet., Ex. D. This award is “plausibly grounded in the parties’ agreement” and, therefore, must be confirmed. *Trs. of Empire State Carpenters Annuity, Apprenticeship, Labor–Mgmt. Cooperation, Pension & Welfare Funds v. Lazzaro Assocs., Inc.*, No. 12-CV-5651,

2014 WL 4175859, at *5 (E.D.N.Y. July 15, 2014) (citation and internal quotation marks omitted), *report and recommendation adopted by*, 2014 WL 4175868 (E.D.N.Y. Aug. 20, 2014); *see also Trs. of New York City Dist. Council of Carpenters Pension Fund v. Deжил Sys., Inc.*, No. 12 Civ. 5, 2012 WL 3744802, at *3 (S.D.N.Y. Aug. 29, 2012) (“Where, as here, there is no indication that the arbitration decision was made arbitrarily, exceeded the arbitrator’s jurisdiction, or otherwise was contrary to law, a court must confirm the award upon the timely application of any party.”). Based on the foregoing, the Court finds that Petitioners have met their burden of demonstrating that there is no issue of material fact precluding summary judgment. Therefore, the Court recommends that the arbitration award be confirmed.

Petitioners also seek to recover \$372.50 in attorneys’ fees and \$400.00 in costs expended in bringing this action. The Collection Policy provides that, “[a]ttorneys’ fees shall be due to the Fund from a delinquent employer at the hourly rate charged to the Fund for such services . . . for all time spent by Counsel in collection efforts” Pet., Ex. B, § 6.2. Moreover, in actions seeking to confirm arbitration awards, “when a challenger refuses to abide by an arbitrator’s decision without justification, attorney’s fees and costs may properly be awarded.” *Int’l Chem. Workers Union (AFL–CIO), Local No. 227 v. BASF Wyandotte Corp.*, 774 F.2d 43, 47 (2d Cir. 1985). Because Respondent failed to appear at the arbitration hearing and has refused to abide by the arbitrator’s decision, the Court recommends that Petitioner be awarded reasonable attorneys’ fees incurred with respect to the instant Petition. Here, Petitioners seek \$372.50 in attorneys’ fees, representing 3.1 hours of work at an attorney’s rate of \$225.00 per hour and a legal assistant’s rate of \$100.00 per hour. The Court has reviewed the contemporaneous time records and finds the hourly rate and time expended to be reasonable.

With regard to costs, Petitioners seek to recover \$400.00 for the court filing fee. ERISA

provides for the recovery of costs associated with litigation, see 29 U.S.C. § 1132(g)(2)(D), and “[a] court will generally award ‘those reasonable out-of-pocket expenses incurred by the attorney[s] and which are normally charged fee paying clients.’” *Finkel v. Jones Lang LaSalle Ams., Inc.*, No. 08–CV–2333, 2009 WL 5172869, at *6 (E.D.N.Y. Dec. 30, 2009) (quoting *Reichman v. Bonsignore, Brignati & Mazzotta, P.C.*, 818 F.2d 278, 283 (2d Cir. 1987)). Moreover, the arbitrator’s award expressly provides that “the Employer shall be responsible for all court costs including, but not limited to, the filing fee of \$400.00.” Pet., Ex. D, at 5 ¶ 6. Therefore, the Court recommends that Petitioners be awarded \$400.00 to recover for their filing fees.

CONCLUSION

For the foregoing reasons, it is respectfully recommended that the arbitrator’s award be confirmed in the amount of \$6,637.24, plus attorneys’ fees in the amount of \$372.50 and costs of \$400.00, for a total award of \$7,409.74.

OBJECTIONS

A copy of this Report and Recommendation is being electronically filed on the date below. Counsel for the Petitioners shall serve a copy of this Report and Recommendation on the Respondent upon receipt and shall file proof of service with the Court. Any objections to this Report and Recommendation must be filed with the Clerk of the Court with a courtesy copy to the undersigned within 14 days of service. Failure to file objections within this period waives the right to appeal the District Court’s Order. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72; *Wagner & Wagner, LLP v. Atkinson, Haskins, Nellis, Brittingham, Gladd & Carwile, P.C.*, 596 F.3d 84, 92 (2d Cir. 2010); *Beverly v. Walker*, 118 F.3d 900, 902 (2d Cir. 1997); *Savoie v. Merchants*

Bank, 84 F.3d 52, 60 (2d Cir. 1996).

Dated: Central Islip, New York
May 4, 2017

_____/s/_____
ARLENE R. LINDSAY
United States Magistrate Judge