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**Laborers' District Council of Ohio, Local 265 and  
AMS Construction, Inc. and International Union  
of Operating Engineers, Local 18.** Case 9–  
CD–500

December 28, 2010

DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS BECKER, PEARCE, AND HAYES

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act (the Act). AMS Construction, Inc. (the Employer) filed a charge on March 11, 2010, alleging that Laborers' District Council of Ohio, Local 265 (Laborers) violated Section 8(b)(4)(D) of the Act by threatening to engage in proscribed activity with an object of forcing the Employer to assign certain work to employees represented by Laborers rather than to employees represented by International Union of Operating Engineers, Local 18 (Operating Engineers). The hearing was held on April 30, 2010, before Hearing Officer Naima R. Clarke. After the hearing, Operating Engineers filed a motion to remand to the Regional Director for the taking of additional evidence, accompanied by a supporting memorandum, and the Employer and Laborers each filed a memorandum in opposition to Operating Engineers' motion to remand. The Employer, Laborers, and Operating Engineers also filed posthearing briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The parties stipulated that the Employer, a corporation with its principal place of business in Ohio, is engaged in the business of underground utility work. They also stipulated that during the 12-month period preceding the hearing, a representative period, the Employer derived gross revenues in excess of \$50,000, and purchased and received at its Maineville, Ohio facility goods and materials valued in excess of \$50,000 directly from suppliers located outside the State of Ohio. The parties further stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Laborers and Operating Engineers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

The Employer specializes in underground utility construction. The project at issue involves the construction and maintenance of gas pipelines for Duke Energy Corporation utilizing the directional boring method. Utilizing that method, a crew consisting of two employees—one operating a directional drill and the other operating a locator box—bore underground holes for utility piping. Directional boring allows for underground utility construction that limits environmental impact. The directional drill machine's main component is a drill that digs through the ground in a horizontal direction. The drill head contains a beacon that communicates with a locator box by radio signal. The employee operating the locator traces the underground movement of the drill, and, by radio, guides the drill operator. The locator ensures that the drill is following the correct path through the ground and also prevents its contact with obstacles, such as other pipes.

The Employer has had collective-bargaining agreements with Laborers since 1991. It also has had a collective-bargaining agreement with Operating Engineers since 2001. From about 1999, when the Employer first began using the directional drill, until 2004, the Employer assigned the directional drill machine work to employees represented by Laborers. In 2004, the Operating Engineers filed a grievance against the Employer, alleging that the assignment of the work violated the Operating Engineers' collective-bargaining agreement. At the time, the Employer employed three two-worker crews comprised entirely of Laborers-represented employees. The Employer resolved the grievance by converting three of its six Laborers-represented employees into Operating Engineers-represented employees, and it executed separate assignment letters with each union covering the directional boring work.<sup>1</sup> Subsequently, the directional boring work was performed by a crew of Laborers-represented employees, a crew of Operating Engineers-represented employees, or a mixed crew.

The Employer's most recent collective-bargaining agreement with Laborers Locals 265 and 534, effective August 7, 2006 to August 1, 2010, covers "all phases of the installation of any pipe including directional boring, horizontal drilling, locating of pipe, . . . [and] lining up of the pipe." The agreement specifically includes the use of "directional boring machines."

The Employer's collective-bargaining agreement with Operating Engineers, effective June 1, 2007 to May 31, 2010, covers "installation . . . of distribution pipeline

<sup>1</sup> At the time of the hearing, due to personnel changes over the last several years, the Employer's crews no longer consisted of three Laborers and three Operating Engineers. Instead, the Employer's crews comprised three Laborers, two Operating Engineers, and one unaffiliated employee.

(including work in conjunction with total energy plans) which transport natural gas, liquid gas or vapors . . . including portions of the work with private property boundaries or public streets, from the first metering station or connection at the main transmission line (consistent with this definition in the Mainline Pipeline Agreement) to the Consumer or User.”

In 2010,<sup>2</sup> the Employer began work on a gas pipeline project for Duke Energy Company at the Hyde Park module in Cincinnati, Ohio.<sup>3</sup> The Employer utilized the directional boring method with employees represented by Laborers. The Employer’s superintendent, John Weber, testified that Foreman Russell Osborne informed him that, in January and February, business agents of Operating Engineers visited the Hyde Park jobsite. According to Osborne, upon learning that employees represented by Laborers were assigned the directional boring work, the Operating Engineers’ representatives told workers at the site that this work should be assigned to employees represented by Operating Engineers, not Laborers. Additionally, Operating Engineers filed two pay-in-lieu grievances against the Employer, each for a different part of the Hyde Park area, seeking wages and fringe benefits for all hours worked on the project. The grievances claimed that the Employer was using “someone other than Operating Engineers to operate directional drill and locator on” the Hyde Park site. Weber testified that he and the Employer’s owner, John Stephenson, met with Operating Engineers representatives Gary Marsh and Nate Brice to discuss resolution of the grievances. During that meeting, the Operating Engineers representatives maintained that the Employer had to remove all Laborers-represented employees from directional drilling assignments. Operating Engineers also demanded that any newly hired directional crew members come from the Operating Engineers’ hiring hall. Further, Operating Engineers indicated that it wanted all of the directional boring work for employees it represents. The parties met on several occasions, but could not resolve the grievances.

While those grievances were pending, Laborers learned that the Employer might reassign the work to Operating Engineers. As a result, Laborers sent a letter to the Employer dated February 9. The letter stated:

It has come to our attention that your company has assigned or may assign directional boring, min-excavating [*sic*] and related tasks to employees represented by the International Union of Operating Engineers. This work falls within our agreement and has been traditionally assigned to Laborers’. Accordingly, Local 265 will take any and all action necessary to pre-

serve our work, including but not limited to picketing and work stoppages on the Project.<sup>4</sup>

Superintendent Weber testified that after the Employer received the letter, he spoke with Laborers representatives Tony Brice and John Phillips to resolve the issue. Laborers made it clear that it would not compromise on the assignment of work.

#### B. Work in Dispute

The parties did not stipulate to the work in dispute. The notice of hearing described the disputed work as “[t]he operation of the directional bore machine and the locator.” The Employer, Laborers, and Operating Engineers dispute this description, and the Employer and Laborers offered alternative descriptions. The Employer described the work as the operation of the directional bore machine and the locator on distribution pipeline construction. Laborers proposed that the work in dispute be described as the installation of any pipe, including directional boring, horizontal drilling, and locating of pipe on all distribution pipeline construction. We find, based on the record, that the work in dispute is as follows: The operation of the directional drill machine and locator for the construction of gas pipelines for Duke Energy Corporation at the Hyde Park module, Cincinnati, Ohio jobsite.

#### C. Contentions of the Parties

Operating Engineers contends that the notice of hearing should be dismissed because it has not claimed the disputed work. Relying on *Laborers (Capitol Drilling Supplies)*, 318 NLRB 809 (1995) (union’s action through grievance procedure to enforce claim against general contractor does not constitute claim against subcontractor for work in dispute), Operating Engineers argues that it has pursued only contractual grievances against the Employer for breaches of its collective-bargaining agreement. Operating Engineers also contends that Laborers’ letter could not constitute a real or actual threat because Laborers’ collective-bargaining agreement prohibits strikes or work stoppages. Finally, Operating Engineers contends that Laborers’ threat was a “paper threat,” contrived to create a jurisdictional dispute under Section 10(k) and obtain the work assignment preferred by the Employer.<sup>5</sup>

<sup>4</sup> As noted above, Laborers Local 534 is also signatory to the Laborers’ contract with the Employer. Local 534 sent a letter similar to that of Laborers Local 265 to the Employer. The Employer did not file a charge against Local 534, and no party contends that Local 534 is otherwise involved in the dispute.

<sup>5</sup> At the hearing, the Operating Engineers excepted to the hearing officer’s ruling that prohibited repetitive questioning of John Phillips, Laborers’ business manager, regarding whether Laborers’ motive in sending the February 9 letter to the Employer was to precipitate a 10(k) hearing. Operating Engineers renewed this exception in its motion to remand for the taking of additional evidence. Operating Engineers argues that the hearing officer erroneously sustained the Laborers’

<sup>2</sup> All dates refer to 2010 unless otherwise indicated.

<sup>3</sup> Modules are geographic areas identified by Duke Energy as targets for underground utility line installation.

The Employer and Laborers contend that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated because of the Laborers' letter. They further contend that there are competing claims to the disputed work, and therefore the notice of hearing should not be dismissed. In particular, they contend that representatives of Operating Engineers made multiple visits to the Employer's worksite and told Laborers employed on the project that they were performing Operating Engineers' work. Additionally, Laborers argues that Operating Engineers claimed the work by filing two pay-in-lieu grievances seeking wages and benefits paid on the Hyde Park project.

On the merits, the Employer and Laborers assert that the work in dispute should be awarded to employees represented by Laborers based on the factors of collective-bargaining agreements, employer preference, current assignment and past practice, area and industry practice, relative skills, and economy and efficiency of operations.<sup>6</sup> The Employer further contends that a broad award is warranted because the issue of its assignment of work on the directional drill machine and locator will arise on future projects.

#### *D. Applicability of the Statute*

Before the Board may proceed with determining a dispute pursuant to Section 10(k) of the Act, there must be reasonable cause to believe that Section 8(b)(4)(D) has been violated. This standard requires finding that there is reasonable cause to believe that: (1) there are competing claims for the disputed work among rival groups of employees; (2) a party has used proscribed means to enforce its claim to the work in dispute; and (3) the parties have not agreed on a method of voluntary adjustment of the dispute. On this record, we find that this standard has been met.

##### 1. Competing claims for the work

We find that there are competing claims for the work in dispute. Laborers has at all times claimed the work in dispute for the employees it represents, and those employees have been performing the work. Further, Laborers' February 9 letter claimed the work in dispute for employees represented by Laborers. Operating Engineers' claim to the disputed work is demonstrated by its filing of two pay-in-lieu grievances with the Employer, each effectively claiming the directional boring work.

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objection, and therefore Operating Engineers should be allowed a proper and adequate opportunity to develop its theory that the Laborers' threat to the Employer in its February 9 letter was a sham. As discussed below, we deny the motion.

<sup>6</sup> In its posthearing brief, Operating Engineers did not set forth any contentions regarding the merits of the dispute. Operating Engineers did, however, introduce some evidence relevant to the merits, and that evidence is considered below. See *U.S. Utility Contractor Co.*, 355 NLRB No. 59, slip op. at 2 fn. 3 (2010).

See *Carpenters Los Angeles Council (Swinerton & Walberg)*, 298 NLRB 412, 414 (1990) (pay-in-lieu grievance may constitute a competing claim for work). See also *Local 30, United Slate, Tile & Composition Roofers v. NLRB*, 1 F.3d 1419, 1427 (3d Cir. 1993) (attempted distinction "between seeking the work and seeking pay for the work is ephemeral"). Additionally, to resolve these grievances, representatives from Operating Engineers met with the Employer on several occasions to discuss whether the disputed work should be assigned to Operating Engineers' represented employees, further evidencing Operating Engineers' claim to the disputed work. Finally, as set forth above, witnesses for the Employer and Laborers testified that representatives from Operating Engineers made several visits to the worksite, and each time these representatives claimed the disputed work on behalf of Operating Engineers. Although Operating Engineers disputes the validity of this testimony, we find that it is sufficient to establish reasonable cause to believe that the Operating Engineers made a claim for the disputed work. See *U. S. Utility Contractor*, supra, 355 NLRB No. 59, slip op. at 3; *J. P. Patti Co.*, 332 NLRB 830, 832 (2000).<sup>7</sup>

In sum, we find that there is reasonable cause to believe that there are competing claims to the disputed work between rival groups of employees.

##### 2. Use of proscribed means

We also find that there is reasonable cause to believe that Laborers used means proscribed under Section 8(b)(4)(D) to enforce its claim. Laborers' February 9 letter to the Employer, threatening it with picketing and work stoppages if it reassigned any of the disputed work to members of Operating Engineers, constituted a threat to take proscribed coercive action in furtherance of a claim to the work in dispute. Further, Laborers testified that it was planning to follow through on the threats made in this letter. Although Operating Engineers urges the Board to find that this threat was a sham in order to obtain the work assignment in this 10(k) proceeding and

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<sup>7</sup> The Board need not rule on the validity of testimony in order to proceed to the determination of a 10(k) dispute because the Board need only find reasonable cause to believe that the statute has been violated. *U. S. Utility Contractor*, 355 NLRB No. 59, slip op. at 3 fn. 9. In any event, we note that Operating Engineers' second grievance, dated February 9, states that its business representative Brice spoke with Laborers-represented employee Mark Hedges, who was operating the equipment, to try to resolve the grievance.

Contrary to the Operating Engineers' contention, we find the Board's decision in *Laborers (Capitol Drilling Supplies)*, 318 NLRB 809 (1995), to be distinguishable. *Capitol Drilling* involved a union's grievance against a general contractor, alone, for subcontracting work in breach of a lawful union signatory clause. *Id.* at 810. Absent a direct claim against the subcontractor, the Board found no competing claims for the work and quashed the notice of 10(k) hearing. *Id.* at 810-812. Here, there is no subcontractor involved and both the Laborers and the Operating Engineers have made competing claims to the Employer for the work. See *Laborers' District Council of West Virginia*, 325 NLRB 1058, 1059 fn. 2 (1998).

that Laborers' collective-bargaining agreement prohibits strikes or work stoppages, it offers no evidence that the threat was not genuine or that Laborers colluded with the Employer in this matter.<sup>8</sup> See *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1140 (2005) ("In the absence of affirmative evidence that a threat to take proscribed action was a sham or the product of collusion, the Board will find reasonable cause to believe that the statute has been violated."). Moreover, the Board has rejected the argument that a strike threat was a sham simply because it would have violated a no-strike clause. See *Lancaster Typographical Union 70 (C.J.S. Lancaster)*, 325 NLRB 449, 451 (1998) ("The existence of a no-strike clause in a union's collective-bargaining agreement does not provide a basis for a finding that a threat by that union is a sham."). We therefore find reasonable cause to believe that Section 8(b)(4)(D) has been violated.

### 3. No voluntary method for adjustment of dispute

The Employer and Laborers contend that there is no method for voluntary adjustment of the dispute to which all parties are bound. Operating Engineers asserts instead that article 17 of the Laborers' collective-bargaining agreement, which requires that Laborers attempt to seek settlement of disputes, constitutes a method for voluntary adjustment of the dispute. The dispute resolution mechanism in article 17, however, does not bind Operating Engineers, a party to this dispute. In order for an agreement to constitute an agreed-upon method for voluntary adjustment, all parties to the dispute must be bound to that agreement. *Operating Engineers Local 150 (Nickelson Industrial Service)*, 342 NLRB 954, 955 (2004). Thus, because not all the parties to the dispute are bound by article 17 or any other mechanism, we find that there is no voluntary method for adjustment of this dispute.

In view of the evidence above, we find reasonable cause to believe that there are competing claims for the disputed work and that a violation of Section 8(b)(4)(D) has occurred. We further find that no voluntary method exists for the adjustment of the dispute. Accordingly, we find that this dispute is properly before the Board for determination.

<sup>8</sup> As mentioned above, at the hearing, Operating Engineers questioned Phillips about the Laborers' motivation for sending the letter, and received Phillips' answers. When Operating Engineers began to repeat the same questions, the Laborers objected on the grounds that the questions had been asked and answered. The hearing officer sustained the objection. Based on the foregoing, we find that the hearing officer did not prohibit Operating Engineers from developing its case, but simply prevented repetitive questioning. Therefore, we find that the Operating Engineers was afforded a full opportunity to be heard, to examine and cross-examine witnesses, including Phillips, and to adduce evidence bearing on the issues in this case. Accordingly, we deny the Operating Engineers' motion to remand for the taking of additional evidence.

### E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402, 1410-1411 (1962).

The following factors are relevant in making the determination of this dispute.

#### 1. Certifications and collective-bargaining agreements

There is no evidence of any Board certifications concerning the employees involved in this dispute.

The Employer and Laborers are parties to a collective-bargaining agreement, effective from August 7, 2006 to August 1, 2010. Article 2 of that agreement, entitled, "Scope," provides at paragraph 3:

The work coming under the jurisdiction of the UNION and covered by terms of this Agreement includes, but is not limited to, all phases of the installation of any pipe including directional boring, horizontal drilling, locating of pipe, preparation of the pipe for joining, lining up of the pipe, handling of the clamps, joining of the pipes and cleanup after the pipe has been installed. This agreement also includes the use of pipe bending machines, directional boring machines power winches, mini excavators, restoration tractors, skid steer loaders and all walk behind equipment. This Agreement excludes the joining of steel pipe.

We find, based on the above-quoted provision, that the work in dispute is explicitly covered by the Employer's collective-bargaining agreement with Laborers.

The Employer and Operating Engineers are parties to a collective-bargaining agreement effective from June 1, 2007 to May 31, 2010. Article I, paragraph A of that agreement, entitled, "Coverage," provides:

[W]ork coming under this Agreement is defined as follows:

The construction, installation, treating, repair and/or re-conditioning of distribution pipeline (including work in conjunction with total energy plants) which transport natural gas, liquid gas or vapors, crude oil, petroleum products or other fuels, including portions of the work with private property boundaries or public streets, from the first metering station or connection at the main transmission line (consistent with this definition in the Mainline Pipeline Agreement) to the Consumer or User.

Additionally, the contract's "working rules" state that Operating Engineers are to maintain and repair equipment under its jurisdiction, and will be assigned "all operating configurations to the horizontal directional drill machine."

"In interpreting collective-bargaining agreements, the specific is favored over the general." *Laborers Local 1184 (Golden State Boring & Pipejacking)*, 337 NLRB 157, 159 (2001) (operation of directional drilling machine awarded to employees represented by Laborers, not Operating Engineers), quoting *Steelworkers Local 392 (BP Minerals)*, 293 NLRB 913, 914-915 (1989). Here, the Laborers' contract specifically refers to the disputed directional drilling work and related work (locating the pipe) and equipment (directional boring machine); the Operating Engineers' contract is worded in more general terms. The factor of collective-bargaining agreements accordingly slightly favors an award of the disputed work to employees represented by Laborers.

## 2. Employer preference and current assignment

The Employer currently has assigned the disputed work to employees represented by Laborers, and it prefers to have the disputed work performed by employees represented by Laborers. Although the Employer stated that the Laborers-represented employees' superior relative skills and training was the reason for its preference, the Board does not generally examine the reasons for an employer's preference unless there is evidence that the employer was coerced. See, e.g., *Laborers Local 829 (Mississippi Lime Co.)*, 335 NLRB 1358, 1360 fn. 5 (2001). There is no evidence of coercion here, and thus the Employer's preference is a valid factor. Further, it is well established that the fact of employer preference is entitled to "substantial weight." See, e.g., *Iron Workers Local 1 (Goebel Forming)*, 340 NLRB 1158, 1163 (2003). Accordingly, we find this factor favors an award of the disputed work to employees represented by Laborers.

## 3. Past practice

On projects previous to the Hyde Park Project, the Employer assigned the directional drilling and related work to crews consisting either solely of Laborers, solely of Operating Engineers, or composite crews of employees represented by both unions. This practice has been in place since 2004, when the Employer executed letters of assignment assigning the directional drilling work to employees represented by both unions. Because the Employer's past practice was to assign directional drilling and related work to both Laborers-represented employees and Operating Engineers-represented employees, we find that this factor does not favor awarding the work in dispute to either group of employees.

## 4. Area and industry practice

No party introduced any evidence with respect to industry practice.

The Employer's foreman Russ Osborne testified that employees represented by Laborers have performed work of the kind in dispute in the past for the Brewer Company, one of the Employer's competitors. Additionally, the Brewer Company is a signatory, along with the Employer and RLA Investments, Inc., to the collective-bargaining agreement with Laborers. Further, Laborers Business Manager Phillips testified that Laborers have performed work of the kind in dispute since 1992.

Operating Engineers also offered evidence that its members have performed work of the kind in dispute. Operating Engineers introduced assignment letters for directional drilling work from dozens of area contractors, spanning from 2000 to 2006.

Based on the above, we find that this factor does not favor an award of the work in dispute to either group of employees.

## 4. Relative skills and training

The Employer and Laborers presented testimony that that Laborers' members possess the requisite skills and training to perform the disputed work and that they are experienced in doing so. Specifically, Foreman Osborne testified that Laborers-represented employees have the requisite skills and training to perform the work in dispute. He testified that every single worker performing the disputed work for the Employer was originally trained as a Laborer, including Operating Engineers who have previously been assigned this work. Employer Superintendent John Weber testified that Laborers-represented employees have the proper skills and training to perform the work, and can do so in a safe manner. Laborers presented evidence that Laborers-represented employees must participate in training that includes classroom work and on-the-job training.

The record establishes that employees represented by Operating Engineers had been performing the work for a substantial period of time, and there is no evidence that the Employer considered unsatisfactory any of the work in dispute performed by these employees. Accordingly, we find that this factor favors neither group of employees.<sup>9</sup>

## 6. Economy and efficiency of operations

Weber, the Employer's Superintendent, testified that it is more efficient to have employees represented by Laborers perform the disputed work. He explained that Laborers are more capable of performing additional work that is associated with directional drill and locator work, such as digging holes or moving equipment. Weber further testified that Operating Engineers do not always

<sup>9</sup> *Electrical Workers IBEW Local 486 (New England Power)*, 311 NLRB 1162, 1164 (1993).

complete tasks and are not always properly trained. For these reasons, the Employer testified that Laborers-represented employees deliver better work product than Operating Engineers-represented employees. Operating Engineers did not present evidence with respect to this factor. Laborers-represented employees are thus better equipped to perform the necessary work that stems from directional drilling at Hyde Park than Operating Engineers-represented employees. Accordingly, the factor of economy and efficiency of operations favors an award of the work in dispute to employees represented by Laborers. See, e.g., *Operating Engineers Local 825 (Walters & Lambert)*, 309 NLRB 142, 145 (1992) (factor of economy and efficiency of operations favored Laborers over Operating Engineers where evidence showed that, when not performing disputed work, Laborers possessed knowledge and skills necessary to perform additional craft work).

#### Conclusion

After considering all the relevant factors, we conclude that employees represented by Laborers are entitled to perform the work in dispute. We reach this conclusion relying on factors of collective-bargaining agreement, employer preference, employer current assignment, and economy and efficiency of operations. In making this determination, we are awarding the disputed work to employees represented by Laborers, not to that labor organization or its members.

#### *F. Scope of the Award*

The Employer requests a broad, areawide award covering the work in dispute. The Board customarily does not grant an areawide award in cases where the charged party represents the employees to whom the work is awarded and to whom the employer contemplates continuing to assign the work. See, e.g., *Laborers Local 243 (A. Amorello & Sons)*, 314 NLRB 501, 503 (1994). Accordingly, we shall limit the present determination to the particular controversy that gives rise to this proceeding.

#### DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of AMS Construction, Inc., represented by Laborers' District Council of Ohio, Local 265, are entitled to perform the operation of the directional drill machine and locator for the construction of gas pipelines for Duke Energy Corporation at the Hyde Park modules, Cincinnati, Ohio jobsite.

Dated, Washington, D.C. December 28, 2010

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Craig Becker, Member

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Mark Gaston Pearce, Member

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Brian E. Hayes, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD