

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 25**

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 150, AFL-CIO,)	
Charged Party,)	
and)	
)	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 703, AFL-CIO,)	
Charged Party,)	
and)	Cases 25-CD-80014
)	25-CD-80015
BEVERLY ENVIRONMENTAL, LLC,)	
Charging Party,)	
and)	
)	
LABORERS INTERNATIONAL UNION OF NORTH AMERICA LOCAL UNION NO. 751,)	
Party-in-Interest.)	

POST-HEARING BRIEF OF BEVERLY ENVIRONMENTAL, LLC

STATEMENT OF THE CASE

On or about April 30, 2012, Beverly Environmental, LLC (“Beverly,” or “Employer”), filed an unfair labor practice charge with the National Labor Relations Board, Sub-Region 33, alleging that the International Union of Operating Engineers, Local 150, AFL-CIO (“Operators”) and the International Brotherhood of Teamsters, Local 703 (“Teamsters”) violated Section 8(b)(4)(D), 29 U.S.C. § 158(b)(4)(D), of the National Labor Relations Act (“Act”). On or about May 16, 2012, Region 25¹ issued a Notice of Hearing. Laborers International Union of North America, Local Union No. 751 (“Laborers”), is a Party-In-Interest in these proceedings and was served with a copy of the underlying unfair labor practice charge and the Notice of Hearing (Tr. 90).

¹ Effective on or about May 1, 2012, the National Labor Relations Board consolidated Sub-Region 33 with Region 25.

On May 24, 2012, Region 25 conducted a hearing pursuant to Section 10(k) of the Act, 29 U.S.C. § 160(k). Beverly, the Operators and the Teamsters appeared at the hearing (Tr. 5). Despite receiving a copy of the Notice of Hearing (Tr. 90), the Laborers did not appear at the hearing (Tr. 6). Beverly now files this Post-Hearing Brief and respectfully requests the Board to award the disputed landscape construction work to the Operators and the Teamsters on the project in question and, based on the on-going nature of this dispute, extend the award throughout the entire Chicago metropolitan area.

STATEMENT OF FACTS

The Operators and the Teamsters are both labor organizations as that term is defined in Section 2(5) of the Act, 29 U.S.C. § 152 (Tr. 71-72; 85-87; ER Ex. 1; ER Ex. 2). The Operators and Teamsters jointly represent employees working in the landscape industry throughout northern Illinois, including those represented by Beverly (Tr. 14, 68-69; ER Ex. 1).

Beverly is a landscape construction contractor; it works throughout the Chicago metropolitan area. James Esposito is the President of Beverly (Tr. 12). Beverly is an employer as that term is defined in Section 2(2) of the Act (Tr. 13, 44) and is bound to the terms of a joint collective bargaining agreement with the Operators and Teamsters. The joint collective bargaining agreement covers employees in the “plantsman,” “installer” and “helper” classifications (Tr. 14-17; ER Ex. 1). Beverly’s plantsmen employees are represented by the Operators; its installers and helpers are represented by the Teamsters (Tr. 17). Beverly’s equipment operators are covered by a separate collective bargaining agreement with the Operators (Tr. 15; ER Ex. 2). At no time has Beverly been signatory to a collective bargaining agreement with LIUNA, Local 751, or any other Laborers’ local for that matter (Tr. 18, 45, 57).

Beverly is currently working on a pipeline project for Shell Oil in Limestone, Illinois (Tr. 16). The project is being performed as a result of a lawsuit in which Shell Oil was required

to construct a pipeline to bring in fresh drinking water to the residents of Limestone, Illinois (Tr. 70). R&R Sewer and Water (“R&R”) is the general contractor on the project (Tr. 19). In March 2012, R&R awarded a subcontract to Beverly; the scope of that subcontract includes the installation of silt fencing before other contractors install the pipeline (Tr. 20, 22, 39). Once the pipeline is installed, the subcontract calls for Beverly to remove the silt fencing and then restore the ground by spreading soil and then sodding and seeding, as necessary (Tr. 39, 57, 71).

Beverly typically operates with three-man composite crews: one equipment operator; one plantsman and one installer (Tr. 21, 90-91). A silt fence is a black tarp-like fence that is used on construction projects for erosion control and as a preventative barrier to keep construction materials from blowing into residential and agricultural areas and to prevent foreign materials from blowing onto the site of construction (Tr. 32-33). To install silt fences, Beverly uses a small tractor that plows the ground and rolls out the fence (Tr. 34). The plantsman and the installer follow the tractor and line up the wood stakes, hammer the wood stakes into the ground and staple the silt fence to the stakes (Tr. 36). On this project, the plantsman, installer and helper perform the same tasks (Tr. 41-42). The subcontract calls for 20 miles of silt fencing (Tr. 38). The pipeline project begins in farm fields and concludes in a residential area (Tr. 41). With respect to the restoration work, Beverly will spread black dirt using a skid steer (Bobcat) or a small tractor and then the plantsman and installer will rake the dirt, after which sod or seed is applied—again by the plantsman and installer (Tr. 43-44).

Beverly began working on the project on April 6, 2012 (Tr. 20). Beverly has historically assigned all of its landscape construction work to members of the Operators and the Teamsters (Tr. 18, 60). Consistent with this past practice, Beverly assigned the work on the Shell Oil project to members of the Operators and the Teamsters (Tr. 21-22, 59). As the Beverly crew was

working on April 6, Terry Taylor, a Laborers' business agent approached Alex Straughn, Beverly project manager/equipment operator (Tr. 62-63). Taylor told Straughn that the Local 150 Operators were fine to operate equipment, but that "the people working behind the silt fence" --the plantsmen and Teamsters-- "weren't allowed on the jobsite" (Tr. 62). Taylor told Straughn that the people working behind the silt fence had to be "his Laborers" (*id.*). Taylor asked Straughn to have his office contact Taylor's office (*id.*).

Straughn then called Jim Esposito, President of Beverly, and reported his conversation with Taylor (Tr. 23). Straughn explained that Taylor approached him at the job site and told him the operators could be there but that the plantsmen and Teamsters could not (*id.*). Esposito then called Taylor later that same day, April 6 (*id.*). Taylor told Esposito that Beverly's Local 150 plantsmen and Teamsters would not be allowed on the project; Taylor explained "they don't do it that way down here" (Tr. 24). When Esposito offered to have representatives from Local 150 give Taylor a call, Taylor exclaimed, "You can call them, but whatever you do, it's not going to fucking matter and we don't ... we don't do it that way down here in this area, we don't use those guys, we use laborers" (*id.*).

Between April 6, 2012 and May 11, 2012, the Laborers filed six grievances against the general contractor for having subcontracted work to Beverly (Tr. 25-27; ER Ex. 4(a) through 4(f)). As a remedy for each grievance, LIUNA, Local 751 sought full contract wages and benefits provided for in its CBA for the alleged contract violation—i.e. pay in lieu of work (*id.*).

On April 11, 2012, Esposito was at the job site with four of his employees; also present was Local 150 Business Agent Gabriel Restrepo (Tr. 27-28). After taking some pictures of Beverly's employees, Taylor later had a conversation Restrepo (Tr. 28). Restrepo asked Taylor if there was a problem (Tr. 74). Taylor replied, "Well, you know that the problem is, you have

landscapers doing laborers work” (*id.*). Taylor said, “These guys can’t do the work, you need to have Laborers. Laveka Landscaping should be doing this work” (Tr. 28; *see also* 48).

Restrepo asked Taylor how they could resolve the problem (Tr. 74-75). Taylor replied, “The only way that we can resolve this problem is that the Laborers perform the work. You can have all the machines you want, your operators, but the guys on the ground are mine, they will be mine, they are always going to be mine” (Tr. 75). When Restrepo reminded Taylor of a “gentlemen’s agreement” between the Operators, Teamsters, and Laborers, Taylor exclaimed, “There was no such fucking agreement,” and that if it was up to him, “it will only be Laborers doing all the work in Limestone” (*id.*). Restrepo then reminded Taylor of a previous meeting between their respective bosses (*id.*). Taylor replied, incongruously, “Bullshit, bullshit, there was never anything, there was never any meeting, I was there, nobody was there, we never came up to any agreement” (*id.*). When it became clear that the unions were not going to resolve the jurisdictional dispute at the jobsite, Restrepo said, “Okay, fine, have a nice day,” and he walked away (*id.*). Restrepo testified at the hearing that based on his conversation with Taylor, he believed the Laborers were claiming the work that Beverly was performing using members of IUOE, Local 150 and Teamsters, Local 703 (*id.*).

Later on April 11, 2012, officers of the Operators and Teamsters sent Beverly a letter in which they acknowledged that the Laborers had made a claim for the landscape construction work at the Shell pipeline project (Tr. 29; ER Ex. 5). The Operators and the Teamsters also confirmed that they too claimed the disputed work and would “engage in any and all means, including picketing, to enforce and preserve their historical and traditional work assignment” (*id.*).

Notwithstanding the competing claims and the threat to picket, it remains Beverly's preference to continue using members of the Operators and the Teamsters to perform the disputed work at the project in Limestone, Illinois (Tr. 30). Beverly expects to complete all the work on the project in the fall 2013 (Tr. 91, 93).

DISPUTED WORK

In the Notice of Hearing, Region 25 defined the disputed work as including the following tasks:

All landscape construction work being performed by employees of Beverly Environmental, LLC except for the operation of the silt fence installation machine at the Shell Waterline Pipeline project in Limestone, IL.

Based on the evidence adduced at the hearing, the specific tasks at issue in this case involve the installation and removal of the silt fencing and the eventual restoration of the ground by raking soil and seeding and sodding. Beverly has assigned this work to employees represented by the Operators and the Teamsters. Based on the Notice of Hearing, as well as the evidence adduced at the hearing, the operation of equipment such as skid steers and small tractors is not in dispute. The Operators currently represent Beverly's equipment operator.

ARGUMENT

I. The Board Has Jurisdiction To Make A Determination Of This Dispute Pursuant To Section 10(k).

The Board must proceed with a determination of the dispute pursuant to Section 10(k) of the Act if: (1) there are competing claims for the work in question; (2) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated; and, (3) the parties have not agreed on a method for the voluntary adjustment of the dispute. *Laborers' Int'l Union of North America, Local 113 (Super Excavators, Inc.)*, 327 NLRB 113, 114 (1998). All of the elements are satisfied in this case.

A. There Are Competing Claims For Work Being Performed By Beverly At The Shell Waterline Pipeline Project in Limestone.

A jurisdictional dispute “is a dispute between two or more groups of employees over which are entitled to do certain work for an employer.” *NLRB v. Radio and Television Broadcasters*, 364 U.S. 573, 579 (1961). On April 6 and April 11, Terry Taylor, Laborers’ business agent, made a direct claim for the disputed work. Specifically, Taylor told Beverly’s project manager on April 6 that “the people working behind the silt fence ... weren’t allowed on the job site” (Tr. 62). Beverly’s employees “working behind the silt fence” were Operators and Teamsters. According to Taylor, Beverly was supposed to use “his Laborers” (*id.*). Taylor reiterated this same message when Esposito called later that same day (Tr. 24). Taylor told Esposito, “we don’t do it that way down here in this area, we don’t use those guys, we use laborers” (*id.*). Later, on April 11, Taylor advised Restrepo that he had a problem: landscapers were doing laborers work” (Tr. 74). Taylor told Restrepo, “the guys on the ground are mine, they will be mine, they are always going to be mine” (*id.*). These statements constitute a claim for the work on behalf of the Laborers.

The Board has held that a pay-in-lieu grievance constitutes a claim for work. *See Laborers’ International Union of North America, Local 113 (Super Excavators, Inc.)*, 327 NLRB 113, 114 (1998). In this case, as explained above, the Laborers filed a series of pay-in-lieu grievances against the general contractor, thereby making a claim for the work. Even if the pay-in-lieu grievances do not constitute a claim for the work, since the Laborers also made a direct claim to Beverly (the subcontractor controlling the assignment), *Laborers (Capitol Drilling Supplies)*, 318 NLRB 809 (1995) is inapplicable to this case. The Laborers made a claim for the disputed work. Significantly, since the Laborers had notice of the hearing and elected not to

participate, the union has waived any right to contest the notion that it made a claim for the disputed work.

For their parts, the Operators and Teamsters also claimed, and continue to claim, the disputed work (Tr. 10-11, 87; ER Ex. 5). The Board has held that performance of work by a group of employees is evidence of a claim for the work by those employees, even in the absence of a declarative claim. *Iron Workers Local 1 (Advance Cast Stone)*, 338 NLRB 43, 45 (2002), citing *J.P. Patti*, 332 NLRB No. 69 at fn. 6 (2000); *Longshoremen ILWU Local 14 (Sierra Pacific Industries)*, 314 NLRB 834, 836 (1994). Employees represented by the Operators (plantmen) and the Teamsters (installers and helpers) have been performing the “disputed work” since Beverly began working on the project on April 6. This alone constitutes a claim for the work. Lest there be any doubt, in their joint April 11 letter, representatives of the Operators and Teamsters restated their claim for the disputed work (ER Ex. 5). On this record, there are competing claims for the disputed work.

B. There Is Reasonable Cause To Believe That Section 8(b)(4)(D) Has Been Violated.

A threat to engage in conduct proscribed by Section 8(b)(4)(D) constitutes a violation of the statute. *Robbins Plumbing & Heating Contractors, Inc.*, 261 NLRB 482, 487 (1982). “In a Section 10(k) proceeding, the Board is not charged with finding that a violation did, in fact occur, but only that reasonable cause exists for finding such a violation.” *Local 7, Empire State Regional Council of Carpenters (UBC and Five Brother, Inc.)*, 344 NLRB 910, 911 (2005). Thus, in order to proceed to the merits in this case, the Board need only find reasonable cause to believe that the Operators and Teamsters threatened to engage in activity proscribed by Section 8(b)(4)(D).

“It is well established that as long as a Union’s statement, on its face, constitutes a threat to take proscribed action, the Board will find reasonable cause to believe the statute has been violated, in the absence of affirmative evidence that the threat was a sham or the product of collusion.” *Local 3, IBEW (Alliance Elevator Co.)*, 352 NLRB 1947 (2008). On April 11, Operators’ business agent Gabe Restrepo had a conversation with Terry Taylor from the Laborers wherein Taylor made a claim for the work at the Shell Oil project (Tr. 75).

Later on April 11, 2012, the Operators and Teamsters, Local 703 sent Beverly a letter in which they threatened to “engage in any and all means, including picketing, to enforce and preserve their historical and traditional work assignment” (Tr. 29; ER Ex. 5). Under *Alliance Elevator*, the April 11 letter from the Operators and Teamsters is sufficient to establish reasonable cause to believe that Section 8(b)(4)(D) was violated. And, as explained above, by failing to appear at the hearing, the Laborers waived its right to present evidence or advance any alternative theories or arguments related to whether there is reasonable cause to believe that Section 8(b)(4)(D) was violated in this case. Consequently, this second element is satisfied.

C. All Parties Have Not Agreed On An Alternative Method To Resolve This Dispute.

“In order for an agreement to constitute an agreed-upon method for the voluntary adjustment, all parties to the dispute must be bound to that agreement.” *International Union of Elevator Constructors, Local 2 (Kone, Inc.)*, 349 NLRB 1207, 1210 (2007). In this case, the parties have not agreed upon an alternative method to resolve this dispute (Tr. 52, 73) and the Laborers have waived their right to present any evidence or arguments regarding the existence of an agreed-upon method to voluntarily adjust this dispute. Since all three elements are satisfied in this case, the Board should proceed with a determination of this dispute.

II. The Board Should Award The Disputed Work To Local 150 and Local 703.

Section 10(k) requires the Board to make an affirmative award of disputed work after giving due consideration to various factors. *Ironworkers Local 380 (Stobeck Masonry, Inc.)*, 267 NLRB 184 (1983). The Board's 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. *Construction and General Laborers District Council of Chicago and Vicinity, Local 1006 (Central Blacktop Co., Inc.)*, 292 NLRB 57 (1988).

A. Employer Preference And Past Practice Favor An Award to Local 150 and Local 703.

The Board normally accords employer preference considerable weight. *Stobeck Masonry, Inc.*, 267 NLRB at 287, fn. 8. Accordingly, the Board will make an award to the union-represented employees to whom the employer prefers to assign, and has in the past assigned, the disputed work. *Machinists Lodge 776 (Lockheed Martin)*, 352 NLRB 402 (2008); *see also IUOE, Local 150 (All American)*, 296 NLRB 933, 936 (1989); *Machinists, Lodge 837 (McDonnell Douglass Corp.)*, 242 NLRB 913 (1979).

Beverly has historically assigned landscape construction work to members of the Operators and the Teamsters (Tr. 18, 19, 60, 81, 89). In contrast, Beverly has never employed Laborers to perform landscape construction work (Tr. 18). It is Beverly's preference to assign the disputed work at the Shell Oil project to employees represented by the Operators and Teamsters (Tr. 30; *see also* 54). Beverly intends to use employees represented by the Operators and Teamsters for the duration of the project (*id.*). Employer preference and past practice favor an award of the work to the Operators and Teamsters.

B. Certifications And Collective Bargaining Agreements Favor An Award To Local 150 and Local 703.

When one of the competing unions has a current agreement with the employer and the other does not, this factor favors an award to the employees covered by the agreement. *International Longshoremen's Associations (Coastal Cargo)*, 323 NLRB 570, 572-3 (1997); *see also International Union of Elevator Constructors, Local 91 (Otis Elevator Co.)*, 340 NLRB 94, 96 (2003) (“Although both Unions’ collective bargaining agreements arguably cover the work in dispute, the collective bargaining agreement that is relevant is the one that has been negotiated with the employer who has the ultimate control over the assignment of the work”).

This factor applies even when the collective bargaining agreement between the employer and the union only “arguably” covers the disputed work. For example, in *United Association, Local 447 (Rudolph & Sletten, Inc.)*, 350 NLRB 276, 279 (2007), the employer’s collective bargaining agreement with the carpenters union contained general language arguably covering the work in dispute, employees employed under the agreement had performed similar work, the parties to the agreement considered the work in dispute to be covered by the agreement and the employer had no collective bargaining agreement with either of the rival unions: the plumbers and electricians. On those facts, the Board held that the “collective bargaining” factor favored an award of the work to employees represented by the carpenters. *Id.*

In this case, the Operators and Teamsters are the joint exclusive bargaining representatives of Beverly’s employees working in the plantsman, installer, and helper classifications (Tr. 17, 90-91; ER Ex. 1). Employees in the plantsman classification are represented by the Operators; employees in the installer and helper classifications are represented by Teamsters (Tr. 17, 90-91; ER Ex. 1, p. 1).

The Operator/Teamster joint collective bargaining agreement covers the landscape work in dispute in this case (*See* ER Ex. 1 Article III). Specifically, Article III provides:

The scope of work covered by this Agreement shall include but not be limited to all work historically performed in the landscape construction industry at or on construction sites, including ... soil preparation, all seeding including hydro seeding and any other mulching applications, sodding, ... erosion control of shoreline and other areas, ... miscellaneous clean up functions associated with all such work, the placing of soil and other landscape materials, applying finish landscape materials on subgrade prepared by others, and the transporting of materials and equipment necessary to perform such work. ***

Thus, the contract plainly covers erosion control, the placing of landscape materials, and the application of finish landscape materials, including seeding and sodding. Operator business agent Gabe Restrepo testified that he is familiar with the work that Beverly is going to be performing; he further testified that the work is going to be performed pursuant to the terms of the joint collective bargaining agreement (Tr. 71). The “certifications and collective bargaining” factor favors an award of the work to Local 150 and Local 703.

C. Economy and Efficiency Favors An Award to Local 150 and Local 703.

The Board favors assignments that promote the efficient and economical performance of the work. *Electrical Workers Local 222 (KTVU)*, 272 NLRB 648 (1984). In assessing economy and efficiency, the Board considers various factors including fragmentation of the work process and the potential for idle time and delay. *Iron Workers Local 6 (Kulama Erectors)*, 264 NLRB 166 (1982); *Laborers’ District Council (Anjo Construction)*, 265 NLRB 186 (1982). It is Beverly’s intention to continue using the same employees it is now using through the duration of the project (Tr. 30). Of course, those current employees are members of the Operators and Teamsters. If Esposito were forced to use Laborers, he testified that he would have to train those new employees to perform the same work that is current being efficiently performed by

employees represented by the Operators and Teamsters. Changing a work assignment would be terribly inefficient. The Board should affirm the current work assignment on efficiency grounds.

D. Skills, Safety and Training Favor An Award to Local 150 and Local 703. Training Favors Local 150.

Formal training is preferable to on-the-job training. Award of work goes to the union with more formal training. *Construction & General Laborers' District Council of Chicago and Vicinity (Henkels & McCoy)*, 336 NLRB No. 108, slip opinion at 2 (2001). The Operator/Teamster collective bargaining agreement contains strong incentives for employees to receive formal training. Under the contract, employees who complete a certification program and pass a test administered by the Illinois Landscape Contractors Association ("ILCA") earn the title "certified landscape technician" and receive increased compensation (ER EX. 1, p. 8).

In addition, Esposito testified that his plantsmen, installer and helper employees represented by IUOE, Local 150 and Teamsters, Local 703 have the skills necessary to perform the landscape construction work at issue in this case (Tr. 52, 88). Indeed, Esposito explained that he prefers using employees represented by the Operators and Teamsters precisely because they have the skills "to get the project done the way we need to" (Tr. 30). In contrast, there is no evidence in this record that members of the Laborers possess similar skills. This factor favors and award of the work to the Operators and Teamsters.

E. The Likelihood Of Job Loss Favors An Award To Local 150 and Local 703.

The Board will consider the potential for loss of jobs when making an award of the work. *Newark Typographical Union (Mid-Atlantic Newspapers)*, 220 NLRB 4, 7 (1975); *see also Iron Workers Local 40 (Unique Rigging)*, 317 NLRB 231, 233 (1995) ("we find the potential adverse impact on the Employer's current employees favors an award of the work in dispute to those employees"). On April 11, Terry Taylor told Gabe Restrepo, "These guys can't do the work, you

need to have Laborers. Laveka Landscaping should be doing this work” (Tr. 28; *see also* 48). Forcing the work from Beverly to Laveka Landscaping, or some other contractor signatory with LIUNA, Local 751 would result in an immediate job loss for at least three of Beverly’s current employees. The likelihood of job loss militates against awarding the disputed work to the Roofers.

III. The Board Should Issue A Broad Award In Favor Of IUOE, Local 150 and Teamsters, Local 703.

Where the evidence indicates that a jurisdictional dispute is likely to recur, the Board will issue an area award. *Advance Cast Stone*, 338 NLRB at 48, *citing Iron Workers Local 1 (Fabcon)*, 311 NLRB 87, 92 (1993). Esposito testified that the Laborers have a history of threatening to strike or picket Beverly at jobsites, which Esposito anticipates will continue in the future (Tr. 94, citing past U.S. Cellular Field project; Tr. 94, citing projects Beverly is currently bidding; Tr. 95-96, citing future Mantino and Tenco Engineering projects). Esposito further testified that the Laborer’s Local 751 jurisdictional area includes south of Will County, and that Beverly presently works in that area, had in the past, and intends to in the future (Tr. 98-99).

The Laborers chose not to attend the hearing in this matter, therefore, they have waived any right to contest Beverly’s request a broad award. According, the Board should issue in favor of the Operators and Teamsters.

CONCLUSION

For all the above-stated reasons, Beverly Environmental, LLC respectfully request the Board make an affirmative award of the disputed work to IUOE, Local 150 and Teamsters, Local 703.

Dated: June 21, 2012

Respectfully submitted,

/s/ Julie E. Diemer
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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that she served the foregoing **Post-Hearing Brief of Beverly Environmental, LLC**, via electronic filing with the Office of Executive Secretary and Region 25 on June 21, 2012.

In addition, the undersigned hereby further certifies that she served the foregoing on the following persons via e-mail on or before 5:00 p.m. on June 21, 2012:

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