UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LABORERS' INTERNATIONAL UNION OF NOTH AMERICA, LOCAL 894
Charged Party

Case No. 8-CD-081837

and

DONLEY'S, INC.
Employer

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18
Party-In-Interest

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18
Charged Party

Case No. 8-CD-081840

and

DONLEY'S, INC.
Employer

and

LABORERS' INTERNATIONAL UNION OF NOTH AMERICA, LOCAL 310
Party-In-Interest

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18'S MOTION TO QUASH & POST HEARING BRIEF

I. INTRODUCTION & PARTIES

A. The International Union of Operating Engineers, Local 18

For over seventy years, Local 18 has represented the interests of building construction equipment operators working in the State of Ohio. Currently, Local 18 represents approximately 15,000 operating engineers working in 85 of Ohio's 88 counties along with four counties in Northern Kentucky. Jt. Exh 1; Jt. Exh 2; Tr. 1043-46, 1050. Headquartered in Cleveland, Ohio, Local 18 operates six district offices across the state and negotiates and administers several contracts covering both the building and highway construction industry. Tr. 1043-51. For decades, these contracts have specifically identified fork lifts and skid steers as construction equipment that is exclusively within Local 18's craft jurisdiction. In order to preserve the scope and jurisdiction of work performed by its membership and avoid jurisdictional disputes with other crafts, Local 18 has consistently negotiated and consistently enforced language in its collective bargaining agreements that mandates an economic sanction in the event that a signatory employer elects to assign equipment that is within Local 18's craft jurisdiction to another craft. Tr. 1112-15.

B. The Construction Employers Association

The Construction Employers Association ("CEA") is a multi-employer bargaining association, representing construction companies operating in and around Cleveland, Ohio. Tr. 240-42. The scope of the CEA's representational activities includes negotiating collective bargaining agreements on behalf of those construction employers that have specifically assigned their collective bargaining rights to the CEA. Id. For over a decade, Local 18 has negotiated a series of contracts with the CEA governing the terms and conditions of employment for Local 18 members performing building construction work within a specific geographic location in

Northeast Ohio.[1] Jt. Exh. 12, Tr. 1045-47. In order to preserve and protect both the work performed by and the craft jurisdiction of its membership, Local 18's contracts with the CEA have specifically identified both fork lifts and skid steers as equipment that subjects the signatory contractor to an economic sanction in the event it elects to assign that equipment to someone other than an operating engineer. Jt. Exh. 2 at ¶ 10, 20-21; Tr. 49-51.

C. The Associated General Contractors of Ohio

The Associated General Contractors of Ohio ("AGC") is also a multi-employer bargaining association that represents construction employers performing building construction work in Ohio. Jt. Exh. 1; Tr. 1045-47. Like the CEA, the AGC negotiates collective bargaining agreements on behalf of those employers that have specifically assigned their bargaining rights to the AGC. Tr. 1003. These negotiation activities are effectuated by the Labor Relations Division of the AGC. Jt. Exh. 1; Tr. 1069-73. The resulting contract is automatically binding upon those that have elected to become members of the AGC's Labor Relations Division or that have otherwise assigned their bargaining rights to the AGC. Jt. Exh. 1; Tr. 1069-73.

In addition to representing contractors that have agreed to become signatory to collective bargaining agreements, the AGC also opens it ranks to non-union contractors. Tr. 1069-73. While these non-union contractors are considered members of the AGC they are not bound by any of the collective bargaining agreements negotiated by the AGC's Labor Management Division. Id. Rather, AGC employers that have not assigned their bargaining rights to the AGC or that have refrained from becoming members of the AGC's Labor Management Division are only bound by the terms of the collective bargaining agreements negotiated by AGC when and if they actually execute an agreement with a union. Id.

[1] Specifically, the geographic jurisdiction covered by the CEA includes the following Ohio counties: Ashtabula; Cuyahoga; Erie; Geauga, Huron; Lake; Lorain; and Medina.

For decades, Local 18 has negotiated a continuous series of collective bargaining agreements with the Labor Relations Division of the AGC. Local 18's agreement with the AGC covers building and construction work in all counties within the State of Ohio excepting those covered under the CEA agreement. Jt. Exh. 1 at ¶ 2. Each of these agreements have included language that protects and perseveres the work and craft jurisdiction of Local 18 by mandating an economic sanction in the event that a signatory contractor elects to assign equipment that is within Local 18's contract to someone other than an operating engineer. Id. at ¶ 20-22. Both fork lifts and skid steers are identified in each agreement and, as such, are subject to the contract's economic penalty provisions. Id. at ¶ 52.

D. The Laborers' International Union of North America, Local 310 and the Laborers' International Union of North America, Local 894

In addition to negotiating building construction agreements with Local 18, both the CEA and the AGC also negotiate separate agreements with various other labor organizations including local affiliates of the Laborers' International Union of North America ("LIUNA"). For building construction work performed in and around Cleveland, Ohio, the CEA directly negotiates with the Laborers' International Union of North America, Local 310 ("LIUNA 310"). Jt. Exh. 3. Meanwhile, for building work performed in and around Akron, Ohio, the AGC negotiates with the Laborers' International Union of North America, Local 894 ("LIUNA 894"). Jt. Exh. 4. Unlike Local 18's agreement with the AGC and the CEA, the contracts negotiated by LIUNA 310 and LIUNA 894 fail to include any specific provision requiring or imposing any economic sanction in the event work or equipment contractually stipulated as belonging to a LIUNA affiliate is transferred to another non-LIUNA employee. Jt. Exh. 3-5.

E. The International Union of Operating Engineers and the Laborers' International Union of North America

Pursuant to their respective constitutions, both the International Union of Operating Engineers ("IUOE") and LIUNA are vested with the authority to enter into agreements regarding the jurisdiction of their respective crafts which are binding upon their local affiliates. Tr. 183-85. Relevant to the instant matter, in 1954 IUOE and LIUNA had occasion to enter into an agreement regarding the proper and appropriate work jurisdiction that should be allocated to each respective body with respect to fork lifts and other similar type equipment ("Fork Lift Agreement"). L18 Exh. 8.[2] Pursuant to the Fork Lift Agreement, IUOE and LIUNA agreed as follows: "[w]ith regard to fork lifts and other similar type of equipment, the operation of same will be by members of [IUOE]; a member or members of [LIUNA] will work in connection with said equipment for the purpose of seeing to it that the load is properly on the lift and to do any necessary tending[.]" Id. Sixteen years later, IUOE and LIUNA entered into yet another agreement regarding the territorial jurisdiction of their respective craft. ("10(k) Agreement") L18 Exh. 9. Pursuant to the 10(k) Agreement, local affiliates of IUOE and LIUNA are prohibited from acting in concert with an employer to initiate and/or otherwise participate in jurisdictional disputes under section 10(k) of the Act. Id.

F. Donley's, Inc.

Donley's, Inc. ("Donley's") is a construction contractor with offices located in Cleveland, Ohio. Tr. 58. By and large, Donley's area of building expertise in Northeast Ohio is the construction of parking garages and decks. Tr. 58-59. With regard to its construction projects in the Greater Cleveland area, Donley's has for decades intermittently signed CEA agreements with Local 18. Jt. Exh. 12-14. Since at least 2011, however, Donley's has assigned its bargaining

[2] Exhibits offered into evidence by Local 18 are hereinafter cited as "L18 Exh. [X]," X referring to exhibit number.

rights to the CEA and, as such, has agreed to become immediately bound by the terms and conditions contained within the collective bargaining agreement negotiated by and between Local 18 and the CEA. L18 Exh. 25.

Donley's membership the AGC, however, has never extended to include membership in the AGC Labor Relations Division nor has Donley's ever specifically assigned its bargaining rights to the AGC. Tr. 990, 1006-09, 1030-33, 1080-86, 1129-34. As such, Donley's has never been automatically bound to the collective bargaining agreements covering work performed in and around Akron, Ohio. Rather, Donley's has only been bound to the terms of the AGC agreement on those occasions where it elected to execute separately signed AGC agreements with Local 18. Over the last two decades, Local 18 has spent considerable time and energy in procuring Donley's execution of separately signed AGC agreements. Jt. Exh. 9-11. In those instances where a separately signed AGC agreement has been procured from Donley's, Local 18 sent Donley's formal notice upon of the expiration of that agreement along with a request to begin negotiations for a new agreement. L18 Exh. 29.

In addition to entering into contracts with Local 18, Donley's has also elected to sign collective bargaining agreements with LIUNA local affiliates. With regard to its construction operations in and around Cleveland, Ohio, in 2005 Donley's signed an Assent and Participation Agreement with LIUNA 310. Jt. Exh. 15. This agreement was the last and only agreement between LIUNA 310 and Donley's. For work performed in and around Akron, Ohio, Donley's has, in a similar fashion, agreed to be bound by the terms of the agreements negotiated by and between LIUNA 894 and the AGC. Jt. Exh. 5.

II. RELEVANT FACTS

In late 2011, Donley's was commenced in no fewer than two large scale construction projects in Northeast Ohio that are relevant to the instant matter. The first project was located in downtown Cleveland and consisted of constructing a parking garage as part of the Cleveland Flats East Bank Project ("Flats Project"). Pursuant to its status as a signatory member of the CEA, Donley's building operations at the Flats Project were governed by Local 18's agreement with the CEA. L18 Exh. 29. Remarkably, no current signed agreement that was a product of subsequent re-negotiations between Donley's and LIUNA 310 covering work at the Flats Project was admitted into evidence.

As the Flats Project was underway in Cleveland, Donley's was readying to build a parking garage at the Goodyear world headquarters located in Akron, Ohio ("Goodyear Project"). In November of 2011, Local 18's representatives stationed in the Union's Akron office first learned that Donley's would be involved in the nearby Goodyear Project. Tr. 984-88. Upon discovery of Donley's involvement in the Goodyear Project, these representatives attempted to discern whether Donley's was, in fact, signatory to the AGC agreement which covered work performed at the Goodyear Project. Id. In so doing, Local 18 discovered that while Donley's was signatory to Local 18's agreement with the CEA, it had yet to execute Local 18's current AGC agreement. Id. Accordingly, in November of 2011, Local 18's representatives traveled to the Goodyear Project jobsite and met with a representative from Donley's. Id. During this meeting, Local 18 explained the different geographical regions covered by the AGC and the CEA and requested that Donley's sign a current AGC agreement covering work performed on the Goodyear Project. Id. The Donley's representative at that meeting, however, indicated that he lacked the authority to sign any such agreements. Tr. 984-88. Thereafter, Local 18 delivered a copy of the AGC agreement to the Goodyear Project and requested that Donley's execute the

agreement. Tr. 988-89. Despite numerous subsequent attempts, Local 18 was unable to obtain an executed AGC agreement from Donley's.

Having failed to procure a signed contract from Donley's covering the Goodyear Project, Local 18 began considering the option of conducting a primary picket in protest of Donley's refusal to sign a collective bargaining agreement. Tr. 989-90. Prior to deciding whether to picket the Goodyear Project, Local 18's representatives again investigated whether Donley's had, in fact, signed an AGC agreement. Tr. 1006-09, 1030-33, 1080-86. To that end, Local 18 again contacted representatives at the AGC and inquired into whether Donley's was party to an agreement with Local 18 or had otherwise assigned their bargaining rights to AGC Labor Relations Division. Id. The AGC, however, failed to offer any reply to this inquiry. Id. Local 18 then checked its own records and determined that Donley's last signed an AGC agreement in the year 2000 and that a notice of cancellation and request to bargain regarding that agreement was sent to Donley's in 2007. Id.; Jt. Exh. 10; L18 Exh. 29. Finally, Local 18 examined the fringe benefit reports submitted by Donley's. Tr. 1006-09, 1030-33, 1080-86. In so doing, Local 18 discovered that Donley's fringe benefit reports failed to identify any work being performed in Summit County where the Goodyear Project was taking place. Id.; L18 Exh. 1. Rather, these reports specified only work performed in and around Cuyahoga County where the Flats Project was taking place. L18 Exh. 1.

In the early morning hours of February 22, 2012, Local 18 commenced a representational picket at the Goodyear Project. Tr. 468. During that picket, Local 18's members carried signs indicating that they were protesting Donley's failure to sign a collective bargaining agreement. Tr. 469. That same day, Donley's faxed correspondence to Local 18 regarding the picket. In that correspondence, Donley's alleges that Local 18 was engaged in an illegal "jurisdictional picket"

regarding the question of which craft should be assigned the operation of fork lifts at the Goodyear Project. CP Exh. 12B.[3] Donley's further cautioned that it would undertake all available legal remedies unless the picket was removed by 3:00 PM that day. Id. That same day, Donley's also sent correspondence to LIUNA 894 indicating that LIUNA 894 members were being assigned the responsibility of operating fork lifts at the Goodyear Project. CP Exh. 12C.

Despite its earlier threat of legal action, on February 23, 2012, Donley's executed an AGC short form agreement with Local 18 covering the Goodyear Project. Jt. Exh. 11. The execution of this agreement was the result of a meeting between representatives from Local 18 and Donley's wherein Local 18 explained that the picket was for representational purposes only and that it would cease once Donley's agreed to sign Local 18's agreement with the AGC. Tr. 575. By virtue of signing this agreement, Donley's agreed that its building operations at the Goodyear Project would be governed by the terms and conditions contained within Local 18's agreement with the AGC. At the same time, Donley's work at the Goodyear Project was also governed by its agreement with LIUNA 894.

On February 23, 2012, after the AGC agreement was executed, Local 18 and Donley's conducted a "pre-job conference" covering the Goodyear Project. Tr. 991-92; L18 Exh. 4. During the pre-job conference, Local 18's representatives identified the provisions of the AGC agreement that require an economic sanction in the event an employer assigns equipment listed in the agreement to someone other than an operating engineer and explained that the operation of fork lifts and skid steers were subject to that provision. Tr. 991-92; L18 Exh. 4. Donley's, however, indicated that the operation of fork lifts and skid steers at the Goodyear Project had been assigned to members of LIUNA 894 and further stated that it did not believe the AGC agreement's economic penalty provisions applied. Tr. 991-92; L18 Exh. 4. Rather, Donley's

[3] Exhibits offered into evidence by Donley's are hereinafter cited as "CP Exh. [X]," X referring to exhibit number.

alleged that the application of the economic penalty provisions of the contract to the operation of fork lifts and skid steers at the Goodyear site constituted a jurisdictional dispute between Local 18 and LIUNA 894. Tr. 991-92; L18 Exh. 4.

Four days later, Local 18 filed a written grievance with Donley's. CP Exh. 11. Pursuant to this grievance, Local 18 asserts that: "Donley's is in breach of the 2010-2013 AGC of Ohio Building Agreement . . . by failing to employ operating engineers on its fork lifts and skid steers. As a result of the employer's breach the employer is required under paragraph 22 to pay a penalty . . . in the amount of all applicable wages and fringes from the first day of violation and continuing thereafter for each fork lift and skid steer until the project's completion." CP Ex. 11.

After the Goodyear Project written grievance was filed, representatives from both Donley's and Local 18 met to conduct a "Step 2" grievance meeting. Tr. 992-94. During this meeting, Local 18 explained that it was not seeking to have the fork lift work reassigned from LIUNA 894 to Local 18. Id. Rather, Local 18 explained that the economic damages clause contained within their agreement with AGC effectively prohibited Local 18 from seeking the actual reassignment of work and instead limited Local 18's relief to economic damages as specified in the contract. Id. Donley's, however, denied that the Union's grievance was a contractual dispute and instead argued again that the Union's grievance was actually a jurisdictional dispute between Local 18 and LIUNA 894. Id. The Step 2 meeting concluded with both parties agreeing to move to Step 3 of the contractually mandated grievance procedure. Id.

Prior to conducting the Step 3 grievance meeting, Donley's contacted a representative from LIUNA 894 and informed him of the nature of Local 18's grievance. Lab. Exh. 4.[4] Donley's further falsely informed LIUNA 894 that there remained the possibility that the fork lift

[4] Exhibits offered into evidence by the local LIUNA affiliates are hereinafter cited as "Lab. Exh. [X]," X referring to exhibit number.

work could be reassigned from LIUNA 894 to Local 18. Id. In response, LIUNA 894 indicated that it adamantly opposed the proposed transfer of fork lift work and that if that work was transferred to Local 18's members, LIUNA 894 "will take whatever action necessary to protect its work jurisdiction, including, picketing and/or striking at the site of the project." Id.

On Friday, April 20, 2012, representatives from Donley's, Local 18, and the AGC met in order to conduct a Step 3 grievance meeting. L18 Exh. 10; Tr. 1088-90. During this meeting, Local 18 once again reiterated that it was not claiming the fork lift or otherwise demanding that the fork lift work be reassigned to its members. L18 Exh. 10; Tr. 1088-90. Rather, Local 18 once again explained that it was merely seeking economic damages as mandated by the AGC agreement. L18 Exh. 10; Tr. 1088-90. For its part, Donley's continued to assert that Local 18's grievance was, in fact, a jurisdictional dispute and should be handled as such. L18 Exh. 10; Tr. 1088-90. After further discussion and deliberation, the Step 3 meeting concluded with no resolution. L18 Exh. 10; Tr. 1088-90. Thereafter, Local 18 requested that its written grievance be submitted to binding arbitration.

In addition to pursuing a grievance under the AGC agreement regarding Donley's use of fork lifts at the Goodyear Project, Local 18 also filed a written grievance with Donley's under the CEA agreement concerning the Flats Project. CP Exh. 12. As with the grievance filed over the Goodyear Project, Local 18's Flats Project grievance requested that Donley's pay the contractually mandated economic sanction for assigning fork lift work to someone other than an operating engineer. Id. Specifically, Local 18's grievance alleged that: "Donley's is in breach of the 2009-2012 CEA Collective Bargaining Agreement . . . by failing to employ operating engineers on its fork lifts. As a result of the employer's breach the employer is required under paragraph 21(E) to pay a penalty to all qualified referral registered applicants in the amount of all

applicable wages and fringe benefits from the first day of violation and continuing thereafter for each fork lift until the project's completion." Id. After further examining the facts and circumstances surrounding the Flats Project grievance, Local 18 discerned that the matter was not timely grieved. As such, Local 18 voluntarily withdrew the Flats Project grievance. Tr. 1086-97.

Concurrent with processing its grievance under the AGC agreement, Local 18 and the CEA were engaged in negotiations for a new collective bargaining agreement. L18 Exh. 21-23; Tr. 1112-15. During these negotiations, Local 18 proposed new language quadrupling the applicable economic sanction for those CEA contractors that elect to assign equipment that is within Local 18's contract to someone other than an operating engineer. CP Exh. 3. Specifically, Local 18 requested that the economic penalty be increased fourfold and identified as liquidated damages. Id. Local 18 further requested the inclusion of new language in the agreement that would clarify that the employer is prohibited from remediating any economic penalty assessed and creating a jurisdictional dispute by reassigning the operation of the equipment to Local 18 members. Id. This proposal was subsequently rejected by the CEA.

At the same time that it was engaged in negotiations with Local 18, the CEA was also negotiating a new contract with LIUNA 310. CP Exh. 6; Tr. 404-15. Donley's representatives attended and participated in these negotiations on behalf of the CEA. Tr. 404-15. Eventually, these contract negotiations culminated with the parties agreeing to include new language in their agreement whereby LIUNA 310 would be awarded contractual jurisdiction over a variety of construction equipment including fork lifts and skid steers. Jt. Exh. 4.

On May 25, 2012, shortly after Local 18 requested arbitration of its grievances, Donley's, filed an unfair labor practice charge with Region 8 of the National Labor Relations Board

("NLRB" or "Board") alleging that Local 18 violated section 8(b)(4)(D) of the National Labor Relations Act ("Act" or "NLRA"). *See* Charge No. 08-CD-081840. Specifically, Donley's May 25th charge alleged that Local 18 "engaged in and induced individuals to engage in a strike or refusal to perform services, and/or threatened, coerced, or restrained [Donley's] where the object is and was to force or require . . . [Donley's] to assign fork lift and related work [to Local 18's members.]" The charge offers no further elaboration as to the specific facts constituting the nature of the alleged strike, refusal to perform services, threat, coercion, or restraint. Nor does it contain a date when this unlawful conduct is alleged to have occurred. The May 25th charge does, however, specify that the dispute concerned construction work being performed at the site of the Goodyear Project; *to wit*: 225 Innovation Way, Akron, Ohio 44316.

Shortly thereafter, on June 4, 2012, Donley's filed a second charge with the Board again alleging the existence of a jurisdictional dispute in violation of Section 8(b)(4)(D). *See* Amended Charge No. 08-CD-081837. In its June 4th charge, Donley's alleged that LIUNA 894 "threatened, coerced, or restrained" Donley's in an attempt to force or require Donley's to assign fork lift and related work to LIUNA 894's members. As with its May 25th charge, the charge filed by Donley's on June 4th fails to provide any specific allegations as to the facts and circumstances constituting the alleged violation nor does it identify a date when these violations are alleged to have occurred. The June 4th charge does, however, once again specifically identify the Goodyear Project as the location where the alleged jurisdictional dispute was taking place.

On June 28, 2012, the Regional Director issued an Order Consolidating Cases and Notice of Hearing ("Order"). Pursuant to this Order, the Regional Director consolidated the charges contained in Case Nos. 08-CA-081837 and 08-CA-081840, and notified Local 18 that the Board was exercising its authority under Section 10(k) of the Act to conduct a hearing concerning the

jurisdictional disputes alleged in those charges. While the Order predictably identifies Local 18, Donley's, and LIUNA 894, as parties to a jurisdictional dispute at the Goodyear Project, it inexplicably identifies LIUNA 310 as an additional party and the Flats Project as the location of an additional jurisdictional dispute. Indeed, given the fact that Local 18 has yet to be provided with any unfair labor charge alleging that a jurisdictional dispute between Donley's, Local 18 and LIUNA 310 is taking place at the Flats Project, the basis for the inclusion of these parties and locations in the Order remains a mystery. Similarly confounding is the Regional Director's expansion of the scope of Donley's charges by including in the Order uncharged allegations regarding the operation of skid steers. Once again, given the fact that Local 18 has yet to be provided with any unfair labor charge alleging a jurisdictional dispute involving skid steer work, the basis for the inclusion of that work in the Regional Director's Order is also cryptic at best.

III. LAW AND ANALYSIS

A. The Regional Director's June 28th Order Should Be Quashed Because No Reasonable Cause Exists To Believe That Section 8(b)(4)(D) Of The Act Has Been Violated.

Before the National Labor Relations Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must first be satisfied that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated. *Laborers Dist. Council (Capitol Drilling Supplies, Inc.),* 318 NLRB 809, 810 (1995). This determination requires a finding that there is reasonable cause to believe that: (1) a party has used proscribed means to enforce its claims to the work in dispute; (2) there are competing claims to the disputed work between rival groups of employees; and (3) the parties have not agreed on a method for the voluntary adjustment of the dispute. *Id*.; *Carpenters Local 275 (Lymo Construction Co.)*, 334 NLRB 422, 423 (2001). In this matter, there is no reasonable cause to believe that Section 8(b)(4)(D) has been violated with

regard to either the Goodyear Project or the Flats Project. Indeed, Local 18 has not made any claim for disputed work nor has it used any proscribed means in an attempt to procure that work. Rather, Local 18's activities are limited to conducting a lawful representational picket at the Goodyear Project and processing two grievances that seek to vindicate duly negotiated contract language and which are limited in recourse to monetary damages. As a matter of both fact and law, such lawful activities do not constitute a proscribed means of enforcing a claim to disputed work that is subject to resolution under Section 10(k) of the Act. As such, the Regional Director's June 28th Order should be quashed.

1. Local 18's Picket at the Goodyear Project Does Not Constitute a Proscribed Means of Enforcing a Claim to Disputed Work.

It is a well-accepted rule that a union may commence a representational picket for the purpose of coercing an employer in the construction industry to sign a pre-hire agreement under Section 8(f) of the Act. *NLRB v. Iron Workers Local 103 (Higdon Contracting Co.)*, 434 U.S. 335, 341-343 (1978), fn. 7. As the Supreme Court acknowledged in *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 268 (1963), the line between essentially representational and jurisdictional disputes is oftentimes blurred. "This blurred line is not a product of the law, but a product of the facts. The factual question which must be answered in each case is, 'What is the purpose of the picketing?'" *Waterway Terminals Co. v. NLRB*, 467 F.2d 1011, 1022 (9th Cir. 1972).

When the line between representational and jurisdictional has been blurred, the Board is charged with discerning whether the object of the picket is representational or jurisdictional. *Id.* In making this determination, the Board considers all of the circumstances surrounding the case and engages in a mixed question of law and fact. *Plumbers & Pipe Fitters Local 32 (Bayley Constr.),* 315 NLRB 786 (1994). *See also Iron Workers Local 103 (Higdon Contracting Co.),*

434 U.S. 335 (1978). In answering this mixed question, the Board is mindful that "a demand for recognition as bargaining representative for employees doing a particular job, or in a particular department, does not to the slightest degree connote a demand for the assignment of work to particular employees rather than to others." *Teamsters Local 222 (Jelco, Inc.)*, 206 NLRB 809, 811 (1973), citing *Communications Workers (Mountain States Telephone)*, 118 NLRB 1104, 1107-08 (1957).

The evidence presented in this case clearly demonstrates that Local 18's picket at the Goodyear Project was a representational picket designed to protest Donley's failure to sign the AGC agreement and had nothing to do with any purported jurisdictional dispute regarding fork lifts and/or skid steers. In February of 2012 Donley's was performing construction work at the Goodyear Project but had yet to sign the AGC agreement with Local 18 which would cover that work. After several failed attempts to procure Donley's execution of the AGC agreement, Local 18 decided to conduct a picket to protest Donley's failure to recognize Local 18 as the duly authorized bargaining representative for certain employees working on the Goodyear Project. Tr. 468. The goal of this picket was not to cause Donley's to assign any particular work to Local 18 and neither Local 18 nor its picketers requested such a resolution. Indeed, such a resolution would have been impossible to achieve at the time because absent a signed AGC agreement Local 18 could not make any claim for any work at the Goodyear Project let alone coerce Donley's into assigning that work to Local 18's membership. Moreover, if the picket was for jurisdictional purposes, Local would have undoubtedly extended that picket to include the Flats Project. The Falts Project, however, remained untouched by Local 18's picket. As such, the evidence instead clearly establishes that Local 18 utilized the picket for representational purposes only. Had the picket been instituted by Local 18 for the jurisdictional object of forcing Donley's

to reassign work to Local 18's members, the execution of the AGC agreement would have been of no effect and the picket would have remained in place until the alleged jurisdictional object was achieved. This, however, was clearly not the case because Local 18 removed the picket from the Goodyear Project immediately upon Donley's execution of the AGC agreement. Tr. 575.

Presently, Donley's and the local LIUNA affiliates made party to this matter attempt to blur the line between representational and jurisdictional in order render an otherwise lawful representational picket an unlawful jurisdictional demand. The facts, however, remain clear: the Goodyear Project was picketed in order for Local 18 to gain representational status with Donley's. At no point in time did Local 18 ever request or demand to be assigned certain work in exchange for removing the picket. Rather, once Local 18 achieved its representational aim and procured a signed AGC Agreement from Donley's, the picket was immediately removed. Tr. 575. Local 18's picket at the Goodyear Project is therefore properly cognizable as a lawful demand for recognition as bargaining representative for employees doing a particular job or in a particular department and does not in the slightest degree connote a jurisdictional demand for the assignment of work.

2. Local 18's Grievances Do Not Constitute The Use of Proscribed Means in Order to Procure Disputed Work.

As a preliminary matter, it bears repeating that the grievances filed by Local 18 with regard to both the Flats Project and the Goodyear Project do not seek to have any work – be it fork lift, skid steer, or otherwise – assigned to Local 18. Tr. 992-994, 1088-90; L18 Exh. 10. Rather, by their own terms, the contracts and grievances seek only to enforce a damages provision contained within each of Local 18's respective agreements with Donley's. Jt. Exh. 1-2. Throughout the grievance processing procedure, Local 18 consistently and explicitly explained that the economic damages clause contained within their agreements effectively prohibited it

from seeking the actual reassignment of work and instead limited Local 18's relief to economic damages as specified in the contract. Id. Nevertheless, Donley's, LIUNA 310, LIUNA 894, and the Regional Director each apparently assert that these grievances are an exercise of proscribed means in order to procure disputed work subject to Section 10(k) of the Act.

Reasonable cause to believe that Section 8(b)(4)(D) has been violated requires a finding "(1) that a party has used proscribed means to enforce its claims to the work in dispute and (2) that there are competing claims to the disputed work between rival groups of employees." *Laborers Dist. Council (Capitol Drilling Supplies, Inc.)*, 318 NLRB at 810. As such, the factual predicate for asserting a colorable 10(k) dispute is found when an employer faces a proscribed means of enforcing a claim to disputed work resulting from a jurisdictional dispute that is not of his own making and in which he has no interest. *Intl. Longshoremen's & Warehousemen's Union Local 62-B v. NLRB*, 781 F.2d 919, 924 (D.C.Cir.1986). When examining evidence proffered to satisfy the "reasonable cause" standard, testimonial evidence must be "viewed in its entirety" and the Board must do so by looking at the "specific language used and surrounding conduct and events." *Bricklayers Local 20 (Altounian Builders Inc.)*, 338 NLRB 1100, 1101 (2003).

When viewed in their entirety, the testimonial evidence, specific language used, and surrounding conduct and events all demonstrate that Local 18's grievances constitute neither a claim to disputed work nor a proscribed means to enforce a claim to that work. The evidence adduced in this matter instead demonstrates that Local 18's grievances concern the applicability and efficacy of duly negotiated contract language that mandates economic damages as the sole form of relief should an employer elect to assign work within Local 18's agreement to someone other than an operating engineer. Jt. Ex. 1-2; CP Exh. 11; L18 Exh. 10; Tr. 992-994, 1088-90. As such, Local 18's grievances concern and address the terms of the collective bargaining

agreements between Local 18 and Donley's and do not seek a reassignment of work. A finding that Local 18's grievances constitute a proscribed means of enforcing a claim to disputed work would therefore not only be outside the purview of a Section 10(k) hearing but also contrary to the basic principles and purpose of the Act which protect the rights of parties to collectively bargain and promote the use of arbitrational proceedings to resolve disputes between contracting parties. As such, there is no reasonable cause to believe that Local 18's grievances constitute a proscribed means of enforcing a claim to disputed work subject to Section 10(k) of the Act.

A collective bargaining agreement is an effort to erect a system of industrial self-government utilizing agreed-upon rules of law which seeks to avoid leaving "matters subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces." *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580-81 (1960). As such, it has long been federal policy to promote industrial stabilization through the voluntary use of collective bargaining agreements. National labor policy encourages the grievance-arbitration procedure as the preferred method of resolving labor-management disputes arising under collective bargaining agreements. *Id.*; *ILWU Local 7 (Georgia-Pacific Corp.)*, 291 NLRB 89, 93 (1988). Congressional support of this policy is clearly set forth in Section 203(d) of the Act, which states: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." In *AT&T Technologies v. Communications Workers*, the Supreme Court reaffirmed the preferred status of labor arbitration stating that contract provisions that call for arbitration of disputes "have served the industrial relations community well, and have led to continued reliance on arbitration . . . as the preferred method of resolving disputes, arising during the term of a collective-bargaining

agreement." 475 U.S. 643, 648 (1986); *See also Paperworkers v. Misco*, 484 U.S. 29, 36-37 (1987). With this policy in mind, the Board has determined that it is oftentimes prudent to refrain from exercising its authority to adjudicate alleged unfair labor practices in order to facilitate private dispute resolution under the grievance-arbitration process. *E.g., United Technologies Corp.*, 268 NLRB 557, 558 (1984); *Collyer Insulated Wire*, 192 NLRB 837, 839-840 (1971); *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955).

With regard to jurisdictional disputes between labor organizations, the Board has adopted the Supreme Court's premise in *Carey v. Westinghouse Corp.*, 375 U.S. 261 (1964), that the grievance and arbitration process has a major role to play in settling these disputes. Specifically, the Board stated:

> "The [Supreme] Court held in *Carey* that prior to a Board 10(k) award, a union involved in a jurisdictional dispute may file a contractual grievance, pursue it to arbitration, and seek to enforce an arbitration award under Section 301. The Court stated that the 'underlying objective of the national labor laws is to promote collective bargaining agreements and to help give substance to such agreements through the arbitration process'; that '[g]rievance arbitration is [a common] method of settling disputes over work assignments'; and that '[s]ince § 10(k) not only tolerates but actively encourages voluntary settlements of work assignment controversies between unions, we conclude that grievance procedures pursued to arbitration further the policies of the Act.'"

ILWU Local 7 (Georgia-Pacific Corp.), 291 NLRB at 93, quoting *Carey*, 375 U.S. at 265-266. This position is not only in accordance with federal policy embracing the role that arbitration plays in resolving disputes arising under collective bargaining agreements, but is also consonant with the legislative history of Section 10(k) which itself embraces the priority placed upon collective bargaining and arbitration. In discussing the merits and liabilities of the then-proposed LMRA bill S.1126, Senator Taft, co-sponsor of the LMRA, stated that the "desired objectives" of enacting, *inter alia*, Section 10(k) of the LMRA were "prompt elimination of the obstructions to the free flow of commerce *and encouragement of the practice and procedure of free and*

private collective bargaining." (Emphasis added.) S. Rep. No. 245, 80th Cong., 1st Sess., I Legislative History of the Labor Management Relations Act ("Leg. Hist.") 414 (LMRA 1947).

Given the strong Congressional policy of encouraging the private settlement of disputes through the grievance-arbitration machinery and the legislative history and purpose behind Section 10(k) of the Act, the Board has been reluctant to find that the mere filing of an arguably meritorious contractual grievance constitutes a proscribed means of enforcing a claim to disputed work subject to Section 10(k). *ILWU Local 7 (Georgia-Pacific Corp.)*, 291 NLRB at 93. Rather, the Board has specifically adopted the Supreme Court's decision and analysis in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983) in order to determine whether contractual grievances are arguably meritorious and therefore not subject to a 10(k) resolution. Under this approach, if a pre-10(k) grievance regarding work assignment contains both a lawful motive and a reasonable basis, the Board should not brand such a grievance as unlawful coercion under Section 8(b)(4)(D). *ILWU Local 7 (Georgia-Pacific Corp.)*, 291 NLRB at 93. *See also Teamsters Local 222 (Geneva Rock Prod.)*, 322 NLRB 810, 810-811 (1996).

In the present matter, Local 18's grievances are founded upon a reasonable basis and contain lawful motives. Both the Flats Project grievance and the Goodyear Project grievance concern the applicability and efficacy of contractual language that specifically mandates economic damages in the event that a signatory employer elects to assign equipment that is within Local 18's contractual jurisdiction to someone other than an operating engineer. This contractual language is clear in its mandate, was duly negotiated and agreed upon by the parties, and has been consistently enforced by Local 18. Neither the Flats Project grievance nor the Goodyear Project grievance cite to or rely upon an expansive interpretation of an otherwise mundane jurisdictional clause nor do they assert Local 18's general craft jurisdictions as related

to other employee groups, crafts, or organizations. Rather, by their own terms, the basis of Local 18's grievances is the specific language contained within both the CEA agreement and the AGC agreement which itself *prohibits* Local 18 from pursuing jurisdictional disputes by mandating monetary damages should an employer assign equipment that is within Local 18's collective bargaining agreement to someone other than an operating engineer. Local 18's grievances are therefore founded upon a reasonable basis; *to wit*: the clear and express terms of the collective bargaining agreements agreed upon and executed by and between Donley's and Local 18.

In addition to possessing a reasonable basis, Local 18's grievances also contain a lawful motive. Specifically, both the Flats Project grievance and the Goodyear Project grievance are intended to enforce agreed upon damages provisions contained within the parties' respective agreements. The damages forming a basis for Local 18's grievances were specifically negotiated in order preserve the scope and jurisdiction of work performed by Local 18's members and Local 18 has consistently enforced this language. Tr. 1112-15. Moreover, throughout the course of processing these grievances, Local 18 consistently explained that the economic damages clause contained within each agreement effectively prohibits Local 18 from seeking the actual reassignment of work and instead limited Local 18's relief to monetary damages specified in the contract. Id. As such, Local 18's grievance does not seek to protect and preserve its memberships' contractual work jurisdiction by asking for a reassignment of the work at issue. Rather, Local 18 seeks the lawful object of work perseverance by pursuing the sole remedy available to it under its contracts with Donley's; *to wit*: monetary damages. Accordingly, because Local 18's grievances contain both a lawful motive and a reasonable basis, the Board should not brand them as unlawful coercion under Section 8(b)(4)(D). Rather, the Board should view the grievances between Local 18 and Donley's as they are – that is, disputes between Local 18 and

Donley's regarding the applicability of the terms and conditions of their collective bargaining agreements. In accordance with national policy favoring collective bargaining and the submission of disputes to arbitration, the Board should refrain from subjecting these grievances to administrative review and should instead permit the parties to proceed forward with their contractually agreed upon dispute resolution mechanism.

Donley's, the LIUNA affiliates, and the Regional Director will undoubtedly assert that when a union files a pay-in-lieu grievance it is in effect asserting a claim for work in dispute and thus triggers a cognizable 10(k) dispute. *See e.g. Laborers Local 113 (Super Excavators Inc.)*, 327 NLRB 113, 114 (1998); *ILWU Local 7 (Georgia-Pacific Corp.)*, 273 NLRB 363, 366 (1984). The cases likely to be cited in support of this proposition, however, are distinguishable from the facts and circumstances in the present matter insomuch as none of the prior cases that addressed so-called pay-in-lieu grievances involved contract language that specifically mandates economic sanctions in the event an employer elects assign work to another individual. Unlike the grievances addressed in previous cases, Local 18's grievances do not rely upon or assert a general work jurisdiction clause or a contractually mandated pay rate. Rather, in the instant matter, the contract language providing a basis for Local 18's grievances specifically mandates that Local 18's only remedy in the event equipment identified in its contract is assigned to someone other than operating engineers is to pursue monetary damages as opposed to an assignment of the work in dispute. As such, Local 18's grievances can be viewed as simply seeking the actual benefit of what it bargained for when it agreed to forgo any rights it may have to pursue reassignment of disputed work and limit its relief in such circumstances to the damages specified in its contract. Presently, Donley's has elected to assign equipment contained within its agreement with Local 18 to someone other than an operating engineer. While Donley's has the

contractual right to exercise its bargained-for benefit, Local 18 has the concurrent right to file a grievance in order to collect monetary damages and thereby protect the benefit of its own bargain.

Moreover, to brand Local 18's grievances as a proscribed means of procuring disputed work would, in effect, reward Donley's for placing itself in an alleged jurisdictional dispute that is of its own making. A 10(k) procedure, however, is not "an absolution for employers that find themselves stuck between conflicting contractual obligations they created" nor is designed to "exonerate employees with unclean hands" but rather resolves legitimate "jurisdictional disputes that arise between unions without costly work stoppages . . ." *Moore-Duncan v. Sheet Metal Workers Intl. Assn. Local 27*, 624 F.Supp.2d 367, 377 (D.N.J.2008). As such, when the alleged jurisdictional dispute is of the employer's own making, the employer is not neutral in the dispute as required under Section 10(k) of the Act. Rather, the employer has an interest in one group over another. In those instances where the employer bears unclean hands, the fact that a union demanded the work is insufficient to establish a jurisdictional dispute. *Intl. Longshoremen's & Warehousemen's Union Local 62-B v. NLRB*, 781 F.2d 919, 925 (DC Cir.1986). In this matter, Donley's has from the very beginning attempted to manipulate the facts surrounding Local 18's grievances in order to frame a jurisdictional dispute between Local 18 and the local LIUNA affiliates and thus evade its obligation to pay damages pursuant to its contracts with Local 18.

With regard to Local 18's grievance concerning the Flats Project, prior to proceeding forward with Step 3 of the grievance resolution process, Donley's acted proactively to create a jurisdictional dispute by contacting LIUNA 894 and falsely stating that Local 18 was attempting to procure the reassignment of fork lift and skid steer work at the Goodyear Project. Lab. Exh. 4. Absent Donley's false representations concerning the nature and scope of Local 18's grievances,

LIUNA 894 would have no basis to formally demand the work let alone threaten coercive action over the assignment of that work. Similarly, while Local 18 and Donley's were engaged in the grievance resolution process mandated by the AGC agreement, Donley's was simultaneously participating in negotiations between LIUNA 310 and the CEA which eventually culminated in the execution of an agreement that specifically included fork lifts and skid steers. CP Exh. 6; Tr. 404-15. By participating in the negotiations that led to the inclusion of fork lifts and skid steers in Local 310's agreement, Donley's was able to create a jurisdictional dispute between Local 18 and LIUNA 310 over that equipment in an attempt to avoid its obligation to pay damages pursuant to its contract with Local 18.

By actively participating in the events and circumstances leading up to the purported jurisdictional disputes at the Flats Project and the Goodyear Project, Donley's has shed its façade of an impartial employer caught between the demands of two competing unions. Donley's instead stands as an active participant in a jurisdictional dispute it created in an attempt to avoid its contractual obligations to render monetary damages to Local 18. The fact that Donley's intentionally acted to procure the facts and circumstances necessary to present an alleged jurisdictional dispute clearly demonstrates that it is not an innocent employer to whom to the provisions of Section 10(k) are available.

B. The June 28th Order Should Be Quashed As The Regional Director Acted Without Jurisdiction Under Section 10(B) By Originating A Complaint Upon His Own Initiative.

Section 10(b) of the Act provides: "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board . . . shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect[.]" This section of the Act has been declared to perform two separate yet equally important

functions. *Ross Stores, Inc. v. NLRB*, 235 F.3d 669, 677 (D.C.Cir.2001) (Randolph, J., concurring). Section 10(b) first "sets down a condition for the Board's exercise of jurisdiction," namely, that the Board, which here acts through the General Counsel, may investigate and prosecute conduct only in response to the filing of a "charge," that is, a formal allegation made (by a union, an employer, or an employee) against a union or an employer. Second, Section 10(b) "'functions much like a statute of limitations,' restricting the proper subject of any complaint issued by the General Counsel to conduct about which a charge was filed within six months of its occurrence." *Precision Concrete v. NLRB*, 334 F.3d 88, 90 (D.C.Cir.2003), quoting *Ross Stores, Inc.*, 235 F.3d at 667 (Randolph, J., concurring). As such, the Board has long conceded that Section 10(b) of the Act "obliges it to await a charge before it may initiate an investigation or issue a complaint." *G.W. Galloway Co. v. NLRB*, 856 F.2d 275, 278 (D.C.Cir.1988). Section 10(b) therefore circumscribes the Board's power so that "when the Board ventures outside the strict confines of the charge, it must limit itself to matters sharing a significant factual affiliation with the activity alleged in the charge." *Id.* at 280 (citations omitted); *Lotus Suites v. NLRB*, 32 F.3d 588, 591 (D.C. Cir. 1994).

In *Redd-I, Inc.*, the Board adopted a three-part test in order to determine whether uncharged allegations contained within a complaint are so closely related as to share a significant factual affiliation with the activity alleged in the charge. Under the *Redd-I, Inc.* test, the Board will look to (1) whether the uncharged allegations involve the same legal theory as the allegations in the charge; (2) whether the uncharged allegations arise from the same factual circumstances or sequence of events as that which is alleged in the charge; and (3) whether a respondent would raise similar defenses to both the charged allegations and the uncharged allegations. 290 N.L.R.B. 1115, 1118 (1988). A challenge to the Board's authority to hear and

address allegations not raised by a charge constitutes a direct challenge the Board's jurisdiction. *Precision Concrete,* 334 F.3d at 91. As such, "it is incumbent upon the Board to establish its authority to act, at least once its jurisdiction has been put in issue." *See, e.g., Lotus Suites, Inc. v. NLRB*, 32 F.3d at 592 (where the Board either did not or failed to establish a sufficient factual connection between the general terms of the charge and the specific allegations of the complaint, the Board's order would be set aside). *See also Drug Plastics & Glass Co., Inc. v. NLRB*, 44 F.3d 1017, 1022 (D.C.Cir.1995) (where the Board fails to connect the allegations in its complaint with the charge allegation, the Board lacks jurisdiction over the unrelated complaint allegations). The burden is therefore upon the Board to establish its jurisdiction in regard to allegations outside of the charges filed by Donley's on May 25th and June 4th. Specifically, under the *Redd-I, Inc.* test, the board must establish that the uncharged allegations contained within it June 28th Order involve the same legal theory, arise from the same factual circumstances or sequence of events, and invoke similar defenses as the charges filed by Donley's on May 25th and June 4th.

The facts presented by this case, however do not support a finding that the uncharged allegations contained within the Board's June 28th Order are so closely related as to share a significant affiliation with the charges filed by Donley's in Case Nos. 08-CA-081837 and 08-CA-081840. As to the issues of same legal theory and defenses, the charges filed by Donley's on May 25th (08-CA-081837) and June 4th (08-CA-081840) make no reference to, nor otherwise identify any jurisdictional dispute regarding the Flat Projects, LIUNA 310, or skid steers. Rather, these charges only allege that a jurisdictional dispute is taking place between LIUNA 310 and Local 18 with regard to the operation of fork lifts at the Goodyear Project. At best, the evidence adduced during the 10(k) hearing demonstrates that the uncharged and charged allegations both assert a violation of 8(b)(4)(D). That fact alone, however, does not establish a

shared legal theory. *Brockton Hosp. v. NLRB*, 294 F.3d 100, 108 (D.C.Cir.2002); *Drug Plastics & Glass Co. v. NLRB*, 44 F.3d 1017, 1021-1022 (D.C. Cir.1994). Rather, in order to be closely related in legal theory, both the charged and uncharged allegations must share a specific and identical legal basis. *Brockton Hosp.*, 294 F.3d at 108. In this case, the evidence does not support a finding that the charged allegations regarding the jurisdictional dispute allegedly taking place between Local 18 and LIUNA 894 at the Goodyear Project share a specific and identical legal basis with the uncharged allegations regarding LIUNA 310 and the Flats Project. The evidence also completely fails to demonstrate how the charged allegations regarding fork lifts at the Goodyear Project share a specific and identical legal basis as the uncharged allegations regarding skid steers.

Turning to the question of whether the charged and uncharged allegations arise from the same factual circumstances or sequence of events, the fact that the charged and uncharged allegations are temporally related does not in and of itself establish identical factual circumstances or sequence of events. *E.g., G.W. Galloway Co. v. NLRB*, 856 F.2d at 280-81 (allegations one day apart not factually linked). *Accord Ross Stores v. NLRB*, 235 F.3d at 674 (coincidence of two separate violations during the same organizing campaign does not of itself create a close factual relationship). Rather, the evidence in this matter clearly indicates that the charged and uncharged allegations each address entirely separate and distinct job locations, labor organizations, and collective bargaining agreements. On the one hand, Donley's charges assert, as adopted by the Regional Director, that it, Local 18, and LUNA 894 are parties to a jurisdictional dispute regarding the operation of fork lifts at the Goodyear Project. *See* Case Nos. 08-CD-081840 and 08-CD-081837 On the other hand, the Regional Director has presented an uncharged allegation that Donley's, LIUNA 310, and Local 18 are parties to a jurisdictional

dispute taking place at the Flats Project and that skid steers are at issue between the parties. Clearly, the charged and uncharged allegations address entirely separate and distinct job locations, labor organizations, collective bargaining agreements, and construction equipment. Given these stark differences in fact, it cannot be said that the Regional Director's uncharged allegations arise from the same factual circumstances or sequence of events as the allegations contained with Donley's charges.

Clearly, the June 28th Order exceeds the scope of the charged allegations by including therein matters related to Local 18, LIUNA 310, the Flats Project, and the operation of skid steers. More importantly, the uncharged allegations contained within the June 28th Order are not so closely related as to share a significant affiliation with the to the allegations contained in Donley's May 25th and June 4th charges. As such, the June 28th Order should be quashed as the Regional Director acted without jurisdiction under Section 10(b) by originating a complaint upon his own initiative.

C. Even Assuming *Arguendo* That the Board Has Reasonable Cause to Believe that Section 8(b)(4)(D) of the Act Has Been Violated and Determines the Merits of the Instant Dispute Under Section 10(k), it Should Award the Disputed Work to Local 18.

Pursuant to Section 10(k) of the Act, the Board is required to resolve jurisdictional disputes by making an affirmative award of disputed work on the merits of the conflict. *NLRB v. Radio & Television Broadcast Engineers Union*, 364 U.S. 573, 579 (1961). In so doing, the Board will not formulate general rules for making jurisdictional awards, but must decide every case on its own facts. *Machinists Lodge 1743 (J.A. Jones Constr. Co.)*, 135 NLRB 1402, 1410 (1961). A representative list of relevant factors includes the presence of CBAs between the parties, employer preference, employer practice (both present and past), area and industry practice, relative skills and training, economy and efficiency of operations, and any interunion

agreements. *Id. Accord Iron Workers Local 1 (Goebel Forming Inc.)*, 340 NLRB 1158, 1161-1162 (2003). No one factor is dispositive, as the Board makes a jurisdictional determination upon consideration of all pertinent factors. *See Printing Pressmen Local 269 (Thompson Brush-Moore Newspapers, Inc.)*, 216 NLRB 154, 157 (1975). The union awarded the disputed work may prevail by not necessarily demonstrating that *all* of the relevant factors weigh in its favor, but rather that the majority of them are favorable. *See Plumbers Local 447 (Rudolph & Sletten Inc.)*, 350 NLRB 276, 282 (2007); *IBEW Local 363 (U.S. Information Systems)*, 326 NLRB 1382, 1383-1384 (1998). Under this calculus, if the Board deigns to construe the instant matter as a jurisdictional dispute under Section 10(k) of the Act, it should award the disputed work to Local 18 because it clearly prevails on the factors of collective bargaining agreements, area and industry practice, economy and efficiency of operations, employer preference, and relative skills and training.

1. Collective Bargaining Agreements

Where the unions in a 10(k) dispute do not have equivalent collective bargaining agreements with the employer in said dispute, this factor will tend to weigh in favor of the union with the effective CBA that covers the work in dispute. *Laborers Internatl. Union of North America (Eshbach Bros. LP)*, 344 NLRB 201, 203 (2005). In the instant matter, Local 18 has effective CBAs via the AGC and CEA agreements with Donley's covering the work in dispute. Tr. 983; R. Jt Exh. 1-2. Likewise, LIUNA 894 has an effective CBA via the AGC agreement with Donley's for the Goodyear Project. Tr. 214-215; Lab. Exh. 5-6. Normally, where the unions in dispute have effective CBAs with the employer covering the same disputed work, this factor will not favor any union. *Laborers Local 113 (Super Excavators)*, 327 NLRB 113, 115 (1993). However, there are two important considerations that shift this factor in favor of Local 18.

First, because LIUNA 310 does not have a current CBA with Donley's for the Flats Project, its claim to the work is weakened as compared to Local 18's claim to the work. Specifically, while LIUNA 310 and Donley's signed an assent and participation agreement in 2005, Jt. Exh. 15, neither party presented any agreements that were the product of any subsequent re-negotiations. As a result, while both Local 18 and LIUNA 310 claim that they have effective CBAs that cover the work in dispute at the Flats Project, the latter's contentions are without merit, and therefore a finding on this factor should be made in favor of Local 18. *See Laborers Local 113*, 327 NLRB at 203 (where both Unions claim that CBAs cover disputed work, but employer withdrew its authorization of the employers' association to bargain on its behalf for Union A such that there were no subsequent negotiations between employer and that union, it resulted in a finding on that factor in favor of Union B).

Second, to the extent that the CBAs between Donley's and Local 18, LIUNA 310, and LIUNA 894 contain language in their jurisdictional clauses that purport to cover same sort of work – that is, fork lift work – both of Local 18's CBAs with Donley's cover the work in such a fashion that would render this factor in favor of Local 18. The disputed fork lift work that is contained within the jurisdictional provisions of the LIUNA CBAs with Donley's only refers to masonry fork lift work while Local 18's contracts cover all types of fork lifts. Jt. Exh. 1-4. No such masonry fork lift work, as provided for in the LIUNA CBAs, has been performed at the Flats and Goodyear Projects. Rather, the fork lift work was designed to assist in concrete structural work at both locations. Tr. 93, 142. Furthermore, it is both relevant and revealing that Local 18 and LIUNA 310 and LIUNA 894 have been subject to the National Maintenance Agreement – which functions as an umbrella agreement covering work performed at power plants to which the AGC and CEA agreements are subject – where prior arbitration decisions

pursuant to that agreement dealing with work scope disputes have consistently awarded fork lift work to Local 18. Tr. 1010, 1207. These contractual circumstances support a finding that this factor weighs in favor of Local 18 because "the Board looks to whether one of [the CBAs] gives a superior claim." *Bridge Workers Local 1 (Goebel Forming Inc.)*, 340 NLRB at 1161. This more nuanced balancing test utilized by the Board in analyzing the CBA factor has been upheld in other contexts as well. *See Laborers District Council of Ohio Local 265 (AMS Constr.)*, 356 NLRB No. 57, *19-20 (2010) (where Union A's CBA specifically referred to the disputed work, but the Union B's CBA was worded in more general terms, the CBA factor was in favor of Union A). Thus, on balance, the CBA factor should be accorded to Local 18.

2. Area and Industry Practice

Area and industry practice for the assignment of the disputed work clearly favors Local 18. As an Ohio-wide labor organization encompassing, *inter alia*, the geographical areas containing the Flats Project and the Goodyear Project, it is uncontested that Local 18 has obtained hundreds of letters of assignment from various contractors who are members of the AGC and CEA, in which they acknowledge that fork lift and skid steer work properly falls within the jurisdiction of Local 18. Tr. 995-997; L18 Exh. 20. Furthermore, the contractors state in the letters that they will abide by the jurisdictional scope of Local 18's work and assign any such work accordingly. L18 Exh. 20. The contractors also claim that Local 18's jurisdictional claim of fork lifts includes both full-time *and* intermittent work for sites that involve concrete structural work. Notably, the latter type of this work described is very similar to that which would be performed at the Flats and Goodyear Projects. Tr. 70, 145. In addition, there have been up to 10,000 work referrals for Local 18 members to perform fork lift work throughout all six districts within Local 18's geographical jurisdiction since 1994 up until the present time. Tr.

1115-1119; L18 Exh. 30. A superior showing of letters of assignment and work referrals both in quantity and type tend to favor a finding that this factor favors the union producing said evidence. *IBEW Local 71 (Capital Electric Line Builders Inc.)*, 355 NLRB 140, 143 (2010); *Operating Engineers Local 825 (Nichols Electric Co.)*, 137 NLRB 1425, 1433 (1962).

Further facts compound the above circumstances demonstrating that area and industry practice favor Local 18. Jurisdictional disputes which occurred many years prior to the instant dispute under the National Maintenance Agreement – which essentially is an umbrella agreement covering work performed at power plants to which the AGC and CEA agreements are subject – regarding disputed fork lift work have been resolved in favor of awarding such work to Local 18. Tr. 1010, 1207. Indeed, even as early as 1954, the Fork Lift Agreement was executed as a Memorandum of Understanding between IUOE and LIUNA stating that fork lifts and other similar type of equipment would be operated by Operating Engineers members. L18 Exh. 8. This wide swath of chronological evidence clearly demonstrates that Local 18 members have historically been favored and appointed as fork lift operators throughout Ohio.

By contrast, Ohio LIUNA letters of assignment are much less in number and contain a number of letters which condition the fork lift work to projects involving masonry, a limitation which is not found in any of the Local 18 letters of assignment. CP Exh. 2. Thus, on balance, the area and industry factor should be accorded to Local 18.

3. Economy and Efficiency of Operations and Employer Preference

While conventional analyses of both economy and efficiency of operations and employer preference involve the Board investigating the nature of the work performed by the competing unions, *e.g., Laborers' Local 860 (Anthony Allega Cement Contractor, Inc.)*, 336 NLRB 358, 363 (2001), the unique facts of the instant dispute beg an inquiry in another direction. Namely,

the finding that it would be more economic to award the disputed work to LIUNA 310 and LIUNA 894 would result in an absurd situation in which the Board essentially gives sanction to Donley's breach of the damages clauses in the AGC and CEA agreements with Local 18. Jt. Exh. 1, ¶ 22; Jt. Exh. 2, ¶ 21. By not awarding Local 18 the disputed work, Donley's would be subject to both the labor costs associated with LIUNA 310 and LIUNA 894 *and* damages costs associated with Local 18 pursuing any and all grievances that allege a breach of contractual provisions in its CBAs with Donley's. In examining this factor, the Board has previously addressed conflicts between contractual terms and workplace economy by recognizing that where conditions in CBA clauses would result in impractical costs to the employer, it would not award the disputed work to the union that would activate such unnecessary expenditures. *E.g., Teamsters Local 1187 (Anheuser-Busch, Inc.),* 258 NLRB 997, 1001 (1981) (where awarding work to Union A would result in contractually mandated job-bidding restrictions and work guarantees potentially subjecting the employer, *inter alia*, to greater costs, the Board found this factor in favor of Union B). *Accord Glaziers Local 1621 (Hart Glass Co.),* 216 NLRB 641, 643 (1975).

The same logic applies to the employer preference factor. While the Board will not generally examine the reasons behind an employer's preference, *Laborers Local 829 (Mississippi Lime Co.),* 335 NLRB 1358, 1360 (2001), fn. 5, the Board will treat employer preference with great skepticism when it appears that the preference is not "representative of a free and unencumbered choice." *ILWU Local 50 (Brady-Hamilton Stevedore Co.),* 223 NLRB 1034, 1037 (1976), *rev'd on other grounds*, 224 NLRB 275 (1979). In the instant matter, Donley's preference is inextricably linked with its prospect of being subject to damages for the damages clauses in its CBAs with Local 18. To find that the employer preference factor weighs in favor of

LIUNA 310 and LIUNA 894 would essentially mean that Donley's labor preference is based on an illegitimate desire to avoid its lawfully negotiated collective bargaining terms with Local 18. Donley's preference is neither "free" nor "unencumbered" but based on a sham.

Thus, the factors of economy and efficiency of operations and employer preference should be accorded to Local 18 because to do otherwise would cause the Board to vitiate the duly negotiated CBAs between Local 18 and Donley's that were executed pursuant to employee collective bargaining rights under Section 7 of the Act.

4. Relative Skills and Training

In comparing the relative skills and training of the conflicting unions over the disputed work, the Board has held that, all else being equal, formal training is preferable to on-the-job training, which results in a finding of this factor in favor of the union that demonstrates a greater usage of formal training. *Construction & General Laborers' District Council of Chicago and Vicinity (Henkels & McCoy)*, 336 NLRB 1044, 1045 (2001). Local 18 offered formal training for fork lift work via the "OSHA 10" class. Tr. 816-817; L18 Exh. 15, 17. Furthermore, this program was a longstanding institution that was developed over a decade ago primarily by Local 18 in concert with OSHA. Tr. 817. Indeed, Local 18 developed a formal "alliance" relationship with OSHA in 2011 to provide rigorous training resources that will provide Local 18 members with, *inter alia*, all necessary information and guidance to engage in the usage of construction equipment. L18 Exh. 14. Although testimony was offered that the Ohio Laborers offer a training program for its LIUNA 310 and LIUNA 894 members, Donley's itself was unaware whether their members had in fact been trained either formally or on-the-job. Tr. 103. On the other hand, Local 18 had developed a state-wide training program, containing locations at four cities in Ohio: Ritchfield, Logan, Miamisburg, and Cygnet. Tr. 812-813. These sites contain both outdoor

and indoor all-weather training areas that faithfully replicate actual working conditions. Tr. 813-814. These training sites contain classrooms and instructors that can cover all of the equipment within Local 18's jurisdictions pursuant to its CBAs with employers. Tr. 814-815.

In sum, the record clearly establishes that there should not be a "stalemate" due to "equally credible testimony" regarding relative skills and training. *Laborers Internatl. Union of North America (Eshbach Bros. LP)*, 344 NLRB at 204. Rather, Local 18 has demonstrated that it has a historically more robust training and skills-development program resulting in members who are better suited to perform the disputed work with Donley's. Thus, this factor should be accorded to Local 18.

D. If, and Only if, the Board Determines That Local 18 is Not Entitled to the Disputed Work, Donley's is Not Entitled to a Broad Award.

In the event that Local 18 is not awarded the disputed work at the Flats and Goodyear Projects, a contrary award should be limited to the job sites at issue. The Board will only consider increasing the scope of its award if the work the disputed work has been a continuous source of controversy in the relevant geographic area, related disputes are likely to reoccur, and the charged union has shown a proclivity to use proscribed means in an attempt to secure similar disputed work. *Operating Engineers Local 318 (Foeste Masonry)*, 322 NLRB 709, 714 (1996), citing *Iron Workers Local 1 (Fabcon)*, 311 NLRB 87, 93 (1993); *Bricklayers Local 21 (Sesco Inc.)*, 303 NLRB 401, 403 (1991). All three of these prerequisites must be satisfied and the evidentiary burden in doing so is demanding because "a 10(k) award is ordinarily limited in scope to the particular job-site or jobsites where the proscribed 8(b)(4)(D) conduct has occurred." *IBEW Local 104 (Standard Sign & Signal Co.)*, 248 NLRB 1144, 1148 (1980).

It cannot be demonstrated that a broad award is warranted because the exacting evidentiary standard that would allow the Board to abandon the default application of a 10(k)

jurisdictional award is unavailable based on the facts of the instant case. The record is absent of any evidence that would indicate the disputed work has been a continuous source of controversy that would cause similar reoccurrences *and* that Local 18 has demonstrated a habit to use proscribed means to secure similarly disputed work. At most, there is some testimony between Local 18 and LIUNA officers that recognizes that the long-standing relationship between the two unions had started to deteriorate, Tr. 603, but such statements do not meet the evidentiary burden required to apply a broad 10(k) award. To the extent that LIUNA Locals 310 and 894 and Donley's could demonstrate that prior jurisdictional disputes between the unions should support a broad award, the existence of such disputes alone is *insufficient* to justify a broad award absent evidence of other threatening behavior by the union against whom the award is made. *See IBEW Local 211 (Sammons Communications)*, 287 NLRB 930, 934 (1987) (broad 10(k) award granted in consideration of prior jurisdictional awards *only if* coupled with threat by union against whom award was made to "cause trouble on every other" employer job site). The record contains no evidence of any purported continuous threatening behavior by Local 18 in the context of the instant dispute. As such, if the Board decides to not award the disputed work to Local 18, it should confine the adverse award to the Flats and Goodyear Projects.

V. CONCLUSION

Accordingly, for all the foregoing reasons, local 18 respectfully requests that the Board quash the Notice of Hearing in its entirety. In the alternative, Local 18 requests that the Board issue a project specific award of forklifts and skid steers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Motion to Quash and Post Hearing Brief was filed with National Labor Relations Board and electronically delivered to the following on this 23rd day of August, 2012:

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