

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL 894

Case No. 8-CD-81837

Charged Party

and

DONLEY'S, INC.

Employer

and

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 18

Party-In-Interest

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 18

Case No. 8-CD-81840

Charged Party

and

DONLEY'S, INC.

Employer

and

LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL 310

Party-In-Interest

POST-HEARING BRIEF OF LABORERS' LOCAL 894 AND LABORERS' LOCAL 310

Date: August 23, 2012

I. STATEMENT OF THE CASE

This matter is before the Board under Section 10(k) of the National Labor Relations Act (“the Act”). Donley’s, Inc. (“Donley’s”) filed an unfair labor practice charge on May 25, 2012 alleging that Laborers’ International Union of North America, Local 894 (“Laborers’ Local 894”) violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with the object of forcing or requiring Donley’s to assign certain work to employees represented by the Laborers rather than employees represented by International Union of Operating Engineers, Local 18 (“Operating Engineers”) in connection with the Goodyear Project in Akron, Ohio (“Goodyear Project”). Further, Donley’s, Inc. (“Donley’s”) filed an unfair labor practice charge on May 25, 2012 alleging that the Operating Engineers violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with the object of forcing or requiring Donley’s to assign certain work to employees represented by the Laborers rather than employees represented by Laborers’ International Union of North America, Local 310 (“Laborers’ Local 310”) in connection with the Flats East Bank Project in Cleveland, Ohio (“Flats Project”).

A consolidated hearing notice issued in connection with the Goodyear Project and Flats Project, and a hearing was conducted on consecutive days before Hearing Officer Gregory Gleine on July 23, 2012 through July 26, 2012. Although the parties could not stipulate to the work in dispute, the record demonstrates that the work in dispute is the operation of the forklift and skid steer on the Goodyear Project and the operation of the forklift on the Flats Project. (Tr. 720:23 – 721:2) Importantly, as demonstrated below, Donley’s has a clear preference in making an assignment of the disputed work to its employees represented by Laborers’ Local 894 and Laborers’ Local 310. (Tr. 82:20 – 83:4,

379:20 – 380:3, 480:13 -22.) Moreover, the collective bargaining agreements (Jt. Exs. 3-6), past practice (Tr. 61:5-9, 87:1-7), area practice (Laborers’ Ex. 2; Tr. 367:10 – 372:9, 224:24 – 226:1, 226:10 – 228:3, 623:9-12, 722:13 – 723:4, 787:6 – 788:25), economy and efficiency of operations (Tr. 65:17 – 66:2, 68:3 – 69:3), and relative skills and training (Tr. 84:7 – 85:14, 220:17 – 222:23, 387:22 – 388:1, 479:18 – 480:12, 662:1-9; Laborers’ Exs. 1, 3, 5-6) all clearly favor an award of the disputed work to employees represented by Laborers’ Local 894 and Laborers’ Local 310.

II. JURISDICTION

The parties have stipulated that Donley’s is an employer engaged in commerce within the meaning Section 2(6), (7) of the Act. (Tr. 28:14 – 29:22.) Further, the parties stipulated that Laborers’ Local 894, Laborers’ Local 310 and Operating Engineers are labor organizations within the meaning of Section 2(5) of the Act. (Tr. 29:23 – 30:24.) Although the parties could not stipulate that there is no voluntary adjustment procedure in place—between the Employer, Laborers’ Locals 894, and Operating Engineers on the Goodyear Project and the Employer, Laborers’ Local 310, and Operating Engineers on the Flats Project—to resolve the dispute, the record demonstrates there is none.

III. THE DISPUTE

A. Factual Background

1. The Work in Dispute

Laborers’ Local 894 and Laborers’ Local 310 have separate collective bargaining agreements with Donley’s. (Jt. Ex. 3-6.) Laborers’ Local 894’s agreement covers building construction in Medina, Summit, and Portage Counties in Ohio, and Local 310’s agreement covers building construction work in Cuyahoga, Geauga, and Lake Counties in Ohio. (*Id.*)

Both Laborers' Local 894 and Laborers' Local 310's agreements cover the forklift and skid steer work. (Exs. 3-6; Tr. 616:12-14; 723-724.) Donley's has operated under agreements with Laborers' Locals 894 and 310 for sometime now, and has, at least for the past 25 years, assigned forklift and skid steer work under those agreements to employees represented by Laborers' Locals 894 and 310 as "primarily a tool of the trade." (Tr. 60:22 – 61:9, 87:1-7, 366:5-17, 660:18 – 661:15.) Specifically, Donley's Executive Vice President Don Dreier testified that Laborers' use forklifts to transport materials on jobsites, to assist in stripping operations, and to load equipment on and off trucks. (Tr. 62: 20 – 63:1.) Laborers' usage of forklifts is intermittent on a daily basis. (Tr. 431:21 – 432:12, 475:20 – 477:5, 482:5 – 484:3, 734:23 – 735:4.) Members of Laborers' Local 894 and Local 310 also use the skid steer for general clean up on projects, which is likewise on an intermittent basis. (Tr. 86:4-7, 478:15 – 479:3.) Usage of the forklifts and skid steers on Donley's projects is incidental to Laborers' other tasks on the projects, and these tools of the trade are not typically used on a full-time basis. (Tr. 65:17 – 66:2, 70:19-25.)

2. Claims to the Disputed Work

a. *The Goodyear Project*

Operating Engineers claimed the forklift and skid steer work on the Goodyear Project. Donley's assigned the disputed work on the Goodyear Project to workers represented by Laborers' Local 894. (Tr. 377:9 – 379:11.) Although the Operating Engineers had never been assigned this work on the Goodyear Project, (Tr. 379:12-19), Operating Engineers representative Russell stated to Laborers' Local 894 Business Manager Bill Orr that the Laborers had been stealing Operating Engineers work for the past 30 years. (Tr. 739:18-22, 934-935.) Donley's Executive Vice President Dreier testified that

“this issue has been out there for a while, it’s just reared its head on the Goodyear Project when –when we had a strike on the project and when we had a grievance filed.” (Tr. 137:11-14.) First, Operating Engineers’ representative Russell approached a member of the Laborers’ on the Goodyear Project, telling him to get off and stop operating a forklift. (Tr. 466:3-8.) Then, on or about February 22, 2012, the Operating Engineers picketed the Goodyear Project over, among other things, the assignment of the forklift work.¹ (Tr. 71:1 – 72:8.) After the picket and during the pre-job conference between the Operating Engineers and Donley’s in connection with the Goodyear Project, the Operating Engineers disputed the assignment of the forklift and skid steer work to employees represented by Laborers’ Local 894 and threatened to shut the job down by not permitting its members to operate cranes. (Tr. 75:10-22; Tr. 130:3-14, 459:23 – 462:18, 465:3-14, 470:6 – 471:11, 487:4 – 488:6.)

Soon thereafter, the Operating Engineers filed a pay-in-lieu grievance against Donley’s with respect to the forklift and skid steer work, resulting in settlement meetings between Donley’s representatives and Operating Engineers representatives, during which another, area-wide claim to the work was made. (Donley’s Ex. 11; Tr. 75:23 – 76:16, 81:9-83:4, 87:8-22, 361:3-11, 471:12-17.) During the Goodyear Project, the Operating Engineers’ Business Manager Pat Sink even asked Donley’s representatives how his organization could get an Operating Engineer on the forklifts. (Tr. 134:18-25.) Ultimately, Donley’s chose to assign the disputed work to employees represented by the Laborers’.

¹ The Operating Engineers may claim the picket of the Goodyear Project was focused simply on the fact that Donley’s had not recently signed a collective bargaining agreement with the Operating Engineers. But that simply is implausible, given that the Operating Engineers were, prior to the strike, accepting union dues deductions and working on other projects in the Akron, Ohio area without any dispute over whether Donley’s was a signatory contractor. (Tr. 150:11 – 151:15, 519:1-18, 550:7-12, 910-911.) Given the surrounding circumstances, it seems likely that the Operating Engineers were picketing over work assignments.

(Tr. 82:20 – 83:4.) As of the date of the hearing, the Goodyear Project was only 70% complete. (Tr. 88:2-9.)

b. *The Flats Project*

Operating Engineers claimed the forklift work on the ongoing Flats Project. Donley's had assigned the disputed work on the Flats Project to workers represented by the Laborers'. (Tr. 384:5-11.) Not satisfied with Donley's assignment, Operating Engineers representative Russell went on site and demanded that workers represented by the Operating Engineers man the forklifts, which were currently being used by Laborers'. (Tr. 493:10-12, 960:5-16.) He also took pictures of the Laborers' union members who working on forklifts on the Flats Project, (Tr. 496:5-16), and told a Laborers' Local 310 steward on that project that Laborers' Local 310's members' days running the forklift in Cleveland, Ohio were numbered. (Tr. 633:13-24.) The Operating Engineers, then, filed a pay-in-lieu grievance in connection with the Flats Project. (Donley's Ex. 2; Tr. 471:18-20.) Although the Operating Engineers conveniently claim that grievance was since been withdrawn, Donley's has no record of its withdrawal. (Tr. 590:20-23.) Likewise, at the same "settlement meeting" between the Operating Engineers and Donley's in connection with the Goodyear Project, the Flats Project was discussed. (Tr. 157:22 – 158:3.) During that meeting, among other things, Operating Engineers representative Mark Totman indicated that he wanted to be transferred to Cleveland so he could fight Laborers' Local 310 Business Manager Terry Joyce over the forklift jurisdiction. (Tr. 474:22 475:3.)

The Operating Engineers' claims to the work also occurred at the negotiating table right after the Goodyear strike. During the Operating Engineers contract negotiations with

the Construction Employers Association (“CEA”) in April 2012,² the Operating Engineers discussed proposals relating to enhanced damages in grievances related to assignment of forklifts to other tradesmen, such as workers represented by the Laborers. (Tr. 245:1 – 246:7.) The Operating Engineers Business Manager stated that such language was needed “to address longstanding problems of contractors using Laborers’ and Carpenters to perform work on . . . equipment that the Operators claimed,” including forklifts. (Tr. 245:11-17, 248:15 – 249:13.) During these negotiations, the Operating Engineers also threatened to strike Donley’s and other CEA employers over the damages proposal relating to assignment of the forklift. (Tr. 250:12-20, 253:11-23.)

c. *The Ongoing Nature of the Claims*

It is important to note that employees represented by the Operating Engineers have never operated forklifts and skid steers for Donley’s; rather, Laborers’ have performed the disputed work, which is incidental to other Laborers’ work. (Tr. 456:14-19, 499:14 – 505:9.) Moreover, the Goodyear Project and Flats Project were not the first projects subject to the Operating Engineers’ claims for the work in dispute.³ As far back as two years ago, Operating Engineers representatives have claimed the forklift work at Donley’s. (Tr. 348:12-24, 456:20 – 458:8.) And the Operating Engineers’ claims to the work did not stop with the Goodyear Project and the Flats Project at issue here. In fact, the Operating Engineers made a continuing claim to the work by unilaterally including a Laborer

² There is no dispute that Donley’s gave the CEA its bargaining rights with respect to this agreement.

³ Moreover, in addition to Donley’s, Operating Engineers’ representatives are making claims to the disputed work directly to members of Laborers’ Local 894 and Laborers’ Local 310 working for other employers. (Tr. 652:5 – 658:16.)

classification in their short-form agreement to capture the skid steer and forklift work.⁴ (Donley's Exs. 7-8; Tr. 275:7 – 276:10.) Further, the Operating Engineers just recently made a claim to the forklift work on the Portage Area Regional Transit Authority ("PARTA") project in Portage County, Ohio. (Tr. 397:2-13, 433:4-10.) Finally, the Operating Engineers intend to make claims to the work by filing grievances in the future. (Tr. 964:7-25, 1150-1151.) Donley's, even despite this continuing threat from the Operating Engineers, does not wish to change its practice of assigning the forklift and skid steer work to employees represented by the Laborers'. (Tr. 439:8-22.)

3. Threats of Picketing and Work Stoppages

After learning that the Operating Engineers had claimed the forklift and skid steer work through, among other things, a grievance on the Goodyear Project, Laborers' Local 894 Business Manager Bill Orr sent an email to Donley's representative Mike Dille threatening job actions if Donley's reassigned the disputed work. (Laborers' Ex. 4.) The Operating Engineers actually did strike the Goodyear Project and threatened to picket and strike in connection with Donley's work on the Flats Project. (Tr. 250:12-20, 253:11-23.)

B. Applicability of the Statute

Before the Board may proceed with determining a dispute pursuant to Section 10(k) of the Act, there must be reasonable cause to believe that Section 8(b)(4)(ii)(D) has been violated. This standard requires finding there is reasonable cause to believe that: (1) there are competing claims for the disputed work among rival groups of employees, *Carpenters Local 275 (Lymo Construction Co.)*, 334 NLRB 422, 423 (2001); (2) a party has used

⁴ By identifying this new classification as a *general Laborer classification*, the Operating Engineers have actually admitted that the work in dispute is and has traditionally been performed by workers represented by the Laborers'. (Tr. 1142-1148.)

proscribed means to enforce its claim to the work in dispute, *see, e.g., Electrical Workers Local 3 (Slattery Skanska, Inc.)*, 342 NLRB 173, 174 (2004); and (3) the parties have not agreed on a method for the voluntary adjustment of the dispute, *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1138-1139 (2005).

1. There Are Competing Claims for the Work

Both Laborers' Local 894 and the Operating Engineers claim the forklift and skid steer on the Goodyear Project. Moreover, both Laborers' Local 310 and Operating Engineers claim the forklift work on the Flats Project.⁵ It is undisputed that the Operating Engineers filed grievances concerning the disputed work on the Goodyear Project and Flats Project. Further, the Operating Engineers' business representatives approached members of the Laborers on the Flats Project and stated, "that's our work" and "it's not Laborers' work." Moreover, the Operating Engineers demanded, during grievance settlement discussions, that the forklift work be assigned to members of the Operating Engineers on the Goodyear Project and the Flats Project.⁶ Finally, Laborers' Local 894 and Local 310 both claimed the work, as indicated in Laborers Local 894's letter on the Goodyear Project and as indicated by Laborers' Local 310 members actually performing work⁷ on the Flats Project. Thus, both Laborers' Local 894 and Operating Engineers claim the disputed work

⁵ There was no skid steer work on the Flats Project.

⁶ Even if the Operating Engineers assert that the grievances are pay-in-lieu grievances, the Board has long considered a pay-in-lieu grievance to be a claim for work. *Laborers' Local No. 113 (Michels Pipeline Construction)*, 338 NLRB 480, 482-83 (2002); *IBEW Local 701 (Federal Street Construction)*, 306 NLRB 829, 830-31 (1992).

⁷ *See Operating Engineers Local 542 (Caldwell Tanks, Inc.)*, 338 NLRB 507, 509 (2002) (observing that the Board has long held that employees' performance of work is evidence of their claim to that work, even absent an explicit claim); *Longshoremen ILWU Local 14 (Sierra Pacific Industries)*, 314 NLRB 834, 836 (1994) (noting that performance of work by a group of employees is evidence of a claim for work by those employees, even in the absence of an explicit claim).

on the Goodyear Project, and both Laborers' Local 310 and Operating Engineers claim the disputed work on the Flats Project.

2. The Unions Engaged in Proscribed Activity

Laborers' Local 894, through its April 23, 2012 letter, threatened picketing and work stoppages on the Goodyear Project in the event the disputed work was assigned to members of the Operating Engineers. The Operating Engineers actually did strike the Goodyear Project. Moreover, Operating Engineers, through its representatives' discussions with Donley's representatives between February and April 2012, threatened picketing and work stoppages on the Flats Project in the event the disputed work was assigned to workers represented by Laborers' Local 310. Indeed, Operating Engineers has jurisdiction throughout the state of Ohio (except for Trumbull, Mahoning, and Columbiana Counties) and four counties in northern Kentucky. As a statewide organization, its threats, actions, and policies reverberate statewide, and its striking of the Goodyear Project, coupled with its representatives' statements in Cleveland in the months following the Goodyear strike,⁸ demonstrate that a true threat existed with respect to the Flats Project.

To be sure, section 8(b)(4)(D) of the Act provides that it is an unfair labor practice to encourage individuals to engage in a strike, or to threaten, coerce, or restrain any person engaged in commerce, where an object thereof is "forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another

⁸ To be sure, the Operating Engineers Business Manager stated during contract negotiations in Cleveland, which covers the Flats Project, that certain contract proposals were intended to address longstanding problems of contractors using Laborers' and Carpenters to perform work on . . . equipment that the Operators claimed, including forklifts. During these negotiations, which ended in April 2012, the Operating Engineers also threatened to strike Donley's and other CEA employers over the damages proposal relating to assignment of the forklift. As such, there is reasonable cause to believe a real threat of a similar strike in Cleveland at the Flats Project (and beyond) existed.

trade, craft, or class . . .” Moreover, “[a] threat to strike and picket to force or require an employer to reassign disputed work constitutes reasonable cause to believe Section 8(b)(4)(D) has been violated.” *Laborers’ International Union of North America, Local 76 (Albin Carlson Co.)*, 286 NLRB 698, 699-700 (1987). “A charged party’s use of language that, on its face, threatens economic action is sufficient to find reasonable cause to believe Section 8(b)(4)(D) has been violated.” *IBEW Local 71 (Thompson Electric)*, 354 NLRB No. 46, p. 4 (2009). There was no affirmative evidence at the hearing that any of the threats were a sham. *Operating Engineers Local 150 (R&D Thiel)*, 340 NLRB 1137, 1140 (2005) (citing *Laborers’ Indiana District Council (E&B Paving)*, 340 NLRB 150 (2003)). Thus, the Board should find that there is reasonable cause to believe that Laborers’ Local 894 (with respect to the Goodyear Project) and Operating Engineers (with respect to the Flats Project) engaged in proscribed activity.

3. There Is No Method for Voluntary Adjustment of the Dispute

Although the parties could not stipulate that there is no voluntary adjustment procedure in place between the Laborers and Operating Engineers to resolve the assignment of the disputed work, the witnesses from Donley’s, Laborers’ Local 894, and Local 310 knew of none. The Operating Engineers presented no evidence or legitimate arguments to the contrary. Thus, the Board should find there is no method for the voluntary adjustment of this dispute between the parties and proceed to determine the merits of the dispute.

IV. THE MERITS OF THE DISPUTE

If the jurisdictional prerequisites have been met, Section 10(k) requires the Board to make an affirmative award of the disputed work to one of the groups of employees

involved in the dispute. *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 579 (1961). While the Act does not set out the standards the Board is to apply in making this determination, the Supreme Court has explained that “[e]xperience and common sense will supply the grounds for the performance of this job which Congress has assigned the Board.” *Id.* at 583. Consistent with the Court’s opinion, the Board announced in *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402, 1410-1411 (1962), that, in making the determination that the Supreme Court found was required by Section 10(k), the Board would consider “all relevant factors,” and that its determination in a jurisdictional dispute would be an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *See generally Teamsters Local 174 (Airborne Express)*, 340 NLRB No. 20, slip op. at 4 (2003). Overall, the applicable factors overwhelmingly favor awarding the work to employees represented by Laborers’ Local 894 and Laborers’ Local 310.

A. The Language of the Agreements Favors the Laborers

According to *Machinists Lodge 1743 (J. A. Jones Construction)*, one of the factors to consider in making the determination as to which craft should be assigned the work is the existence and terms of any agreements between the employer and the crafts. In this case, there is no evidence of any Board certifications concerning the employees involved in this dispute. The agreements, however, specifically favor the assignment of intermittent use of skid steers and forklifts to workers represented by Laborers’ Local 894 and Laborers’ Local 310. Specifically, Laborers’ Local 894’s agreement contains the following Group C classification: “Pipe Layer, Rock Driller, Mucker Tunnel, Burner, Form Setter, Power Saw, Jackhammer, Bottom Man, Hod Carrier, Power Buggy or Power Wheelbarrow, **Bob Cat**,

Skid Steer Work and or similar, Telehandler / **Forklift**, Toxic / Hazardous Waste & Lead Abatement Laborer - Level B.” (emphasis added.) Likewise, Laborers’ Local 310’s agreement contains the following jurisdictional language under various jurisdictional claims: “The operation of forklifts, all-terrain forklifts, skid steer loaders, and all or other machines of similar or like characteristics, whether driven by gas, diesel or electric power when used in the performance of the aforementioned jurisdiction shall be the work of the laborer.” The Laborers’ agreements clearly cover the work in dispute.

Donley’s witnesses testified that, in practice, it is useful to assign the intermittent use of forklifts and skid steers to employees represented by the Laborers’, who are capable of performing more tasks associated with building construction work. The Operating Engineers’ agreements are more restrictive than the Laborers’ agreements. The Operating Engineers’ agreements do not cover the intermittent use of forklifts and skid steers; rather, according to Operating Engineers President Rick Dalton, the agreements penalize employers for pulling an Operating Engineer off another piece of equipment to intermittently use a skid steer or forklift. Thus, the Laborers’ Local 894 and Laborers’ Local 310 agreements cover all the work in dispute without question and without penalty.⁹ Tellingly, the Operating Engineers agreement refers to this intermittent work as *general laborers work*. Thus, the language of the agreements favors an award of the work to employees represented by Laborers’ Local 894 and Laborers’ Local 310.

⁹ It is anticipated that the Operating Engineers will argue that its agreement clearly covers the work in dispute. Even where the Board has determined that one union’s contract clearly covers work, it has not awarded disputed work to the members of those unions. *Laborers Local 368*, 305 NLRB 607, 608 (1991).

B. Prior and Ongoing Employer Practices Favor the Laborers

Workers represented by Laborers' Local 894 and Laborers' Local 310 have always performed forklift and skid steer work at Donley's. Employees represented by the Operating Engineers never have performed the disputed work for Donley's. Thus, the prior and ongoing practices favor an award of the work to employees represented by Laborers' Local 894 and Laborers' Local 310.

C. The Employer's Preference Favors the Laborers

Every single witness for Donley's unequivocally stated that Donley's preference is to assign the work to its employees represented by Laborers' Local 894 and Laborers' Local 310. For various reasons, Donley's does not wish to ever assign the work to employees represented by Operating Engineers. Thus, this factor favors an award of the work to employees represented by the Laborers'.

D. The Training and Skills to Perform the Work Favor the Laborers

Donley's representatives testified that every single employee performing forklift and skid steer work incidental to other Laborers' work was trained as a member of the Laborers'. Donley's provides some training and certification related to the disputed work. Laborers' Local 310, Laborers' Local 894, and the Ohio Laborers' Training Center provide the rest of any required training and certifications related to the disputed work. Further, Donley's representatives indicated that the members of the Laborers have the proper skills and training to perform the work and they perform the disputed work in a safe manner. Although the Operating Engineers provided limited evidence that it trains its members to perform the disputed work, it simply did not present sufficient evidence to prevail on this

factor. Thus, this factor weighs in favor of an award of the work to employees represented by the Laborers’.

E. Efficiency and Economy of Operations Favor the Laborers

In order to efficiently complete work, Donley’s prefers to assign the work to employees represented by the Laborers. Donley’s representatives indicated that the Laborers are capable of performing more tasks associated with intermittent use of forklifts and skid steers. Donley’s Executive Vice President Dreier testified: “It would not be efficient to assign [the work] to Local 18 because, again, we’re not operating that piece of equipment on a full time basis and we’re utilizing it to set forms on our projects, or move material on the projects.” He further stated that it would be inefficient to have an Operating Engineer only being utilized twenty percent of the time per day, when Donley’s has the more efficient option of having a Laborer jump on and off the skid steer or forklift to perform other tasks. The Operating Engineers presented no evidence to refute this testimony. Thus, the economy and efficiency of operations favor an award of the work to the employees represented by the Laborers.

F. Area Practice Favors the Laborers

Aside from a booklet of stock work assignments and some National Maintenance Agreement assignments, the Operating Engineers presented no testimonial evidence from a single employer in the state of Ohio. While it is true that Operating Engineers perform the disputed work within steel mills and at other sites governed by the National Maintenance Agreement, Laborers’ District Council of Ohio Field Representative Eddie Deaton testified that employers throughout the state of Ohio utilize employees represented by Laborers’ to perform skid steer and forklift work on building construction projects. Moreover, the

Laborers' presented evidence from various employers through the state of Ohio that have assigned the disputed work to employees represented by the Laborers'. As such, this factor favors an award of the work to employees represented by the Laborers.

V. THE BOARD SHOULD ISSUE AN AREA-WIDE AWARD

Laborers' Local 894 and Laborers' Local 310 request that the Board not restrict its award to the specific projects for which the Operating Engineers filed its grievances, engaged in proscribed activity, and made claims to the work. This dispute represents an ongoing problem between the parties that will continue to recur until it is finally resolved. *E.g., Local 1184 Laborers (Massey Sand and Rock Co.)*, 198 NLRB 77, 79 (1972) (permitting an area-wide award not limited to specific jobsites where there is evidence that similar disputes may occur in the future). There is nothing peculiar about Donley's work on the Goodyear Project or the Flats Project that gives rise to this dispute. Rather, the underlying cause of the dispute is the fact that both unions have made claims to the disputed work and all are unwilling to walk away from the disputed work. The Operating Engineers have made it readily apparent that its union is willing to engage in proscribed activity—i.e., strike, hold cranes hostage, and threaten members of the Laborers'—to extract work assignments from employers throughout its territorial jurisdiction. Although the Board does not routinely grant an area-wide award where the party engaging in proscribed activity receives the assignment of work, *e.g., Laborers Local 243 (A. Amorello & Sons)*, 314 NLRB 501, 503 (1994), it is the Operating Engineers' union, *whose employees did not receive the work assignment*, that has picketed or threatened to picket both the Goodyear Project, the Flats Project, and any other project where the disputed work is assigned to another union. Moreover, there is evidence that similar disputes over work have arisen on nearly a

dozen other projects between these same parties. As such, it is appropriate for the Board to issue an area-wide award.

VI. CONCLUSION

For the foregoing reasons, the Board should award the work in dispute to the employees for Donley's who are represented by Laborers' Local 894 and Laborers' Local 310.

Respectfully submitted,

MANGANO LAW OFFICES CO., L.P.A.

s/Basil W. Mangano

Basil W. Mangano (0066827)
2245 Warrensville Center Road, Suite 213
Cleveland, Ohio 44118
T. (216) 397-5844
F. (216) 397-5845
bmangano@bmanganolaw.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Post-Hearing Brief was served this 23rd day of August 2012 via the NLRB's electronic filing system upon the following:

NLRB REGION 08 – CLEVELAND, OH

And electronic mail upon the following:

LITTLER MENDELSON
FRANK BUCK, ESQ.
1100 SUPERIOR AVE E
FL 20
CLEVELAND, OH 44114-2518
Email: fbuck@littler.com

And

WULIGER, FADEL AND BEYER
WILLIAM FADEL, ESQ.
TIMOTHY FADEL, ESQ.
1340 SUMNER COURT
THE BROWNELL BUILDING
CLEVELAND, OH 44115
Email: tfadel@wfblaw.com

s/Basil W. Mangano

Basil W. Mangano