

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL 860
Charged Party

Case No. 8-CD-086140

and

MCNALLY KIEWITT ECT JV
Employer

and

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 18
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, the International Union of Operating Engineers, Local 18 (Union" or "Local 18") has represented the interests of 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. 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 including an agreement by and between Local 18 and the Ohio Contractor's Association ("OCA") titled the Ohio Heavy Highway Agreement ("Highway Agreement") (Jt. Ex. 3.).

For decades, the Highway Agreement has included various provisions intended by the parties to preserve and protect the scope of work performed by Local 18's members under that

contract. To this end, the Highway Agreement specifically identifies the scope and type of work and equipment within the exclusive jurisdiction of Local 18's membership. (Jt. Ex. 3, Art. I, Art. II ¶¶ 4-5, 7-9, 11, 13, Art. VI, Exhibit A.) Of consequence to the instant proceedings, the scope of the Highway Agreement specifically includes "Sewer, Waterworks and Utility Construction" as work performed under the agreement (Jt. Ex. 3 at pgs. 2-3) and identifies "Tunnel Machines and/or Mining Machines" as equipment covered by and subject to the terms and conditions of the agreement (Jt. Ex. 3 at pgs. 28, 50.). In order to preserve and protect the scope and type of work and equipment historically performed by Local 18, the Highway Agreement includes a work preservation clause that mandates a specific economic penalty in the event that a signatory employer assigns a piece of equipment covered by the Highway Agreement to an employee that is not an operating engineer. Specifically, the Highway Agreement states:

If the Employer assigns any piece of equipment to someone other than an Operating Engineer, the Employer's penalty shall be to pay the first qualified registered applicant the applicable wages and fringe benefits from the first day of violation.

(Jt. Ex. 3 Art. II, ¶ 13.) In this manner, the Highway Agreement provides signatory employers with the ability to assign work and equipment to employees as it deems fit while simultaneously ensuring Local 18 with some semblance of work preservation by mandating a specific economic deterrent to an employer transferring work traditionally performed by Local 18's membership.

B. The Laborers' International Union of North America, Local 860

In addition to negotiating building construction agreements with Local 18, the OCA also negotiates separate agreements with various other labor organizations including local affiliates of the Laborers' International Union of North America ("LIUNA"). (Jt. Ex. 1.) For highway and other heavy work performed in and around Ohio, the OCA negotiates with the Laborers' District Council of Ohio to reach an agreement that is binding upon local LIUNA affiliates including

Laborers' International Union of North America, Local 860 ("LIUNA 860"). Unlike Local 18's Highway Agreement with the OCA, the contracts by and between LIUNA 860 and the OCA 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 away from that bargaining unit. Nor does the agreement between the OCA and LIUNA 860 identify Mining Machines or Tunneling Machines as equipment covered by the Agreement

C. McNally-Kiewitt ECT JV and the Euclid Creek Tunnel Project

McNally-Kiewitt ECT JV ("McNally") is a joint venture between two large construction contractors: McNally Tunneling Corp.; and Kiewit Building Group. (TR 12-14.) McNally was created for the sole business purpose of bidding on and functioning as the general contractor for the construction of the Euclid Creek Tunnel Project ("Euclid Creek Project"). The Euclid Creek Project is a publically financed sewer system upgrade designed to capture, store, and treat excess rainwater and waste overflow in and around Cleveland, Ohio before the overflow drains into Lake Erie. (TR 36-39.) As designed, the Euclid Creek Project requires the installation nearly 3.5 miles of tunneling spanning 37 feet in diameter at a depth of over 200 feet below ground level. (Id.)

In order to accomplish this engineering feat, McNally hired a German firm to design a tunnel boring machine ("TBM") specifically suited to the demands and requirements of the Euclid Creek Project. (TR 36-39, 94-93.) The resulting TBM was subsequently built in China and shipped to the Euclid Creek Project where the pieces were lowered some 200 feet underground and assembled on site. (Id.) Once assembled, the TBM itself spans some 370 feet from stem to stern. (Id.) Practically speaking, the TBM is a single moving structure composing several distinct parts each with a role to play in the tunnel process. (TR 36-39, 69-70, 83-89, 94-

93.) At the head of the TBM, a giant rotating disc excavates earth to form a tunnel with a diameter of approximately 37 feet. (Id.) An operator that controls the direction and rate of excavation sits some 100 feet behind the face of the TBM. (Id.) Approximately 100 feet behind the operator the TBM composes a segment erector component that installs a prefabricated tunnel lining system. (TR 69-70, 83-84, 97-99, 253.) This prefabricated tunnel lining system utilizes a ring segment installation procedure whereby six prefabricated tunnel lining segments are installed to form one concentric ring. (Id.) Completed rings are then placed adjacent to one another and installed as the TBM moves forward. (Id.) In order to operate the segment installation component of the TBM, McNally utilizes three employees designated as follows: Segment Preparation Person (“SPP”), Ring Builder 1 (“RB1”), and Ring Builder 2 (“RB2”). (Employer Ex. 14, 22, 27; TR 97-99, 128-48, 148-60.) The SPP is responsible for operating a hydraulic segment loader attached to the TBM that manipulates the ring segments in preparation for their installation. (Employer Ex. 14, 22, 27; TR 97-99, 128-48, 148-60.) Once the SPP prepares the ring segments for installation, the RB1 and RB2 then operate a hydraulic segment erector to place and install each segment to form a completed ring. (Employer Ex. 14, 22, 27; TR 97-99, 128-48, 148-60.) In this manner, the TBM is able to excavate and form a continuous line of finished tunneling.

II. RELEVANT FACTS

In February of 2011, McNally agreed to be bound by the terms of Local 18’s Highway Agreement in constructing the Euclid Creek Project. (Joint Ex. 4.) Pursuant to their agreement, McNally and Local 18 agreed to utilize a grievance and arbitration procedure different from that contained with the Highway Agreement. (Id.) Specifically, both parties agreed to use a multi-step

grievance and arbitration procedure to resolve any disputes concerning the interpretation and application of the Highway Agreement. (Id.)

On February 7, 2012, representatives from both Local 18 and McNally meet in order to conduct a contractually mandated pre-job conference. (TR 162, 215-15, 224, 229-37, 240-41.) During the pre-job conference, the parties discussed the nature and scope of the work and equipment necessary to complete the Euclid Creek Project. (Id.) The parties specifically discussed both the TBM and the manning of the segment erector component of the TBM. (Id.) During these discussion, McNally's and Local 18 agreed that those employees operating the segment erector portion of the TBM would be transferred into Local 18's membership and work subject to and in accordance with the terms and conditions of the Highway Agreement. (Id.) At the conclusion of this meeting, representatives from both parties reviewed and executed a written Pre-Job Conference Form which specifically identified both "segmentors" and "TBM" as equipment that was to be operated by Local 18's members. (Local 18 Ex. 3; TR 224, 240-41.)

On May 2, 2011, nearly three months after the segment erector work was assigned to Local 18, McNally entered into a collective bargaining agreement ("Laborers' Agreement") with LIUNA 860. (Jt. Ex. 2.) Prior to entering into this agreement neither party discussed the work associated with the SPP, RB1, and RB2 positions. Nor was the subject of the operation of the segment erector component of the TBM discussed during the parties' contract negotiations. (TR 190-92, 229.) Nevertheless, on July 23, 2012, just as the segment erector work was set to begin, LIUNA 860 sent correspondence to McNally's threatening to strike if McNally's honored its original assignment of the SPP, RB1, and RB2 positions to Local 18. (Jt. Ex. 7.) Shortly thereafter, McNally transferred responsibility for the operation of the segment erector component of the TBM from Local 18 to LIUNA 860.

On August 15, 2012, Local 18 filed a written grievance with McNally concerning the operation of the segment erector component of the TBM. (Jt. Ex. 5.) Pursuant to this grievance, Local 18 alleged that McNally's decision to assign equipment covered by the Highway Agreement to someone other than an operating engineer constituted a violation of the work preservation clause contained within Article II, Paragraph 13 of the Agreement. (Id.) As such, the grievance requested that McNally resolve the matter by paying monetary damages as specified in the Highway Agreement. (Id.) On August 24, 2012, McNally issued a formal written response to Local 18's grievance. (Jt. Ex. 5.) In this response, McNally asserts that the issues raised by Local 18's grievance were the subject of an ongoing Board investigation. (Id.) On September 21, 2012, the Regional Director issued a notice of hearing pursuant to section 10(k) of the NLRA in order to resolve the assignment of "[t]he segment installation work performed by ring builder 1 and ring builder 2 as part of construction work at the Euclid Creek Tunnel Project."

III. LAW AND ANALYSIS

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 the operation of the segment unloaded and the segment erector components of the TBM used at the Euclid Creek Project. Indeed, Local 18's grievance does not make any claim for disputed work nor does it constitute a proscribed means of procuring work. Rather, Local 18's grievance only seeks to vindicate a duly negotiated contract clause regarding the preservation of bargaining unit work. 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 but rather represent a contractual dispute regarding the application of a valid work preservation clause that is specifically exempt from the purview of Section 10(k). As such, the Regional Director's Notice of Hearing Order should be quashed. However, in the event the Board chooses to construe the instant matter as a jurisdictional dispute subject to Section 10(k) of the Act, it should award the disputed work to Local 18

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

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 in this case demonstrate that Local 18's grievance constitutes neither a claim to disputed work nor a proscribed means to enforce a claim

to that work. The evidence adduced in this matter instead clearly demonstrates that Local 18's grievance concerns the applicability and efficacy of a duly negotiated work preservation clause 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. Because Local 18's grievance concerns and addresses the terms of the collective bargaining agreements' work preservation clause, it does not involve a violation of 8(b)(4)(D) of the Act subject to a jurisdictional hearing under section 10(k) of the Act. A finding that Local 18's grievance constitutes 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 for work preservation clauses and promote the use of arbitrational proceedings to resolve disputes regarding such clauses. 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 long recognized that a dispute regarding the application and arbitration of work preservation clauses do not fall within the purview of section 10(k) of the Act if such a dispute is representational in nature as opposed to jurisdictional. *See, e.g., SSA Terminal*, 344 N.L.R.B. No. 126, at 3 (2005); *Buffalo Elec. Constr.*, 298 N.L.R.B. 937, 940 (1990); *Weinheimers, Inc.*, 219 N.L.R.B. 1016, 1018 (1975); *Metropolitan Printing Co.*, 209 N.L.R.B. 320, 322 (1974); *Franklin Broad. Co.*, 126 N.L.R.B. 1212, 1215 (1960). When determining whether a dispute is representational or jurisdictional in nature the Board will examine the “real nature and origin of the dispute.” *USCP-Wesco*, 280 N.L.R.B. 818, 820 (1986). In so doing, the Board has

held that when the real nature and origin of the dispute fundamentally concerns the application of a work preservation clause in order to ensure the preservation of work historically performed by one group of employees the dispute is one concerning issues of representation and not jurisdiction. *SSA Terminal, LLC*, 344 N.L.R.B. 1018 (2005); *Recon Refractory & Construction*, 339 N.L.R.B. 825, 527 (2003); *USCP-Wesco I*, 280 N.L.R.B. 818, 820 (1986).

It bears repeating that the grievance filed by Local 18 regarding the operation of the TBM by the SPP, RB1, and RB2 does not seek to have the duties associated with those positions assigned to members of Local 18. Rather, by its own terms, the grievance filed by Local 18 seeks only to enforce the work preservation clause contained within Local 18's agreement with McNally. Pursuant to that clause, Local 18 is attempting to claim the benefit of its bargain and recoup economic damages in accordance with contract language that is clear in its mandate. In so doing, the grievance protects the work that is historically performed by Local 18's members. Indeed, as early as February of 2011 - during the pre-job conference conducted by and between McNally and Local 18 - the work associated with the positions of SPP, RB1, and RB2 positions, were, in fact, assigned to Local 18's membership. (Local 18 Ex. 3; TR 162, 215-15, 224, 229-37, 240-41.) McNally's initial pre-job assignment conformed to the mandates of the Highway Agreement which identified "Tunnel Machines and/or Mining Machines" as equipment subject to the economic penalty imposed by the work preservation clause in the event the operation of that equipment was assigned to anyone other than an operating engineer. (Joit Ex. 3 at pg. 50.)

Subsequent to both the execution of the Highway Agreement and the pre-job assignment of SPP, RB1, and RB2 work to Local 18, McNally entered into an agreement with LIUNA 860. After the LIUNA Agreement was consummated, LIUNA 860 determined to make an illegal threat to strike should McNally honor its initial assignment of the SPP, RB1, and RB2 positions

to Local 18. (TR 328-29.) Thereafter McNally transferred those positions from Local 18 to LIUNA 860's membership. While the Highway Agreement allows McNally to make such a change in assignment, it also specifies the resultant economic sanction due and owing as a result of the decision to transfer work away from Local 18's membership. Local 18's grievance is therefore intended to enforce this agreed upon damages provisions in order preserve the scope and jurisdiction of work performed by its membership. As such, Local 18's grievance seeks the lawful object of work perseverance by pursuing the sole remedy available to it under its contracts with McNally's; *to wit*: monetary damages.

McNally, LIUNA 860, and the Regional Director will undoubtedly assert that when a union files a so called "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 inasmuch as none of the prior cases that addressed so-called pay-in-lieu grievances involved contract language that includes a work preservation clause specifically mandating economic sanctions in the event an employer elects assign work away from the bargaining unit effected bargaining unit. Indeed, unlike the grievances addressed in previous cases, Local 18's grievance does not rely upon or assert a general work jurisdiction clause or a contractually mandated pay rate as basis. Rather, in the instant matter, the work preservation clause 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, McNally's has elected to assign equipment contained within the Highway Agreement to someone other than an operating engineer. While McNally's has the right to assign work away from Local 18 membership, Local 18 has the concurrent right to file a grievance in order to collect monetary damages and thereby protect the benefit of its bargain.

Moreover, to brand Local 18's grievances as a proscribed means of procuring disputed work would, in effect, reward McNally's for placing itself in an alleged jurisdictional dispute that is of its own making. A Section 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 allegedly 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, McNally played an integral part in creating the instant jurisdictional dispute. Indeed, after assigning the work to Local 18 during the February 2011 pre-job conference, McNally made the affirmative decision to transfer that work away from Local 18's membership. Thereafter, Local

18 filed its grievance seeking to enforce the economic sanction mandated in the contract's work preservation clause. In an attempt to avoid the economic penalty associated with the work preservation clause, McNally has attempted to invoke the provisions of 10(k) of the Act and have the Board deem Local 18's grievance an unlawful demand for work. Such is not the purpose of the NLRA. As the Supreme Court has found, "to fail to hold as controlling the contractual preemption of the work in dispute would be to encourage disregard for observance of binding obligations under collective bargaining agreements and invite the very jurisdictional disputes Section 8(b)(4)(D) is intended to prevent." *NLRB v. Radio and Television Broad. Eng'rs Union, Local 212 (CBS)*, 364 U.S. 573, 577 (1961). To that end, the Board has applied this rule out of respect for the bargain struck between the union and the employer, as well as for the positive benefits of work preservation clauses which would otherwise be rendered unenforceable. *USCP-Wesco I*, 280 N.L.R.B. at 821 ("To hold that this dispute is a jurisdictional dispute to be decided by the Board would not allow the [union] employees the benefit of their negotiated work preservation clause."); *see also UAW, Dist. 190, Local Lodge 1414*, 344 N.L.R.B. No. 126, at 3. Because Local 18's grievance is intended to enforce an agreed upon work preservation clause contained within the parties' agreement and thereby preserve the scope and jurisdiction of work previously performed by Local 18's members, it cannot form the basis of or be subjected to resolution under section 10(k) of the Act. The Regional Director's Notice of Hearing should therefore be quashed and the matter subjected to grievance and arbitration in accordance with the terms of the collective bargaining agreement between McNally and Local 18.

B. 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 relevant factors.

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 an effective CBA with McNally covering the work in dispute. Likewise, LIUNA 860 has an effective CBA with McNally. 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 is an important consideration that shifts this factor in favor of Local 18. Specifically, to the extent that the CBAs between McNally and Local 18 and McNally and LIUNA 860 each contain language in their jurisdictional clauses that purport to cover the same sort of work, specific inclusion of the terms “Tunnel Machines and/or Mining Machines” in the Highway Agreement covers the work in such a specific fashion that it renders this factor in favor of Local 18. In contrast, LIUNA 860’s agreement fails to mention let alone specifically identify either mining machines or tunneling Machines as equipment covered by the agreement. (TR 332-34.) This contractual circumstance supports a finding 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 favors neither party. Indeed, the TBM and its attendant positions of SPP, RB1, RB2 are novel as the machine itself is

a one of kind apparatus specially designed for use on the Euclid Creek Project. (TR 204-05.) The few instances cited by McNally and Local 860 in support of their arguments regarding area and industry practice are easily distinguishable in that none involved the same machine or tunnel lining system at issue in this case. (TR 202-04.) Given this fact, there is no area or industry practice relevant to the determination of this matter.

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 require an inquiry in another direction. Namely, the finding that it would be more economical to award the disputed work to LIUNA 860 would result in an absurd situation in which the Board essentially gives sanction to McNally's breach of the damages clauses in its agreement with Local 18. By not awarding Local 18 the disputed work, McNally would be normally subject to both the labor costs associated with LIUNA 860 *and* the damages costs associated with Local 18 pursuing any and all grievances that allege a breach of the work preservation clause. A determination under Section 10(k) of the Act that awards the work to someone other than an operating engineer would effectively render this economic sanction moot. In examining conflicts between contractual terms and workplace economy, the Board has recognized 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, McNally's preference is inextricably linked with its prospect of being subject to damages under the work preservation clause contained within the Highway Agreement. To find that the employer preference factor weighs in favor of LIUNA 860 would essentially mean that McNally's labor preference is based on an illegitimate desire to avoid its lawfully negotiated collective bargaining terms with Local 18. As such, McNally'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 CBA 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*

Relative Skill and training for the performance of the disputed work favors neither party. Once again, the TBM and its attendant positions of Segment Prep Person, Ring Builder 1, and Ring Builder 2, are novel as the machine itself is a one of kind apparatus specially designed for use on the Euclid Creek Project. (TR 204-05.) Given this fact, there is no training or skill provided by either Local 18 or LIUNA 860 that would render one group of employees more

amenable to the work. Indeed, because of its novelty, the only available training provided on this machine was offered by McNally and conducted on site with the assistance of the TBM's German manufacturer. (TR 177, 205-07.)

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 the disputed work to its membership.

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 November, 2012:

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