

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
WASHINGTON, DC**

In the Matter of:	)	
	)	
<b>GENERAL DRIVERS, WAREHOUSEMEN</b>	)	
<b>AND HELPERS LOCAL NO. 509, a/w</b>	)	
<b>INTERNATIONAL BROTHERHOOD OF</b>	)	
<b>TEAMSTERS &amp; JOINT COUNCIL NO. 9,</b>	)	
	)	
Charged Party,	)	Case No. <b>10-CD-094327</b>
	)	
and	)	
	)	
<b>DURHAM SCHOOL SERVICES, L.P.</b>	)	
	)	
Charging Party.	)	
	)	

**POST-HEARING 10(k) BRIEF OF  
CHARGING PARTY, DURHAM SCHOOL SERVICES, L.P.**

**I. INTRODUCTION**

This is a work assignment dispute proceeding under Section 10(k) of the Act brought by the Charging Party, Durham School Services, L.P. (“Durham”) under Section 8(b)(4)(D) of the Act. The Charged Party, General Drivers, Warehousemen and Helpers Local No. 509 (“Local 509” or the “Union”), affiliated with the International Brotherhood of Teamsters and Joint Council No. 9 thereof, has sought to coerce Durham, by threat of strike and pursuit of a contractual grievance, to assign work historically and currently performed by unrepresented employees of Charleston and Beaufort Counties, political subdivisions of the State of South Carolina, to employees of Durham represented by Local 509. Faced with this coercion, Durham seeks relief from the Board. Durham submits that the Board should follow the decision in *ICTSI*

*Oregon, Inc.*, 358 NLRB No. 102 (2012), *motion for reconsideration denied*, 2012 WL 3757019 (2012), and award the work to the group of employees who have historically performed it.

A hearing was conducted before Hearing office Jennifer Arrington Corbin on December 17, 2012.<sup>1</sup> The case is now before the Board for a decision.

## **II. FACTS**

### **A. Background**

The Counties of Charleston and Beaufort, South Carolina, each operate a public school district for educating students in their respective jurisdiction. (E-1; E-2). At some time before the late 1990s, each County operated extensive school bus systems with county-owned buses and county-employed bus drivers to transport students to and from school, field trips, and activities. (T-142-144). In the late 1990s, however, each County chose to contract out its bus operations to a private contractor. In each case, Laidlaw was the initial contractor who obtained the contract to run and staff the school bus operations. (T-138, 140-141, 142-144).

Although the Counties contracted out the bulk of their respective school bus operations to Laidlaw, they carved out a small group of specifically designated employees who would remain County employees, who would retain their respective routes, and who would continue to be paid by the Counties and receive County benefits. (T-142-144). For ease of understanding, these County employees will be referred to as “grandfathered County employees.” (T-20). These grandfathered County employees have since the late 1990s worked side-by-side with employees of the outside contractors, and employees of the three successive outside contractors were aware

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<sup>1</sup> References to the hearing transcript will be indicated by “T-“ followed by the page number or numbers on which the supporting evidence may be found. References to Board, Union and Employer Exhibits admitted into evidence at the hearing will be indicated by “B-”, “U-“, and/or “E-“, respectively, followed by the number of the exhibit.

of the grandfathered County employees' continued performance of that work and their status as County employees. (T-17-20, 35, 40, 43-44, 73-74, 80, 119, 138, 140-141, 142-144, 146, 155).<sup>2</sup>

At later points in time, apparently in 2006 and 2007, each County re-bid each bus operation agreement and a corporate entity called First Student secured the agreements, replacing Laidlaw. (T-16-20, 142, 144, 206). Under the First Student operations, the grandfathered County employees continued to work their existing regular assigned routes, while remaining County employees receiving County wages and benefits. (T-16-20, 142, 144, 145-146).

On December 27, 2006, the Board certified Local 509 as the representative of First Student's Charleston County-based employees. The certified unit did not include the grandfathered County employees. (U-2; T-16-20, 35, 43-44, 144-145, 149-150). On March 26, 2007, the Board certified Local 509 as the representative of First Student's Beaufort County-based employees. (U-3; T-144-145). Again, the certified unit did not include the grandfathered County employees. (U-3; T-16-20, 43-44, 144-146).

B. Durham's History Of Bus Operations For The Two Counties

On July 1, 2007, Charleston County replaced First Student with Durham as its outside contractor for the bus operation. (E-2; T-16). Durham hired many of the former First Student employees and recognized Local 509 as the representative of its employees in the Charleston County bargaining unit. (T-99). The agreement between the County and Durham, among other things, required that Durham allow 17 grandfathered County employees to continue to work within Durham's operation and gave the County the right to terminate the agreement for breach

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<sup>2</sup> The parties have stipulated that the work assigned to these grandfathered County workers is the work in dispute and that the grandfathered County employees are employees of political subdivisions of South Carolina and are not statutory employees covered by the Act. (T-9-10).

after specified notice. (E-2, Sections 7.1 and 12.6; T-17-22).<sup>3</sup> The grandfathered County employees thus continued their work on their assigned routes side-by-side with the approximately 415 Durham employees who did other routes both before and after Durham and Local 509 entered into a collective bargaining agreement covering Durham's Charleston employees on August 15, 2007. (E-6; T-17-22, 27, 35, 40, 43-44, 73-74, 80, 114, 138-140, 142-144, 155). That agreement's effective term ran through August 15, 2012. The agreement is silent on the subject of the grandfathered County employees. (E-6). Durham never treated the grandfathered County employees or their work as covered by the collective bargaining agreement for the Charleston County bargaining unit. (T-29-30).

In similar fashion, Beaufort County replaced First Student with Durham as the outside contractor for its bus operations on July 1, 2010. (E-1; T-16). As was the case at Charleston, Durham hired many First Student employees and recognized Local 509 as the representative of its employees in the Beaufort County bargaining unit. The agreement between the County and Durham, among other things, required that Durham offer employment in the bus operation to the nine then-grandfathered County employees, who were to remain employees of the County and gave the County the right to terminate the contract for breach after specified notice. (E-1, Sections 5.17, 5.24.2, 6.6, and 8.8; T-16-20).<sup>4</sup> The grandfathered County employees continued to work their assigned routes side-by-side with approximately 165 Durham employees after Durham and Local 509 entered into a collective bargaining agreement on July 1, 2010. (E-5; T-26, 35, 43-44, 73-74, 80, 138-140, 142, 144-146, 148). That agreement's effective term ran through July 16, 2012. (E-5). The agreement is silent on the subject of grandfathered County

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<sup>3</sup> There are currently 11 or 12 grandfathered County employees at the Charleston bus operation. (E-4; T-22).

<sup>4</sup> There are currently eight grandfathered County employees at the Beaufort bus operation. (E-3).

employees. (E-5). Durham never treated the grandfathered County employees or their work as covered by the collective bargaining agreement for the Beaufort County bargaining unit. (T-28-29).

C. The Dispute Over Assignment Of The Grandfathered County Employees' Work

In June and July of 2012, Local 509 and Durham began negotiations for new collective bargaining agreements for the Charleston and Beaufort bargaining units. (T-30-31, 70, 102-103). The two then-applicable collective bargaining agreements' effective terms were initially extended for certain specified time periods, now expired, but by agreement are currently extended indefinitely and are terminable at any time with notice. (U-4; T-82).

From discussions at the beginning of the negotiations and continuing in various bargaining sessions throughout the negotiations, which are still continuing, Local 509's President and Chief Spokesperson, Landell Dula Fletcher, stated to Durham's negotiating team that the work historically performed by the grandfathered County employees was bargaining unit work and should be assigned to Local 509-represented employees rather than the grandfathered County employees. (T-102-103, 146-147, 150-151, 153-154). Local 509's expressed bargaining position for the new collective bargaining agreements being negotiated was that the grandfathered County employees (1) could perform only "activity bus" work and (2) could not perform any of the route work, work which at least in Fletcher's view, was Teamsters bargaining unit work. (T-33, 35, 38-39, 72-73, 75 114, 117-118, 138-140, 151, 153-154). The side-by-side work of the two different classes of employees with different pay and benefits and work guarantees, with only a finite amount of bus driving work available, was creating anger and dissatisfaction among the Local 509-represented employees, who wanted both (1) the work that the grandfathered County employees had been doing for many years and (2) the County

employment terms the grandfathered County employees were receiving, which the Durham employees viewed as superior to their own and which included a 30 hour per week guarantee. (T-91, 120, 131-132, 144, 146-147, 150, 155).

In the multiple bargaining sessions for the two collective bargaining agreements that took place through the late summer and fall of 2012, Local 509's President Fletcher stated repeatedly that the County drivers were a "strike issue" for the Local 509-represented employees and that the Union would strike over this issue. (T-36-37, 41-42, 75-76, 78, 83-84, 91, 131-132, 143, 146-147, 150-151, 153-154). Although Fletcher tried to obfuscate the matter, he effectively conceded on cross-examination that the Union had threatened to strike in support of its claim for the disputed work:

Q. Okay. And when did you first use the word "strike" approximately?

A. When we were talking about County drivers --

Q. Mm-hmm.

A. -- the same issue, they're mad, they're getting 30 hours, they're getting benefits, the whole nine yards. Okay. Durham employees aren't getting that, and I told them they're pissed about it. And I told them they would strike, and when I told them, I said, "And we will strike if that's what they want."

Q. Okay.

A. Okay. And when I say "we," I'm talking about them. I made it clear to this Company, every time that I said, "We will strike," I went back and said now, you've got to remember, I don't have a vote in this, I don't vote. The members vote, but I'm telling you they will strike you over this, it's a strike issue. They know it and they've been told that. But have I ever, L.D. Fletcher, the Union, we're going to strike you? That never has happened, never.

Q. But the Union represents the employees, correct?

A. Yeah.

Q. And if the employees strike, then the Union is striking also, correct?

A. That's correct.

Q. Unless you disavowed the strike or instructed people not to strike.

A. If I take a strike vote and they vote to strike, and we don't come to an agreement, then we're going to strike.

Q. And you said that in these negotiations more than once, correct?

A. In the discussions, yes, I have said that. I've told them that the employees will strike, not that L.D. Fletcher will strike, not that 509 is going to strike you. It's their employees will strike them.

(T-131-132).

On September 13, 2012, Local 509 Business Agent Sebrina Isom filed a grievance under the Charleston collective bargaining agreement requesting that the grandfathered County employees' work at Charleston be assigned to Local 509-represented employees and asserting that Durham was using sub-contractors to do unit work in violation of the agreement. The following day, Isom filed a similar grievance under the Beaufort collective bargaining agreement seeking the assignment of the grandfathered County employees' work at Beaufort to Local 509-represented employees. (T-48-49, 79, 109-111, 142-143; E-7; E-8). Durham denied the grievances, which are pending hearing before the Piedmont Grievance Committee under the grievance and arbitration procedure of the existing collective bargaining agreements, as extended. (U-1; U-4; E-9; E-10; T-48-49, 109).

On December 6, 2012, Durham filed the charge in this case. (B-1). Despite the charge, Local 509 has continued to assert its position that it is entitled to the disputed work under the pertinent collective bargaining agreements. (T-85-86). On December 17, 2012, Hearing Officer Jennifer Arrington Corbin, of Region 10, Sub-Region 11, conducted a hearing in the matter.

Durham and Local 509 participated as parties and presented evidence and witnesses. (T-1-2).

The matter is now before the Board for decision. (T-157).

### III. ARGUMENT

#### A. This Dispute Is Properly Before The Board Pursuant To Section 10(k) Of The Act

Under Section 10(k) of the Act, the Board may proceed with a determination of the dispute if there is “reasonable cause to believe” Section 8(b)(4)(D) of the Act has been or is being violated. That standard requires finding that there is “reasonable cause to believe” that:

- (1) There are competing claims to the disputed work between rival groups of employees;
- (2) a party has used proscribed means to assert its claim to the work in dispute; and
- (3) the parties have not agreed on a method of voluntary adjustment of the dispute.

*ICTSI Oregon, Inc.*, 358 NLRB No. 102 (2012), slip op. at 3. This standard is met here, as discussed below.

#### 1. There are Competing Claims to the Work

Here, Local 509, through (1) threat of strike in negotiations for new collective bargaining agreements and (2) grievances filed under two collective bargaining agreements, seeks to acquire the assignment of work that has historically been performed and is still being performed by grandfathered County employees. The Counties’ agreements with Durham require that the work be given to the grandfathered County employees. Even if the Counties did not so require, the grandfathered employees’ performance of the disputed work is sufficient to establish a claim to the work. *Thomas Industrial Coatings*, 345 NLRB 990, 992 n. 6 (2005) (employees’ performance of work in dispute is evidence of a claim to the work even absent a specific claim). It makes no difference that there are not two union-represented groups of employees making claims on the disputed work. The statute extends to union-represented and unrepresented

employees. *See, e.g., Gulf Oil Corp.*, 275 NLRB 484, 485 (1985); *Cargo Handlers, Inc.*, 236 NLRB 1439 (1978); *Bendix Corp.*, 138 NLRB 689, 692 (1962).

2. Local 509 has Used Proscribed Means to Claim the Disputed Work

Local 509 also has used proscribed means to claim the disputed work. *See ICTSI Oregon, Inc.*, 358 NLRB No. 102, slip op. at 3. Here, despite Local 509's apparent claims to the contrary, there is no serious dispute based on the record evidence that Local 509 threatened a strike in an attempt to acquire the disputed work, which historically was always outside the bounds of Local 509's certifications. Local 509 President Fletcher attempted to muddy the waters by asserting that "he" never personally threatened to strike because "he" could not strike and only the "employees" could vote to strike. This argument of course is a non-sequitur as the Union is the exclusive representative of the employees and a strike by the Union and employees are one and the same. As the certified representative of the employees in the bargaining units, Local 509 was speaking as the agent for the employees in the bargaining sessions when the threats were communicated. Further, the Union's efforts to portray the "County drivers" strike issue as limited to the differences in wages, benefits, and terms of employment is unconvincing. That the employees may have been upset over the wage and benefit differential does not alter the fact that they were also upset over the mere existence of the County drivers and were seeking to oust the County drivers of their routes, as evidenced by the Union's filing of grievances seeking this work. As Union Business Agent Sebrina Isom testified:

A. The benefit and wages and what they believe is that the bargaining unit, the members would have more work to do if the County drivers didn't exist, but they also want that same benefit, 30 hours, the health benefit, the holidays, all of those things that the County workers are getting.

(T-146-147).

When strike or picketing activity is threatened or undertaken and “an object of” the activity is, even in part, to enforce a claim to disputed work, the activity is a proscribed means for asserting a claim to disputed work. *See, e.g., Bendix Corp.*, 138 NLRB 689, 695-96 (1962). Clearly, Local 509 threatened to strike in support of its efforts to claim the disputed work. Further, although the filing of an arguably meritorious grievance prior to the issuance of an adverse 10(k) award does not constitute coercion under § 8(b)(4)(D), *Local 7, International Longshoremen’s & Warehousemen’s Union*, 291 NLRB 89 (1988), the Union’s grievance here is not even arguably meritorious. Under the collective bargaining agreements, the Union’s recognition rights extend only to employees employed by Durham. The Union acknowledges that the County employees are not covered by the agreements and that they pre-existed the Union’s certification. Also, it is clear that Durham does not control the work in dispute. In these circumstances, the subcontracting provisions of the collective bargaining agreement are inapplicable, and the Union’s continued pursuit of its grievances also constitutes unlawful coercion.

To the extent that Local 509 argues that its conduct does not violate Section 8(b)(4)(D) because (1) it seeks to acquire work of employees of public entities not subject to the Act and (2) it has a work preservation claim to the work based on collective bargaining agreements, Local 509’s argument should be rejected for the reasons recently explained by the Board in *ICTSI Oregon, Inc.*, 358 NLRB No. 102, slip op. at 3. There, as to the significance of a public entity employing one group of employees involved in a work assignment dispute, the Board stated:

We find without merit ... [the union’s] contention that there is no violation of Section 8(b)(4)(D) because the dispute concerns the assignment of work by [a] public employer...to its own employees, who are excluded from coverage by the Act. Although [the private employer] does not directly employ the employees who are performing the disputed work, Section 8(b)(4)(D) is applicable

because in a 10(k) case, the Board need have jurisdiction only over the employer that is the target of the respondent union's unlawful conduct.

*Id.*, slip op. at 3. See also *Pacific Crane & Rigging Co.*, 167 NLRB 977, 980 fn. 3 (1967) (rejecting argument that Section 10(k) was inapplicable because a governmental entity was a primary employer in connection with the dispute).

In *ICTSI*, the Board also rejected a union's argument that its contractual claim to work under a collective bargaining agreement's definition of bargaining unit work made Section 10(k) inapplicable. The Board stated:

We also reject [the union's] ... argument that there is no valid jurisdictional dispute because [the union] ... has a work preservation claim to the work. [Another union's] ... represented electricians have been performing the disputed work since 1974. Where, as here, a union is claiming work for employees who have not previously performed it, the objective is not work preservation, but work acquisition. The Board will resolve that dispute through a 10(k) proceeding.

*ICTSI*, slip op. at 3

Here, it is conceded that the Board has jurisdiction over Durham and that Durham is the target of the Union's unlawful conduct. This is sufficient to give the Board jurisdiction.

3. There is No Agreed-Upon Method for Voluntary Resolution of the Dispute and a Section 10(k) Proceeding is Appropriate

The disputed work is currently performed by the grandfathered County employees, and it is undisputed that the Counties are not party to any agreement with Durham and Local 509 that could be used to resolve the dispute and thereby bind the Counties. (T-110). In such circumstances, because not all parties to the dispute are bound to any agreement that might resolve it, no method for voluntary adjustment of the dispute exists. See *Nicholson Industrial*, 342 NLRB 954, 955 (2004).

4. Conclusion

Based on the evidence demonstrating that the standard for a Section 10(k) proceeding has been met -- that there is reasonable cause to believe that there are competing claims for disputed work and a violation of Section 8(b)(4)(D) has occurred, with no voluntary method for adjustment of the dispute binding all parties -- the Board should find that this dispute is properly before the Board for a determination on the merits. See *ICTSI Oregon, Inc.*, 358 NLRB No. 102, slip op. at 3; *Cargo Handlers, Inc.*, 236 NLRB at 1440.

B. Application Of The Factors Relevant In A Section 10(k) Proceeding Favors Award Of The Disputed Work To The Grandfathered County Employees

Section 10(k) requires the Board to make an affirmative award of the disputed work after considering various factors. “The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case.” *ICTSI Oregon, Inc.*, 358 NLRB No. 102, slip op. at 3. The Board examines a number of factors in making this determination, which are discussed herein.

1. The Certifications and Collective Bargaining Agreements Factor

Local 509 was certified as the representative of “employees of the employer” at the time, First Student. Durham voluntarily recognized Local 509 as the representative of two district bargaining units of employees, one at Charleston and one at Beaufort. The certifications do not cover any employees of either County and neither County was subject to a certification or agreement recognizing Local 509 as a representative of any of their employees. Because the certifications do not cover the County employees and these groups of employees were in existence at the time of the certifications, the certifications favor an award of the disputed work to the grandfathered County drivers.

In a dispute such as this, the relevant collective bargaining agreement is “the one negotiated with the employer who has ultimate control over the assignment of the disputed work.” *ICTSI Oregon, Inc.*, 358 NLRB No. 102, slip op. at p. 4; *Otis Elevator Co.*, 340 NLRB 94, 96 (2003). Here, it is uncontested that the Counties have ultimate control over the disputed work and that the Union has no collective bargaining agreement with either County. Moreover, even if Local 509’s collective bargaining agreements with Durham were the relevant agreements to consider, here it is uncontested that the agreements historically have never been applied to the grandfathered County employees’ work. Thus, this factor favors awarding the disputed work to the grandfathered County employees.

## 2. Employer Preference and Past Practice

Employer preference and past practice strongly, if not determinatively, favor awarding the disputed work to the grandfathered County employees. Durham’s preference, as stated in this hearing, is to conform to its contractual agreement with the Counties. Under this contractual agreement, Durham has no right or authority to assign the disputed work to the represented employees. To do so would breach its contractual relationship with the Counties and could result in the Counties terminating its contracts with Durham. Employer preference is entitled to “substantial weight” as a factor considered here. *See, e.g., ICTSI Oregon, Inc.*, 358 NLRB No. 102, slip op. at 5; *Goebel Forming*, 340 NLRB 1158, 1163 (2003).

Further, the grandfathered County employees have always performed the disputed work. Reassignment of the work to Durham employees represented by Local 509 would constitute a change of long standing past practice (in addition to an action that Durham has no right to take under its agreements with the two counties). Thus, past practice factors strongly favor award of the disputed work to the grandfathered County employees who have always performed it. *See,*

*e.g., ICTSI Oregon, Inc.*, 358 NLRB No. 102, slip op. at 5; *Apple Restoration*, 313 NLRB 1111, 1112 fn. 5 (1994).

3. Area Practice

At least in the areas of Charleston and Beaufort Counties, and at least under those County governments' agreements with Laidlaw, First Student, and Durham to contract out their bus operations, the area practice is that grandfathered County employees perform the work they historically have performed. This factor favors award of the disputed work to the grandfathered County employees.

4. Relative Skills and Training

The general skills and training of the two groups claiming the disputed work apparently are relatively equal. However, the grandfathered County employees have driven the same assigned routes for many years. Their special, personal knowledge of the routes favors an award of the disputed work to the grandfathered County employees.

5. Economy and Efficiency of Operations

Because the bus operations are the result of Durham's agreement with each County, any disruption of the contractual relationship between Durham and each County would negatively impact the economy and efficiency of operations. In fact, assignment of the grandfathered County employees work to Local 509-represented employees, even assuming Durham could somehow effectuate such a reassignment, would be in breach of Durham's agreement with each County. Such an outcome could result in termination of Durham's bus operations for each County -- the ultimate lack of economy and efficiency of operations. Thus, this factor strongly, if not determinatively, favors award of the disputed work to the grandfathered County employees.

6. There are No Relevant Joint Board Determinations

No joint board determinations are in evidence. Therefore, this factor does not favor an award of the disputed work to either group of employees.

7. Conclusion

Considering all of the relevant factors, the Board should award the disputed work to the grandfathered County employees. Such an award is consistent with Durham's preference, longstanding past practice, the contractual agreements between Durham and the Counties, relative skills and knowledge, and the prior certifications. *See Teamsters Local 40, 327 NLRB 296 (1998)* (Board assigns milk runs to both groups of employees in accordance with formula developed and previously applied by employer).

**IV. CONCLUSION**

The Board has jurisdiction to decide this work assignment dispute. Based on the relevant factors, the Board should award the disputed work to the grandfathered County employees.

Respectfully submitted,

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**UNITED STATES OF AMERICA**  
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	)	

**CERTIFICATE OF SERVICE**

I hereby certify that I have served the following counsel for Charged Party with a copy of the foregoing Post-Hearing Brief of Charging Party Durham School Services, L.P. by electronic mail delivery this 4<sup>th</sup> day of January, 2013:

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