

**UNITED STATES OF AMERICA  
THE NATIONAL LABOR RELATIONS BOARD  
REGION 8**

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LABORERS' INTERNATIONAL UNION  
OF NORTH AMERICA, LOCAL 894  
*Charged Party – Labor Organization*

Case No. 08-CD-081837

and

DONLEY'S, INC.  
*Charging Party – Employer*

and

INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL 18  
*Party-In-Interest – Labor Organization*

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INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL 18  
*Charged Party – Labor Organization*

Case No. 08-CD-081840

and

DONLEY'S, INC.  
*Charging Party - Employer*

and

LABORERS' INTERNATIONAL UNION  
OF NORTH AMERICA, LOCAL 310  
*Party-In-Interest – Labor Organization*

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**INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18'S MOTION  
FOR A SEC. 10(K) REHEARING**

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Pursuant to Section 102.65(e)(1) of the Board's Rules and Regulations, now comes the International Union of Operating Engineers, Local 18 ("Local 18" or "Union"), by and through counsel, and respectfully moves the Board for a Sec. 10(k) rehearing.

Respectfully Submitted,



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## **I. Introduction & Statement of Facts**

From July 23 to July 26, 2012, Local 18 was a party to a Sec. 10(k) hearing regarding the above-captioned matters. The Union participated in the hearing in full, presenting its case-in-chief, exhibits, witnesses, and cross-examinations. At the conclusion of the hearing, the Hearing Officer informed the parties of their right to file post-hearing briefs and the process for doing so. Local 18 timely filed a post-hearing brief, and the determination of the matter is currently pending before the Board. On September 18, 2013, Local 18 discovered that an entity – other than the Board and/or its employees or agents – was in possession of the Hearing Officer’s completed report to the Board. Specifically, the Hearing Officer’s report was attached as an exhibit to a brief filed before the court in *International Union of Operating Engineers, Local 18 v. Norris Brothers Co., Inc.*, in the Cuyahoga County Court of Common Pleas, Case No. CV 13 813179. (Exh. A.)

Sec. 10214.6 of the Board’s Casehandling Manual mandates that a hearing officer’s report to the Board in a Sec. 10(k) proceeding “is not served on the parties or counsel/representatives of record.” Moreover, Sec. 102.90 of the Board’s Rules and Regulations, which governs the Sec. 10(k) proceedings, states that hearing procedure “shall conform, insofar as applicable, to the procedure set forth in sections 102.64 to 102.68, inclusive.” Sec. 11250 of the Board’s Casehandling Manual refers back to Sec. 102.66 of the Board’s Rules and Regulations by stating that a hearing officer’s submitted report to the Board “is not served on the parties (or counsel/representatives of record).” Furthermore, as a matter of policy, the Board will not, by default, provide documents to any requesting individual or entity if such individual or entity did not originally provide those documents to the Board.

## II. Law & Analysis

In light of this breach of the Board's mandates regarding the confidentiality of the Hearing Officer's report, the Board would be well-warranted in granting a Sec. 10(k) rehearing in the instant case. As a threshold matter, a motion for rehearing requires that the movant raise some facts or issues not previously considered. *See Carter and Brother*, 91 NLRB 911, 912 (1950). Where these facts or issues would result in a "material change" to the state of the proceedings before the Board, the Board will grant a motion for a rehearing. *See Utah-Idaho Sugar Co.*, 85 NLRB 1090, 1090 (1949). The leak of Hearing Officer Gleine's report to entities other than the Board and/or its employees or agents has resulted in a material change to the state of the proceedings in the instant matter to the extreme prejudice of Local 18.

As the Board's Rules and Regulations are codified in the Code of Federal Regulations, the specific regulations at hand – 29 CFR 102.64 to 29 CFR 102.66 and 29 CFR 102.90 – are binding on all parties coming before the Board, as well as the Board itself. *See Edelman v. Lynchburg College*, 535 U.S. 106, 123-124, 122 S.Ct. 1145, 152 L.Ed.2d 188 (2002), O'Connor, J., concurring (EEOC regulations codified in the Code of Federal Regulations are binding on parties coming before the EEOC, as well as the EEOC itself). *See also Chrysler Corp. v. Brown*, 441 U.S. 281, 308, 99 S.Ct. 1705, 60 L.Ed.2d 208 (1979). Moreover, a federal agency must, as a general matter, "follow its own policies and procedures . . ." *E.g., Lobsters, Inc. v. Evans*, 346 F.Supp.2d 340, 348-349 (D.Mass.2004). Accordingly, it is clear that the function of Secs. 10214.6 and 11250, operating pursuant to the binding procedures of 29 CFR 102.64 to 29 CFR 102.66 and 29 CFR 102.90 are also binding on the parties coming before the Board, as well as the Board itself. *See FPL Food, LLC v. United States Dept. of Agriculture*, 671 F.Supp.2d 1339,

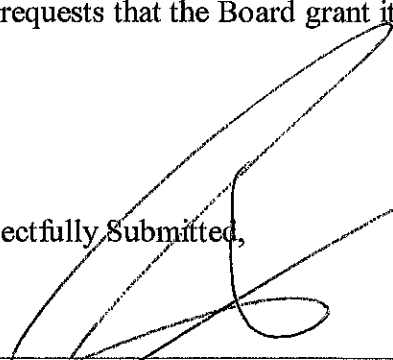
1354 (S.D.Ga.2009) (internal agency guidelines that lack discretionary language indicate that the applicable parties agree to be bound by the guidelines).

Local 18 has clearly been prejudiced by the willful abrogation of the Board's binding guidelines. The integrity of Board decision-making relies upon steadfast adherence to the rules which ensure that all parties that come before it have equal footing to fully present and defend their case. The existence of the Hearing Officer's report outside of the extremely limited channels in which it may be divulged demonstrates that the administrative integrity, as a whole, of the instant Sec. 10(k) hearing has been compromised. This aberration is clearly a "material change" which the Board would consider as an appropriate reason to grant a rehearing. As such, the possibility of any other illegally released information in this case which could harm Local 18, or any other party to this matter, outweighs any difficulties that may arise in reopening the Sec. 10(k) with due and proper regard for the Board's rules, regulations, and guidelines.

### **III. Conclusion**

Based on all the foregoing, Local 18 respectfully requests that the Board grant its Motion for Rehearing.

Respectfully Submitted,



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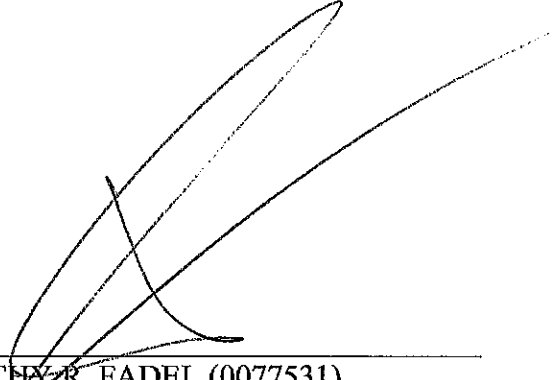
**CERTIFICATE OF SERVICE**

A copy of the foregoing Motion for Rehearing was filed electronically with National Labor Relations Board and served *via* email to the following on this 23rd day of September, 2013:

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UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 8

LABORERS' INTERNATIONAL UNION  
OF NORTH AMERICA, LOCAL 894

Charged Party – Labor Organization

and

CASE 08-CD-081837

DONLEY'S, INC.

Charging Party - Employer

and

INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL 18

Party-In-Interest – Labor Organization

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INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL 18

Charged Party-Labor Organization

and

CASE 08-CD-081840

DONLEY'S, INC.

Charging Party - Employer

and

LABORERS' INTERNATIONAL UNION  
OF NORTH AMERICA, LOCAL 310

Party-In-Interest – Labor Organization



**HEARING OFFICER'S REPORT 10(k) HEARING**

**HEARING OFFICER'S REPORT**

I. BACKGROUND

A. Date charges filed:

Case No. 08-CD-081837: May 25, 2012; Amended Charge filed June 4, 2012

Case No. 08-CD-081840: May 25, 2012

B. Date Order Consolidating Cases and Notice of Hearing issued: June 28, 2012

C. Date Hearing opened: July 23, 2012 (Approx. 10:00 a.m.)

D. Date Hearing closed: July 26, 2012 (Approx. 5:40 p.m.)

E. Parties:

Case No. 08-CD-081837:

Charging Party Employer: Donley's Inc. (Donley's)

Charged Party Union: Laborers' International Union of North America,  
Local 894 (Laborers' Local 894)

Party-In-Interest: International Union of Operating Engineers, Local 18  
(Local 18)

Case No. 08-CD-081840:

Charging Party Employer: Donley's Inc. (Donley's)

Charged Party Union: International Union of Operating Engineers, Local 18  
(Local 18)

Party-In-Interest: Laborers' International Union of North America, Local 310  
(Laborers' Local 310)

F. Date briefs are due: August 23, 2012

G. Estimated transcript length: 900 – 1,000 pages (exclusive of exhibits).



## II. ISSUES

The issues involved include jurisdictional disputes over the assignment of certain forklift and skid-steer<sup>1</sup> work of the Charging Party Employer currently assigned to Laborers' Locals 894 and 310. The Notice of 10(k) hearing cited the following work as being in dispute:

### Case No. 8-CD-081837

The operation of forklifts and skid steers as part of the construction of a parking deck at the Goodyear jobsite located at 225 Innovation Way, Akron, Ohio.

### Case No. 8-CD-081840

The operation of forklifts and skid steers as part of concrete work being performed at the Flat's East Development project located at 101 Front Avenue, Cleveland, Ohio.

## III. PROCEDURE

There were no procedural rulings made which may be challenged. Operating Engineers Local 18 filed a Motion to Quash the Order Consolidating Cases and Notice of 10(k) Hearing with the Hearing Officer (see Board Exhibit 2). The Hearing Officer deferred ruling on the Motion to the Board.

The Hearing Officer also ruled on two separate Petitions to Revoke Subpoenas *Duces Tecum* (see Board Exhibits 7 and 8, respectively). Specifically, the Hearing Officer granted Operating Engineers Local 18's Petitions to Revoke with respect to document request Item #2 in both Board Exhibits 7 and 8, respectively, based upon relevancy grounds.

## IV. LABOR ORGANIZATIONS

There were no contested issues concerning labor organization status. The Parties stipulated on the record that all Unions involved are labor organizations within the meaning of Section 2(5) of the Act.

## V. JURISDICTION

There were no contested issues regarding jurisdiction. The Charging Party Employer, Donley's, Inc., is an Ohio Corporation with an office located at 5430 Warner Road, Cleveland, Ohio 44125. It designs and builds commercial structures and buildings and serves as the construction manager and/or general contractor for construction projects. It also self-performs

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<sup>1</sup> Testimony in the record will reflect that the skid-steer is commonly referred to by the brand name "Bobcat" and has many applications and attachments. Similarly, the testimony will reflect that there are multiple forklifts that can be utilized on the projects addressed at the hearing, the most common of which is the "industrial" forklift.

concrete work for itself and for other general contractors and construction managers. Annually, in the course and conduct of its business, it purchases and receives materials valued in excess of \$50,000 directly from points located outside the State of Ohio.

The Parties stipulated on the record that Donley's is an employer within the meaning of Section 2(2) of the Act.

## VI. THE DISPUTES

Donley's is signatory to Laborers' Local 894's Building Agreement.<sup>2</sup> The agreement covers building construction in Summit, Portage and Medina counties. Donley's work on the Goodyear project is within Local 894's geographical jurisdiction.

On February 22, 2012, Donley's General Counsel Mary L. Reid sent Bill Orr, Local 894's principal officer, a letter assigning forklift operation in conjunction with the union's general duty use to Local 894.<sup>3</sup>

According to the Employer, Laborers Local 310 was assigned to and is performing the forklift work at the Flats East Development project.<sup>4</sup> The Employer is signatory to a collective bargaining agreement with Local 310.<sup>5</sup>

Local 18's geographical jurisdiction includes all counties in the State of Ohio except Trumbull, Mahoning and Columbiana counties. Local 18 negotiated two collective bargaining agreements covering building construction within its geographical jurisdiction<sup>6</sup> with two multi-employer bargaining groups.

The Labor Relations Division of the Associated General Contractors of Ohio (AGC) negotiates with Local 18 over the AGC Ohio Building Agreement (AGC Agreement) on behalf of AGC contractor members who have assigned their bargaining rights to the AGC. The AGC Agreement is applicable within all counties with the geographical jurisdiction of Local 18 except Ashtabula, Cuyahoga, Erie, Geauga, Huron, Lake, Lorain and Medina counties. Employer contractors who have not assigned their bargaining rights to the AGC Agreement are individually required to execute an Acceptance of the AGC Agreement.

Since at least 1990, the Employer has, on an intermittent basis, individually executed the AGC agreement as a non member of AGC.

With regard to the building work outside of the geographical jurisdiction of the AGC Agreement, (Ashtabula, Cuyahoga, Erie, Geauga, Huron, Lake, Lorain and Medina) the Employer assigned bargaining rights to the Construction Employers Association (CEA), a multi-

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<sup>2</sup> See Joint Exhs. 5 and 6.

<sup>3</sup> Donley's provided a similar letter to Orr involving the PARTA project in Kent, Ohio. This work is not at issue as there is an available voluntary adjustment method. See Donley's Exhs. 12 and 13.

<sup>4</sup> Mike Dilley, Donley's Vice President of Concrete Operations, has acted as the Project Executive for the Flats East Bank project. He testified that he did not recall Donley's using a skid-steer on that project.

<sup>5</sup> See Joint Exhs. 3 and 4.

<sup>6</sup> Certain counties in northern Kentucky are also included in Local 18's jurisdiction. See Joint Exhs. 1 and 2.

employer bargaining group which negotiates a collective bargaining agreement with Local 18 covering the building construction work in those counties.<sup>7</sup>

Testimony adduced at the hearing revealed that the parking garage project on the East Bank of Cleveland's Flats falls within the geographical jurisdiction of the CEA agreement and the parking garage project for the Goodyear parking deck in Akron falls within the geographical jurisdiction of the AGC of Ohio Building Agreement.<sup>8</sup>

Greg Przepiora, Donley's General Superintendent and Mike Dilley, Donley's Vice President for Concrete Operations, testified regarding Local 18's ongoing attempts to obtain all of Donley's forklift work for its members. They testified that in a breakfast meeting conducted approximately two years ago with Local 18 Representatives David Russell and Steve DeLong, Local 18 claimed all of the forklift work on all projects. According to Przepiora, the Employer evaluated the request and shortly thereafter informed the union that such an assignment would not work as under this arrangement an operator would have large amounts of idle time. According to Przepiora, in the past Local 18 had not demanded its forklift work or protested such assignments.

Przepiora additionally testified that in November 2011, he met with Russell and Local 18 District Representative Joe Lucas at the pre-startup meeting on the Goodyear project. Przepiora testified that Local 18 demanded that all forklift work be transferred from other trades to Local 18. Przepiora testified regarding Lucas' comments about the operation of the crane on the project in the event that Local 18 members were not given the forklift work. Additional testimony from a number of witnesses addressed the contractual status of Donley's at that time and whether Local 18 could conduct a pre-startup meeting for the project with Donley's.

Multiple witnesses testified regarding Local 18's two-day strike at the Goodyear site that commenced on February 22, 2012 and that Local 18 members established picket lines at the entrances to the site. Przepiora testified that shortly before the strike, Local 18 Representative David Russell told him that if Donley's did not put operators on the forklifts, Local 18 would shut down the site. Laborer's Local 894 Business Manager Bill Orr testified that Russell stated that the Laborers had been stealing Local 18's work for over 30 years. Russell, on cross-examination, admitted making the statement.

Local 18 witnesses testified that they picketed the Goodyear project because Donley's was not, at that time, signatory to the AGC Agreement and that signs utilized on the picket line reflected this.

Witnesses for Local 18 and Donley's differed on whether the picketing that took place at the Goodyear site was in support of a contractual or jurisdictional dispute. Nevertheless, after a

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<sup>7</sup> See Joint Exhs. 9 through 14 for the contract acceptance executions.

<sup>8</sup> Local 18 witnesses testified that at all times and continuing to date, Donley's has been bound to the CEA agreement covering the Flat's project and that Donley's did not become signatory to the AGC Agreement covering the Goodyear project until February 23, 2012.

meeting between representatives of Local 18 and Donley's on or about February 23, 2012, Donley's signed an AGC agreement with Local 18 and Local 18 pulled the pickets.

On February 27, 2012, Local 18 filed two grievances against Donley's involving the Goodyear and Flats projects, respectively.<sup>9</sup> The record contains testimony from multiple witnesses regarding the grievance meetings as well as the disputed current status of both grievances.<sup>10</sup>

On April 20, 2012, following the Step 3 Grievance meeting with Local 18, Mike Dilley sent Local 894's Business Manager Bill Orr an e-mail. In this e-mail, Dilley advised Orr that while Donley's had previously assigned certain work to the Laborers on the Goodyear and Kent PARTA projects, that Donley's would have to assign that same work to Local 18 if the grievance committee voted in their favor.

On April 23, 2012, Bill Orr replied to Dilley's April 20, 2012 e-mail, advising Donley's that Local 894 adamantly opposed any transfer of its members' work, including but not limited to, skid steer work on the Goodyear and Kent PARTA projects. Orr testified that Laborers' Local 894 advised that it would take whatever action it deemed necessary to protect its work jurisdiction, including picketing and/or striking at the site of the Goodyear project.

CEA Executive Vice President Tim Linville testified regarding bargaining between the CEA and Locals 18 and 310 in April, 2012. Linville described proposal #10, offered by Local 18 during the course of negotiations. According to Linville, the proposal addressed ongoing jurisdictional disputes Local 18 had with Laborers and Carpenters locals over the operation of forklifts and related equipment. Linville testified that Local 18 expressed its desire for the forklift and skid-steer work. A tentative CEA agreement was reached with Local 18 on April 30, 2012.<sup>11</sup>

Linville also testified regarding Local 18's attempts to claim forklift and skid-steer work being performed by CEA contractors. Linville specifically testified regarding what he perceived to be Local 18's attempts to directly negotiate with CEA contractors to obtain such work.<sup>12</sup> Linville also testified regarding threatening voicemail messages that were allegedly left for him by Local 18 members who voiced their displeasure that the CEA had negotiated to assign certain

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<sup>9</sup> See Donley's Exhs. 2 and 11, filed on February 27, 2012. Notably, Local 18's grievance regarding the Flats East Bank project makes no mention of skid-steer work.

<sup>10</sup> Local 18 President Rick Dalton testified that the Flats East Bank grievance (Donley's Exh. 2) has been withdrawn because Local 18 determined it was not timely. Meanwhile, Donley's witnesses testified that they have not received anything in writing from Local 18 officials to indicate that Local 18's grievance is no longer being pursued relating to the assignment of forklift work on the Flats East Bank project. Local 18, via e-mail dated April 6, 2012 from Business Manager Pat Sink, offered to settle the grievances provided that Donley's staff one operating engineer per two forklifts on each project (among other terms). See Donley's Exh. 1. Donley's witnesses Mike Dilley and Greg Przepiora testified that during a grievance meeting in Columbus, Local 18 representative Mark Totman stated that Donley's "would be sorry come May1," and that no operating engineers would work their sites.

<sup>11</sup> According to Linville, the scheduled May 1, 2012 ratification was delayed as a result of Sink's May 9, 2012 request (to Linville) for a copy of the CEA/Laborers Local 310 agreement. See Donley's Exh. 5.

<sup>12</sup> See Donley's Exhs. 6 through 8, inclusive.

work to Laborers' Local 310.<sup>13</sup> Donley's work on the Flats East Bank project would fall within the jurisdiction of any such negotiated agreement.

## VII. THE ALLEGED VIOLATIONS

As discussed above, Laborer's Local 894 did notify Donley's that it would strike, if necessary, on the Goodyear project to retain the assignment of forklift work.<sup>14</sup>

Also as discussed above, Local 18 did in fact conduct picketing at the Akron, Ohio, Goodyear job site on February 22, 2012 for a two-day period. Local 18 also filed separate grievances on each project.

The Employer asserts that the comments attributed to Local 18 representatives during the CEA negotiations in April 2012 and grievance meetings constitute threats to strike and / or use proscribed means in support of its claim for the disputed work being performed on the Cleveland Flats East Bank project.

## VIII. THE WORK IN QUESTION

Donley's is constructing a parking deck for Goodyear at 225 Innovation Way in Akron, Ohio. The disputed work at Goodyear includes the operation of forklifts and skid steers. In addition, as a subcontractor, Donley's is performing concrete work in Cleveland on the Flats East Bank Development project located at 101 Front Avenue.<sup>15</sup> At present, the Employer has assigned the forklift and skid-steer work on the Goodyear project to Laborers' Local 894 and the forklift work on the Flats project to Laborers' Local 310. Both projects are on-going.

## IX. POSITIONS OF THE PARTIES ON DISPUTED ISSUES

### A. Work at Issue

The Employer maintains that the forklift and skid-steer work at the Goodyear project should be assigned to Local 894 and the forklift and skid-steer work at the Flats project should be assigned to Local 310. Its witnesses Mike Dilley and Greg Przepiora testified that forklift work has historically been assigned to the trade needing to use the forklift as incidental to that trades completion of its work. Przepiora noted that most frequently, Laborers have been assigned to operate the forklifts. The Employer argues that until recently, Local 18 never demanded the forklift work or protested such assignments. The Employer also argues that such assignment to Local 18 is impractical and would result in idle time for the operator.

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<sup>13</sup> See Donley's Exh. 9. The voicemail recordings and transcripts, however, do not specifically mention forklift or skid-steer work. Instead, the voicemail recordings and transcripts make general, blanket references to work assigned to Laborers' Local 310.

<sup>14</sup> See Laborers' Exh. 4.

<sup>15</sup> According to the Employer Counsel Frank Buck, the General Contractor on the Flats project is Kilbane Construction. Buck notes that Donley's is the employer responsible for assigning the work to Laborers Local 310.

Operating Engineers Local 18 contends that there are no competing claims for the forklift and skid-steer work at issue in these cases. Local 18 instead claims that it is solely interested in enforcing its contractual agreements under the AGC of Ohio Building Agreement (Joint Exh. 1) and the CEA (Construction Employer's Association) Building Agreement (Joint Exh. 2). Local 18 cites to Capital Drilling Supplies 318 NLRB 809 (1995) for dismissal of the charges. Local 18 maintains that any grievances it has filed with Donley's seek to recover economic damages and not an award of the forklift or skid-steer work on either project.

Laborers' Locals 894 and 310 contend that there are competing claims for the forklift and skid-steer work involved on the Goodyear and Flats East Bank projects. Laborers' Locals 894 and 310 have claimed the forklift and skid-steer work and cite Local 18's two-day strike that commenced on February 22, 2012 at the Goodyear project, as well as the two separate grievances (one relating to each project) filed by Local 18 to assert that Laborers are claiming the disputed work. It further cites to Capital Drilling for the proposition that the Board's 10(k) procedures are available where a union pursuing contractual remedies also makes a claim directly for the work.

The Parties presented extensive testimony and documentary evidence regarding the training required and the relative skills needed to perform the disputed work. The Parties also presented ample testimony that their respective members possess various skills to perform the work in question. Multiple witnesses also provided testimony regarding the Employer's preference regarding who performs the work, evidence regarding area and industry practice, the past practice of the Employer and the economy and efficiency of operations.

#### B. Area-Wide Award

Despite not appearing as an issue to be addressed in the Notice of Hearing, it is anticipated that both Laborers' Locals 894 and 310 will argue in its brief for an area-wide award in this case because it views the actions of Local 18 and particularly its Business Representative David Russell on various projects as a continuous claim for the disputed work.

Local 18 opposes an area-wide award in this case, as stated by its legal counsel on the record.

There are two requirements for a broad, area-wide award. First, there must be evidence that the disputed work has been a continuous source of controversy in the relevant geographic area and that similar disputes may recur. Second, there must be evidence demonstrating that the charged party has a proclivity to engage in unlawful conduct to obtain similar work. See Teamsters Local 174 (Airborne Express), 340 NLRB 137, 142 (2003).

Regarding the first requirement, multiple witnesses testified, albeit at times without first-hand knowledge or observation of the events to which they were testifying, regarding the actions of Local 18 agents and / or representatives (particularly those of Business Agent David Russell) on other projects in the area. Terry Joyce, Laborers' Local 310 Business Agent, testified regarding reports of Mr. Russell's actions and the grievances filed by Local 18 at various jobsites in Northeast Ohio.

Regarding the second requirement for finding an area-wide award in this case, evidence was presented to demonstrate that Local 18 intends to file grievances going forward regarding what it views as contractual violations relating to the assignment of forklift and skid-steer work.

X. POSSIBILITY OF A VOLUNTARY METHOD OF SETTLING THE DISPUTE

Donley's and both Laborers Unions agreed that there is no voluntary adjustment procedure in place between the Parties to resolve the disputed work identified in the Notice of Hearing. Local 18 would not agree to stipulate accordingly.

Dated at Cleveland, Ohio, this 2nd day of August, 2012

/s/ Gregory M. Gleine  
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Hearing Officer, Region 8  
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