International Union of Operating Engineers, Local 18 *and* Donley's, Inc. and Hunt Construction Group and Precision Environmental Co. and Construction Employers Association and B&B Wrecking and Excavating and Cleveland Cement Contractors and Laborers' International Union of North America, Local 310.

Laborers' International Union of North America, Local 310 *and* Donley's, Inc. and B&B Wrecking and Excavating, Inc. and Cleveland Cement Contractors, Inc. and Hunt Construction Group and Precision Environmental Co. and Construction Employers Association and International Union of Operating Engineers, Local 18. Cases 08–CD–091637, 08–CD–091683, 08–CD–091684, 08–CD–091686, 08–CD–091770, 08–CD–091773, 08–CD–091643, 08–CD–091677, 08–CD–091678, 08–CD–091682, 08–CD–091687, and 08–CD–091689

May 15, 2014

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND JOHNSON

This is a consolidated jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act, as amended, following the filing of charges in Cases 08–CD–091637 and 08–CD–091643 on October 18, 2012 by Donley's, Inc. (Donley's).[1] Additional charges were filed on October 19 in Cases 08–CD–091677 and 08–CD–091770 by B&B Wrecking and Excavating, Inc. (B&B Wrecking or B&B); in Cases 08–CD–091678 and 08–CD–091773 by Cleveland Cement Contractors, Inc. (Cleveland Cement); in Cases 08–CD–091682 and 08–CD–091683 by Hunt Construction Group (Hunt); in Cases 08–CD–091684 and 08–CD–091687 by Precision Environmental Co. (Precision); and in Cases 08–CD–091686 and 08–CD–091689 by Construction Employers Association (CEA).[2] The Employers alleged that the International Union of Operating Engineers, Local 18 (Operating Engineers) and Laborers' International Union of North America, Local 310 (Laborers) violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing or requiring the respective Employers to assign certain work to employees represented by Operating Engineers rather than to employees represented by Laborers. An order consolidating cases and notice of hearing subsequently issued and a hearing was held on February 25–28, 2013, before Hearing Officer Roberta A. Montgomery.[3] Thereafter, CEA, on behalf of the Employers, filed a posthearing brief, as did Operating Engineers.[4] Operating Engineers also filed a motion to quash the notice of hearing, which was deferred by the hearing officer to the Board for resolution.[5]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, we make the following findings.

[1] All dates are in 2012 unless otherwise indicated.

[2] Donley's, B&B Wrecking, Cleveland Cement, Hunt, and Precision will be referred to as "the Employers." The CEA will be referred to separately.

[3] In a recent case, *Operating Engineers Local 18 (Donley's Inc.)*, 360 NLRB No. 20 (2014)(*Donley's I)*, the Board found reasonable cause to believe that Operating Engineers violated Sec. 8(b)(4)(D) with respect to a dispute with Donley's at a Goodyear construction project in Akron, Ohio, concerning the same work in dispute, and at another project in Cleveland regarding forklift work. The Employers and CEA moved at the hearing to incorporate the record from *Donley's I*. In light of our disposition of all issues here based on the record in this case and taking official notice of the prior decision in *Donley's I*, we find no need to pass on this motion.

[4] Laborers presented oral argument at the conclusion of the hearing in lieu of a brief.

[5] Operating Engineers contends, among other arguments in its motion, that the notice of hearing should be quashed because it does not factually track the underlying unfair labor practice allegations, as required under *Nickles Bakery of Indiana*, 296 NLRB 927 (1989), and its progeny. Specifically, Operating Engineers asserts that unlike the notice of hearing, which identifies the work in dispute and the locations where the alleged Sec. 8(b)(4)(D) conduct occurred, the charges contained only general "boilerplate" allegations and were "utterly lacking in factual specificity." Because the notice of hearing "exceeds the scope of the charged allegations," Operating Engineers contends that the Regional Director acted without jurisdiction under Sec. 10(b) by originating a complaint upon his own initiative and that under *Nickles Bakery* the notice should be quashed.

Operating Engineers' reliance on *Nickles Bakery* is misplaced. That case held that the "boilerplate" statutory language of Sec. 8(a)(1) that is preprinted on a Sec. 8(a) charge form cannot, on its own, support a particularized 8(a)(1) *complaint* allegation because it would "contravene[] 10(b)'s mandate that the Board 'not originate *complaints* on its own initiative.'" 296 NLRB at 928 (quoting *G.W. Galloway Co. v. NLRB*, 856 F.2d 275, 280 (D.C. Cir. 1988) (emphasis added)). However, a notice of hearing in a 10(k) proceeding to determine whether there is reasonable cause to believe that Sec. 8(b)(4)(D) has been violated is not, as Operating Engineers describes it, a "complaint," and, accordingly, the holding of *Nickles Bakery* has not been extended to 10(k) cases.

However, even if *Nickles Bakery* applied, a sufficiently close factual nexus exists between the charges and the notice of hearing. See *Bay Counties Carpenters*, 265 NLRB 646, 647–648 (1982) (rejecting argument that notice of hearing improperly exceeded the scope of the charges by including jobsites not specified in charges). Accordingly, we deny Operating Engineers' motion to quash the notice of hearing on this basis.

I. JURISDICTION

The parties stipulated that in the 12-month period prior to the hearing, Employers Donley's, B&B Wrecking, Cleveland Cement, Hunt, and Precision each purchased and received materials valued in excess of $50,000 directly from points outside the State of Ohio. The parties further stipulated, and we find, that the Employers are engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Laborers and Operating Engineers are labor organizations within the meaning of Section 2(5) of the Act.

CEA is a multiemployer bargaining association that represents construction industry employers in negotiating and administering collective-bargaining agreements with various labor organizations. Donley's, B&B Wrecking, Cleveland Cement, Hunt, and Precision have assigned their bargaining rights to CEA and, through CEA, are signatories to separate contracts negotiated by CEA with Laborers and Operating Engineers. As the Employers have delegated bargaining authority to CEA, and each Employer satisfies the applicable jurisdictional standard, we find that CEA is an employer within the meaning of Section 2(2) of the Act.[6]

II. THE DISPUTE

A. Background and Facts of the Dispute

The Employers have employed employees represented by both Laborers and Operating Engineers for many years and have been signatories to a series of successive collective-bargaining agreements negotiated by CEA with both Unions. The most recent of these contracts are effective from May 1, 2012, through April 30, 2015. Both contracts cover construction work performed in Cuyahoga County in northeastern Ohio, including the city of Cleveland, where the jobsites at issue in this case are located.

The Employers utilize various kinds of equipment on their construction projects, including forklifts and small front-end loaders known as skid steers. Representatives of Employers B&B Wrecking, Cleveland Cement, and Precision testified that their practice for over 20 years has been to assign the operation of this equipment to employees represented by Laborers, and the same practice at Donley's has existed for 15 years.[7] CEA Executive Vice President Tim Linville testified that Operating Engineers sought to change this practice in April 2012, during negotiations for a contract to succeed the CEA-Operating Engineers contract that was due to expire on April 30. According to Linville, Operating Engineers' Chief Negotiator Pat Sink stated that Operating Engineers was prepared to strike over the continued assignment of forklift and skid steer work to employees it did not represent. CEA bargaining committee member Victor DiGeronimo testified that Sink made the same statement to him during the 2012 contract negotiations.

Sink submitted a contract proposal during the negotiations that would have required the Employers to pay "liquidated damages" in the amount of four times the hourly wage of employees represented by Operating Engineers, if forklift and skid steer work was assigned to other employees. Linville testified that in presenting this proposal, Sink explained that "for far too long" the Employers had wrongfully been assigning forklift and skid steer work to employees other than those whom Operating Engineers represented, and his liquidated damages proposal was "intended to stop that."[8]

The successor 2012–2015 contract between CEA and Operating Engineers required ratification by both parties. After CEA ratified it in early May, Linville received a letter from Sink stating that Operating Engineers could not vote on ratification without first reviewing the 2012–2015 successor contract recently negotiated between CEA and Laborers. The letter further requested confirmation of whether that contract specifically "classifies and assigns certain construction equipment to Laborers." Linville confirmed in a responsive letter and phone call to Sink that, consistent with "current and past practice," the new CEA-Laborers contract classifies the operation of forklifts and skid steers as the work of Laborers-represented employees. Linville informed Sink in his letter that he was aware that Operating Engineers had "initiated several jurisdictional proceedings regarding these issues this year." Sink replied that the assignment of this equipment to Laborers-represented employees "might affect our willingness to ratify" the CEA-Operating Engineers contract. Ultimately, Operating Engineers ratified the contract.

Among the other jurisdictional proceedings initiated by Operating Engineers that Linville referred to in his letter to Sink was the dispute in *Donley's I* involving Donley's construction project at a Goodyear facility in Akron, Ohio. That project, located outside the geographic scope of the CEA-Operating Engineers agreement, was covered by a contract between the Associated Gen-

[6] Operating Engineers argues that because CEA does not directly employ any employees at issue in this 10(k) proceeding, it is not a Sec. 2(2) employer. The Board rejected this argument in *Oregon Coast Operators Assn.*, 113 NLRB 1338, 1340 fn. 4 (1955), and we do so here. See also *Broward County Launderers & Cleaners Assn., Inc.*, 125 NLRB 256, 256 (1959).

[7] Employer Hunt's representative did not address the duration of Hunt's assignment practice in his testimony.

[8] Sink did not testify in this proceeding.

eral Contractors (AGC) and Operating Engineers, to which Donley's was signatory. At a prejob conference concerning the Goodyear project, Donley's project superintendent Greg Przepiora told Operating Engineers' representative David Russell that Laborers-represented employees would operate the forklifts and skid steers, and Russell noted his disagreement with this assignment on a prejob conference form.

Russell later appeared at the Goodyear jobsite in early February and, according to Przepiora, told him that Operating Engineers wanted the forklift and skid steer work that it "gave away a long time ago" and that he would shut down the jobsite if Donley's did not acquiesce. After Donley's refused to reassign the work, Operating Engineers engaged in a 1-day strike on February 22 and filed a grievance alleging that Donley's violated the AGC-Operating Engineers contract by failing to "employ Operating Engineers on its forklifts and skid steers" at the Goodyear project. Two meetings followed in an attempt to resolve the grievance. Donley's official Mike Dilley testified that Sink stated at the first meeting in early April that the February 22 strike was a "move[] that the Union should have made a long time ago." Dilley further testified that Operating Engineers' representative Mark Tottman stated at the second meeting on April 20 that when the CEA-Operating Engineers contract expired on April 30, Donley's "would be sorry that [it] was not putting Operators on the forklifts" and that it "would be sorry that [it] would not have Operators come the end of the month."

After the ratification of successor 2012–2015 contracts between CEA and Laborers and CEA and Operating Engineers, the Employers began work on various construction projects in the Cleveland area. They utilized forklifts and/or skid steers at each project and assigned the operation of this equipment to employees represented by Laborers. Operating Engineers filed "pay-in-lieu" grievances against each Employer alleging that the failure to assign the work to employees it represented violated the CEA-Operating Engineers contract. Each grievance sought, as a penalty for the alleged contract breach, the payment of wages and fringe benefits for each day worked on forklift and/or skid steer equipment by employees not represented by Operating Engineers.

In addition to filing grievances, Operating Engineers' representative Russell made oral claims for the forklift and/or skid steer work in discussions with some Employer officials. Brian Baumann, president of B&B Wrecking, testified that after Operating Engineers filed a June 5 grievance over B&B's assignment of forklift work to its Laborers-represented employees at the Cleveland Browns stadium project, Russell stated during a visit to the jobsite that the operation of forklifts fell within Operating Engineers' jurisdiction and that Baumann should reassign the forklift work to the employees represented by that Union. Jim Simonetti, field superintendent for Cleveland Cement, and Tony DiGeronimo, president of Precision, testified that they had similar discussions with Russell. Simonetti testified that prior to the filing of grievances about Cleveland Cement's projects at the Metro Health Medical Center and Tri-C Metro Campus, Russell advised him that employees represented by Operating Engineers should run the forklifts and skid steers at both sites. Simonetti refused, as did DiGeronimo when Russell made a demand for the assignment of forklift and/or skid steer work during a prejob conference prior to commencement of work at Precision's Hannah Annex jobsite. Simonetti testified that Russell stated further that Operating Engineers' claims for this work "were going to continue . . . until they got operators to run the equipment."

In a letter dated October 11, the CEA's Linville notified Laborers' business manager Terence Joyce that "Operating Engineers Local 18 has launched an area-wide campaign to claim forklift and skid steer work from the Laborers" by filing grievances against B&B Wrecking, Cleveland Cement, Hunt, and Precision.[9] Linville advised Joyce that as a result of the grievances, it may become necessary to reassign the forklifts and skid steers work to employees represented by Operating Engineers. Joyce responded by letter on October 16 that

> members of Laborers' Local 310 have traditionally and consistently operated skid-steers and forklifts for the signatory employers referenced in your letter. Skid-steers and forklifts are tools of trade, operated by laborers to perform laborers' duties. You are advised that Local 310 adamantly objects to any assignment of its members' work to Local 18. In the event any of your member-contractors, including those referenced in your letter, assign the operation of skid-steers or forklifts to members of Local 18, Local 310 will picket and strike any and all projects where such assignments take place.

B. Work in Dispute

We find, based on the record and as set forth in the order consolidating cases and notice of hearing, that the work in dispute is the operation of forklifts and skid steers as part of construction projects at Case Western Reserve University (Donley's), Cleveland Browns Stadium (B&B Wrecking), a Tri-C Metro Campus parking lot (Cleveland Cement), Cleveland Hopkins Airport (Hunt

[9] Donley's was not named because the first of several grievances had not yet been filed against it.

Construction), and the Hanna Annex Building (Precision), all located in Cleveland, Ohio.

C. Contentions of the Parties

CEA, the Employers, and Laborers contend that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated based on threats made by Operating Engineers to strike, and by Laborers to picket and strike, over the assignment of forklift and skid steer work. They further contend that there are competing claims for the disputed work and that the work should be awarded to employees represented by Laborers based on employer preference and past practice, area and industry practice, and economy and efficiency of operations. Finally, they contend that a broad areawide award is warranted, coinciding with the territorial jurisdiction of Operating Engineers, because it is likely that disputes over the assignment of forklift and skid steer work will arise on future projects.

Operating Engineers contends that the notice of hearing should be quashed because it has not claimed the work in dispute. Rather, it contends that it has pursued only contractual grievances against the Employers, seeking economic damages for breaches of the work jurisdiction provisions of the CEA-Operating Engineers contract. As such, Operating Engineers argues that the dispute here is one of contractual work preservation rather than a dispute cognizable under Section 10(k). Further, Operating Engineers argues that its threats to strike were "purely representational" with no 10(k) jurisdictional objective, and that Laborers' threats to picket and strike if the disputed work were not assigned to the employees it represents were a "sham" orchestrated by CEA's Linville to manufacture a 10(k) jurisdictional dispute. Alternatively, if the notice of hearing is not quashed and the Board determines that a jurisdictional dispute exists, Operating Engineers argues that the disputed work should be awarded to employees it represents based on the factors of collective-bargaining agreements, area and industry practice, economy and efficiency of operations, and relative skills and training.

D. Applicability of the Statute

The Board may proceed with determining a dispute pursuant to Section 10(k) of the Act only if there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1139 (2005). This standard is met if there is reasonable cause to believe that there are competing claims for the disputed work between rival groups of employees, and a party has used proscribed means to enforce its claim to the work in dispute. Additionally, there must be a finding that the parties have not agreed on a method of voluntary adjustment of the dispute. On this record, we find that this standard has been met.

1. Competing claims for work

We find reasonable cause to believe that both Unions have claimed the work in dispute for the employees they respectively represent. Laborers has claimed the work by its October 16 letter from Local business manager Joyce to CEA's Linville, objecting to any assignment of the forklift or skid steer work to Operating Engineers-represented employees. Even absent this specific claim, the performance of the disputed work by Laborers-represented employees at all of the projects here constitutes evidence of a claim for the work. *Seafarers District NMU (Luedtke Engineering Co.)*, 355 NLRB 301, 303 (2010).

Despite its argument to the contrary, Operating Engineers has also claimed the disputed work. As recounted above, Russell made explicit oral demands for forklift and/or skid steer work in meetings with Donley's Project Superintendent Przepiora at the Goodyear project, with B&B Wrecking President Baumann at the Cleveland Browns Stadium project, with Precision President DiGeronimo at the Hannah Annex project, and with Cleveland Cement Field Superintendent Simonetti at its project at the Tri-C Metro Campus. Operating Engineers' claim for the forklift and skid steer work is also demonstrated by Chief Negotiator Sink's "liquidated damages" contract proposal during bargaining for a 2012–2015 successor contract with CEA. As Linville testified, Sink explained that the proposal was designed to stop employers from assigning forklift and skid steer work to employees other than those represented by Operating Engineers. Finally, Operating Engineers has filed pay-in-lieu grievances against each of the Employers alleging contract violations with respect to their assignment of forklift and/or skid steer work to employees represented by Laborers. The Board has long held that pay-in-lieu grievances alleging contractual breaches in the assignment of work constitute demands for the disputed work. *Laborers Local 265 (AMS Construction)*, 356 NLRB No. 57, slip op. at 3 (2010), and cases cited therein; *Laborers (Esbach Bros.)*, 344 NLRB 201, 202 (2005) (same).

We find no merit in Operating Engineers' contention that the instant proceeding involves a contractual dispute over the preservation of bargaining-unit work for employees it represents, rather than a jurisdictional work dispute within the scope of Section 10(k). It is well established that to prevail in its work preservation claim, Operating Engineers must show that the employees it represents have previously performed the work in dispute and that it is not attempting to expand its work jurisdic-

tion. *Chicago & Northeast Illinois District Council of Carpenters (Prate Installations, Inc.)*, 341 NLRB 543, 544 (2004); *Stage Employees IATSE Local 39 (Shepard Exposition Services)*, 337 NLRB 721, 723 (2002). If the evidence shows that the work in dispute has not previously been performed by employees represented by Operating Engineers, its "objective is not work preservation, but work acquisition," which the Board must resolve in a 10(k) proceeding. *Electrical Workers Local 48 (Kinder Morgan Terminals)*, 357 NLRB No. 182, slip op. at 3 (2011), and cases cited.

The record shows here that the Laborers-represented employees were performing the forklift and skid steer work at all of the Employers' construction projects. Witnesses for Employers Donley's, B&B, Cleveland Cement, and Precision testified that this work has always been assigned to employees represented by Laborers during their 15 to 26 years of employment and not to employees represented by Operating Engineers. Sink and Russell essentially conceded this point. Sink lamented during bargaining negotiations in 2012 that "for far too long" this work has been done by Laborers-represented employees, and Russell acknowledged during his meeting with Przepiora at Donley's Goodyear project that Operating Engineers "gave away" the forklift and skid steer work "a long time ago."

We find no merit in Operating Engineers' attempt to establish its work preservation claim by citing "over 3600 work orders [since 2009] from signatory contractors for the referral of an [Operating Engineer] member capable of operating skid steers and forklifts." There is no indication whether any of these referrals were to the Employers here or any other employer represented by CEA. Further, as Operating Engineers' Local President Dalton acknowledged, the referral of employees "capable" of operating a forklift or skid steer is not proof that the dispatched individuals performed work on that equipment during their time on the project. Operating Engineers also relies on Russell's testimony that during his visits to jobsites since 2009, he has "witnessed" four Operating Engineers-represented employees operating a forklift or a skid steer while employed by B&B Wrecking, Cleveland Cement, or Precision. There is no evidence, however, that the four were *assigned* by any of the Employers to operate the equipment, and even assuming that they were, such "isolated assignments . . . provides [Operating Engineers] no basis to raise a valid work preservation claim regarding the disputed work." *Stage Employees IATSE Local 39*, supra at 723.

Because the record shows that operating forklifts and skid steers is not work that has traditionally been performed by employees represented by Operating Engineers, we conclude that its claim for this work was not one of work preservation, but rather work acquisition, and the Board will resolve the dispute through this 10(k) proceeding.

2. Use of Proscribed Means

We also find reasonable cause to believe that Operating Engineers and Laborers used or threatened to use means proscribed by Section 8(b)(4)(D) to enforce their competing claims for the work in dispute. Operating Engineers Chief Negotiator Sink stated during negotiations for a successor 2012–2015 CEA-Operating Engineers contract that Operating Engineers was prepared to strike if the Employers continued to assign forklift and skid steer work to employees represented by Laborers. Representative Tottman similarly stated, in a grievance meeting with Donley's representatives, that when the contract expired in 2 weeks, Donley's "would be sorry . . . [for] not putting Operators on the forklifts" and that it "would be sorry that [it] would not have Operators." These statements constitute threats to strike over the disputed assignments of forklift and skid steer work, and such threats are a proscribed means of enforcing claims to disputed work. *Operating Engineers Local 150 (Patten Industries)*, 348 NLRB 672, 674 (2006).[10] Laborers engaged in similar proscribed conduct by advising CEA Executive Vice President Linville in its October 16 letter that Laborers would "picket and strike any and all projects" if the forklift and skid steer work were assigned to employees other than those represented by the Laborers.

We find no merit in the Operating Engineers' contention that Laborers' threat to picket and strike was a sham and the product of collusion among CEA, the Employers, and Laborers, who "all conspired in an effort to invoke Section 10(k)" and avoid Operating Engineers' contractual right under its agreement with CEA for Operating Engineers-represented employees to perform the disputed work. The Board has consistently rejected this argument "[i]n the absence of affirmative evidence that a threat to take proscribed action was a sham or was the product of collusion," and Operating Engineers has presented no such evidence here. *Operating Engineers Local 150 (R&D Thiel)*, supra, 345 NLRB at 1140; *Plumbers Local 562 (Grossman Contracting)*, 329 NLRB 516, 520 (1999). It offered no direct evidence that Laborers' threat to "picket and strike" over the assignment of the disputed work was not genuine or that Laborers colluded

[10] Even assuming, as Operating Engineers argues, that its threats to strike also had a lawful representational objective of urging agreement on a successor contract, we find reasonable cause to believe that Operating Engineers violated Sec. 8(b)(4)(D) because *an* object of its strike threats is prohibited. See *Carpenters (Prate Installations, Inc.)*, supra, 341 NLRB at 545.

with CEA and the Employers. Further, even assuming that there was evidence supporting this contention, Operating Engineers' threats to strike are sufficient alone to establish the requisite element of proscribed means to enforce a claim to the disputed work.

In sum, we find that the record evidence provides reasonable cause to believe that Section 8(b)(4)(D) has been violated. Operating Engineers has claimed the work in dispute, which is being performed by Laborers-represented employees, and both Operating Engineers and Laborers have used proscribed means to enforce their claims by threatening to strike and/or picket to retain or obtain the disputed work. In addition, as the parties stipulated, there is no method for voluntary adjustment of the dispute to which all parties are bound. Thus, we find that all three prerequisites for the Board's determination of a jurisdictional dispute are established. Accordingly, we deny Operating Engineers' motion to quash the notice of hearing and find that the dispute is properly before the Board for resolution.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 577–579 (1961). The Board's 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. *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402, 1410–1411 (1962).

The following factors are relevant in making the determination of this dispute.

1. Certifications and collective-bargaining agreements

The work in dispute is not covered by any Board orders or certifications.

Article 1, section 7 of the current collective-bargaining agreement between CEA and Laborers specifies numerous types of work within the jurisdiction of Laborers. Each provision states:

> The operation of forklifts, . . . [and] skid-steer loaders, . . . when used in the performance of the aforementioned jurisdiction shall be the work of the laborer [or laborers].

The current collective-bargaining agreement between the CEA and Operating Engineers states:

> In accordance with the terms of this Agreement, the Employer shall employ Operating Engineers for the erection, operation, assembly and disassembly, and maintenance and repair of the following construction equipment regardless of motive power: . . . Forklifts, Skid steers . . . .

We find that the language in each contract covers the work in dispute. Therefore, the factor of collective-bargaining agreements does not favor an award to either group of employees. *Laborers Local 1184 (High Light Electric)*, 355 NLRB 167, 169 (2010).

2. Employer preference and past practice

As noted above, the Employers' representatives testified that they have assigned the disputed work to their Laborers-represented employees for at least the past 15 years in the case of Donley's, and for over 20 years in the case of Precision, Cleveland Cement, and B&B Wrecking. During these periods, the representatives testified that they never assigned the disputed work to employees represented by Operating Engineers. Representatives of all five Employers testified that, consistent with their past and current practice, they prefer to continue assigning the disputed forklift and skid steer work to employees represented by Laborers. We find, therefore, that the factor of employer preference and past practice weighs in favor of awarding the work to employees represented by Laborers.[11]

3. Area and industry practice

Ed Deaton, a field representative for the Laborers District Council of Ohio whose duties since 2004 included attending prejob conferences at projects throughout the State, testified that contractors assigned forklift and skid steer work to Laborers-represented employees. Joyce testified that as a field representative of Laborers from 1995 to October 2011 and as Business Manager since then, he monitored construction projects in the three counties encompassing Laborers' jurisdiction to ensure employer compliance with bargaining contracts. He testified that the employees represented by Laborers operated the forklifts and skid steers on these jobs.

Operating Engineers argues that area practice supports its claim, as shown by the 3600 work orders from signatory contractors for the referral of a Local 18 member capable of operating skid steers and forklifts. However,

[11] We reject Operating Engineers' contention that the Employers' preference should be treated with skepticism because it is not "representative of a free and unencumbered choice," citing *Longshoremen ILWU Local 50 (Brady-Hamilton Stevedore Co.)*, 223 NLRB 1034, 1037 (1976), reconsideration granted and decision rescinded on other grounds 244 NLRB 275 (1979). There, the Board accorded little weight to the employer preference factor because that preference changed after the charged union initiated a work action. Id. Here, in contrast, the Employers have maintained a consistent preference for Laborers-represented employees, even when faced with pay-in-lieu grievances by Operating Engineers. Therefore, we accord this factor its customary weight.

as discussed above in rejecting this argument as support for its work preservation claim, there is no evidence that Operating Engineers-represented employees actually performed the disputed work on the jobs to which they were referred.

We find based on the foregoing evidence that the factor of area and industry practice favors an award of forklift and skid steer work to employees represented by Laborers.

4. Relative skills and training

Both Unions introduced evidence showing that they provide training in the operation of forklifts and skid steers at their training facilities and that the employees they represent are certified to operate this equipment. Several representatives of the Employers also testified that they verify that their Laborers-represented employees have been trained to operate the forklifts and skid steers on their projects. We conclude that the factor of relative skills and training is neutral and does not favor an award of the disputed work to either group of employees.

5. Economy and efficiency of operations

Representatives of the Employers testified that it is more efficient and economical to assign the operation of forklifts and skid steers to employees represented by Laborers because these employees perform multiple tasks in addition to the disputed work. The disputed work constitutes only a portion of the tasks they perform on a daily basis, with the majority of their time spent performing other duties that Operating Engineers-represented employees do not perform. Consequently, the Employers' representatives explained that they would incur additional costs if they hired employees represented by Operating Engineers to occasionally perform the work in dispute while also retaining employees represented by Laborers to perform other work within Laborers' jurisdiction. In these circumstances, the Board has found that the factor of economy and efficiency of operations favors awarding the disputed work to the more versatile employees—here, the employees represented by Laborers. *Luedtke Engineering*, supra, 355 NLRB at 305; *R&D Thiel*, supra, 345 NLRB at 1141; *Esbach Brothers*, supra, 344 NLRB at 204. In sum, the factor of economy and efficiency of operations favors the award of the disputed work to the Laborers-represented employees.[12]

[12] Operating Engineers argues that assigning the work in dispute to employees represented by Laborers would not be economical because doing so would subject the Employers to damages resulting from their breach of the pay-in-lieu provisions in the CEA-Operating Engineers contract. We reject this argument because the maintenance of pay-in-lieu grievances after the Board has awarded the work in dispute violates Sec. 8(b)(4)(ii)(D). *Iron Workers Local 433 (Otis Elevator)*, 309 NLRB 273, 274 (1992), enfd. 46 F.3d 1143 (9th Cir. 1995).

CONCLUSION

After considering all of the relevant factors, we conclude that the employees represented by Laborers are entitled to perform the work in dispute. We reach this conclusion based on the factors of employer preference and past practice, area and industry practice, and economy and efficiency of operations. In making this determination, we award the work to employees represented by Laborers, not to that labor organization or to its members.

SCOPE OF AWARD

The CEA, Employers and Laborers seek a broad areawide award of the disputed work "covering the geographic jurisdiction of Operating Engineers Local 18," arguing that the dispute here is likely to recur and that Operating Engineers has shown a proclivity to violate Section 8(b)(4)(D).

In determining the appropriateness of such an award, the Board requires evidence that (1) the disputed work has been a continuous source of controversy in the relevant geographic area and that similar disputes may recur; and (2) there is a proclivity by the offending union to engage in further proscribed conduct to obtain the disputed work.[13] We find that both requirements are satisfied here, and that a broad award is warranted.

The evidence demonstrates the disputed forklift and skid steer work has been and will likely continue to be controversial, as the Employers intend to continue assigning the disputed work to employees represented by Laborers, and Operating Engineers has stated its intent to demand that the work be assigned to employees it represents. Operating Engineers' representative Russell informed the president of Precision that his Union's demands for the forklift and skid steer work "were going to continue . . . until they got operators to run the equipment," and Union President Dalton testified that his Union would continue to file pay-in-lieu grievances for the disputed work on future projects. We conclude from these clearly expressed intentions that the dispute here is likely to recur on other jobsites within Operating Engineers' geographical jurisdiction.

We also find that the evidence similarly demonstrates a proclivity by Operating Engineers to engage in further conduct proscribed by Section 8(b)(4)(D) in order to obtain the disputed work.

[13] See, e.g., *Electrical Workers Local 98 (Total Cabling Specialists)*, 337 NLRB 1275, 1277 (2002); *Bricklayers (Sesco, Inc.)*, 303 NLRB 401, 403 (1991).

To establish this requirement, the Board has relied on evidence of a previous 10(k) determination by the Board that the charged union is not entitled to attempt to obtain comparable work through proscribed means. Compare *Electrical Workers Local 3 (Slattery Slanska, Inc.)*, 342 NLRB 173, 174 (2004) (broad award denied in absence of prior Board determination against offending union), and *Glaziers District Council 16 (Service West)*, 356 NLRB No. 105, slip op. at 5 (2011) (*Service West I*) (same), with *Electrical Workers Local 98 (Total Cabling Specialists)*, supra, 337 NLRB at 1277–1278 (broad award given based on prior Board determination against offending union), and *Electrical Workers Local 103 (Comm-Tract Corp)*, 307 NLRB 384, 387 (1992) (same).

Where the Board has issued a prior 10(k) determination, the Board has further required, in some cases, that the conduct considered by the Board in the second case must have occurred after the issuance of the determination in the first case in order to demonstrate proclivity. See *Glaziers District Council 16 (Service West)*, 357 NLRB No. 58, slip op. at 3 (2011) (*Service West II*). In other cases, however, the Board has found that the conduct in a particular case itself supports a finding of proclivity even absent evidence of unlawful conduct subsequent to an extant 10(k) award.[14]

Here, we find that an areawide order is warranted based on the record as a whole, notwithstanding that the Operating Engineers' proscribed conduct occurred before *Donley's I* issued. The present case involves disputes over work performed by five different employers at five separate jobsites over an almost 1-year period. In addition, this widespread and persistent conduct was coupled with Operating Engineers' threats encompassing not only these specific sites but directed at all jobs covered by the multiemployer CEA contract where forklifts and skid steers are used. This evidence establishes that Operating Engineers has shown a proclivity to use proscribed means in the future to obtain the same or similar work, and that a broad award is therefore warranted. *Sheet Metal Workers, Local 19 (E.P. Donnelly),* supra.

Because the two prerequisites for a broad order have been satisfied, we find that a broad areawide award, coextensive with the Employers' operations where the two unions' jurisdictions overlap, is appropriate.[15]

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Donley's Inc., B&B Wrecking and Excavating, Inc., Cleveland Cement Contractors, Inc., Hunt Construction Group, and Precision Environmental Co., who are represented by Laborers International Union of North America, Local 310 are entitled to perform work utilizing forklifts and skid steers in the area where their employers operate and the jurisdiction of Laborers International Union of North America, Local 310 and International Union of Operating Engineers, Local 18 overlap.

2. International Union of Operating Engineers, Local 18 is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force the Employers named above to assign the disputed work to employees that it represents.

3. Within 14 days from this date, International Union of Operating Engineers, Local 18 shall notify the Regional Director for Region 8 in writing whether it will refrain from forcing the Employers named above, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

Dated, Washington, D.C., May 15, 2014

Mark Gaston Pearce,	Chairman
Philip A. Miscimarra,	Member
Harry I. Johnson, III,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[14] See, e.g., *Sheet Metal Workers*, *Local 19 (E.P. Donnelly),* 345 NLRB 960, 965 (2005) (granting broad order despite no prior award based on picketing at 4 jobsites in approximately 4 months, with evidence of additional pressure on other contractors); *Electrical Workers IBEW Local 103 (Lucent Technologies),* 333 NLRB 828, 831–832 (2001) (same based on incidents at 3 separate locations of 3 different customers over a 1-month period).

[15] Contrary to his colleagues, Chairman Pearce would apply *Service West II* and deny an areawide award, because he finds that the proclivity requirements mandated by that case have not been met. In *Service West II,* the Board held that there are two requirements for establishing a union's proclivity to engage in further conduct proscribed by Sec. 8(b)(4)(D): (1) a prior 10(k) award prohibiting the union from attempting to obtain comparable disputed work by proscribed means, and (2) subsequent unlawful attempts by the union to obtain comparable work after the 10(k) award issued.

Here, although the first proclivity requirement has been satisfied, the second has not been met. The alleged proscribed conduct in this case occurred after the conduct in *Donley's I* but before the issuance of the Board's determination that the forklift and skid steer work at issue there and in this case was properly assigned to employees represented by Laborers. Thus, at the time it engaged in the conduct here, Operating Engineers was not on notice that the employees it represented were not entitled to the work in dispute. Absent that notice, Chairman Pearce would limit the scope of the award in this case to the particular controversies that gave rise to the dispute.