UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
THIRTIETH REGION

LOCAL UNION NO. 18 OF SHEET METAL
WORKERS' INTERNATIONAL ASSOCIATION

Charged Party

and

TOTAL MECHANICAL

Case No. 30-CD-078120

Charging Party,

and

LOCAL UNION 601 STEAMFITTERS AND
REFRIGERATION/SERVICE FITTERS,

Intervenor.

POST-HEARING BRIEF OF CHARGED PARTY LOCAL UNION NO. 18 OF SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION

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I. INTRODUCTION

This Section 10(k) matter arises out of a jurisdictional dispute between Charged Party, Local Union No. 18 of the Sheet Metal International Association (Sheet Metal Workers), Charging Party, TOTAL Mechanical, and Intervenor, Local 601 Steamfitters and Refrigerator/Service Fitters (Steamfitters). The dispute relates to service technician work on TOTAL Mechanical jobs for commercial, industrial, and residential customers in a fourteen county area in Southern Wisconsin. The employer in this matter, TOTAL Mechanical, has expressed its preference among the two competing unions by engaging both in services throughout the time period in question via a dual assignment. It did so for eminently rationally-based reasons, including but not limited to both unions' technical proficiency and sophisticated apprenticeship program, cost efficiency and organizational control on its own behalf, and overall customer satisfaction.

As explained more fully below, application of the traditional criteria governing Section 10(k) matters such as this one clearly warrants an award of work to both unions on the basis of employer preference. For the reasons discussed below, the Sheet Metal Workers respectfully request the Board permit both unions to continue working jointly with TOTAL Mechanical under a dual assignment.

II. FACTUAL BACKGROUND

TOTAL Mechanical is a corporation and full mechanical contractor providing services in all manner of trades including heating, ventilating and air conditioning, steam piping, plumbing, fire protection, and electrical work for both commercial, industrial, and residential customers. (Tr. 116:24 - 117:1). TOTAL Mechanical is a member of the Milwaukee Chapter of the Sheet Metal and Air Conditioning Contractors' Association of Milwaukee (SMACCA) which entered into a collective bargaining agreement with the Sheet Metal Workers in 2011-2012. (Tr. 25:18-19; Jt. Exh. 2). TOTAL Mechanical is also a member of the Plumbing and Mechanical Contractors' Association of Milwaukee and Southeastern Wisconsin, Inc. (PMC) which entered into a collective bargaining

agreement with the Steamfitters covering 2011 and 2012. (Tr. 26:5-9; Jt. Exh. 3). TOTAL Mechanical is also a party representative to the National Service and Maintenance Agreement that is effective from August 1, 2010, to July 31, 2015, covering work with the Steamfitters. (Tr. 36:3-15; Jt. Exh. 1). The National Service and Maintenance Agreement contains a prohibition against strikes and lockouts whereas the local agreements have limited prohibitions of same. (Tr. 69:8-11)

Both SMACCA and PMC are members of the Plumbing Mechanical and Sheet Metal Contractors' Alliance (The Alliance) representing contractor employers in the construction industry who have given the Alliance bargaining authority for the purposes of negotiating labor agreements. (Tr. 27:9-10). The Alliance, through a jointly-appointed board of directors and various labor relations committees, was responsible for negotiating the local collective bargaining agreements at issue in this case, each of which contain jurisdictional claims related to the work performed by both unions. (Sheet Metal Workers, Exhibit 2, Article I, page 1 and 2; Steam Fitters, Exhibit 3, Addendum, Section 31.1, 31.3, page 41, 45). Neither of the local agreements contain exclusivity clauses related to the assignment of work for the specific geographic area at issue in this case and none of the agreements contain a voluntary adjustment mechanism for resolving the dispute. (Id.) Moreover, the statement of jurisdiction in the National Service and Maintenance Agreement has been essentially the same since 1998 and no party has sought to enforce that jurisdiction since that time. (Tr. 142:12-15).

TOTAL Mechanical was solely responsible for assigning service work to either members of the Sheet Metal Workers or the Steamfitters based on any number of factors at all times relevant to this case. (Tr. 41:24-25). Indeed, between January 1, 2011, through March 31, 2012, TOTAL Mechanical assigned work to nearly 40 Sheet Metal Workers employees totaling forty-nine thousand (49,000) hours of work while assigning nearly 20 Steamfitters employees to twenty-seven thousand

(27,000) hours of work. (Tr. 124-125).[1] Specific assignments are made through two dispatchers at TOTAL Mechanic's offices who make the determination of who goes where, typically by who is closest to the site where the call originated. (Tr. 131:4-8). Customers who request a particular technician or who maintain a relationship with certain technicians are accommodated since familiarity and expertise are highly valued commodities. (Tr. 132:1-6). Overall, however, both unions supply TOTAL Mechanical with well-trained technicians. (Tr. 132:14).

On or around February 21, 2012, all of that changed. The labor relations committee of the Alliance convened an informal dinner meeting between its members and officials from the Steamfitters to discuss issues facing the industry. (Tr. 53:9; 55:8). At that time, Kevin LaMere, the business manager for the Steamfitters, stated that all service work in the region should be under the exclusive jurisdiction of his union pursuant to the terms of the National Service and Maintenance Agreement. (Tr. 56:3-6). Joel Zielke, the financial secretary for the Steamfitters, confirmed the Steamfitter's position, stating to other members of the Alliance in attendance at the dinner that because of the no strike or lockout provision in the National Service and Maintenance Agreement, the contractors could assign the work exclusively to the Steamfitters without repercussions. (Tr. 56:8; 197:5-10).

It was clear that the Steamfitters were at that point claiming exclusive jurisdiction over the work and, in fact, even offered to organize the putative displaced journeymen from the Sheet Metal Workers into the Steamfitters in order to continue performing service work without interruption. (Tr. 56:20-25). Mr. LaMere's statements marked a stark departure from the established pattern in the industry, which until that point had proceeded smoothly via a dual assignment (Tr. 57:6-7), and all the contractors in attendance understood and believed that the Steamfitters were making an exclusive claim for the service work. (Tr 114:7-10).

[1] Since 2000 to the present neither union filed any grievances over service technician work assignments and neither claimed exclusive jurisdiction over same. (Tr. 51:7-14; 52:25).

Approximately ten days later, Peter Lenz, the Executive Director of PMC and a member of the Alliance, and Tim Braun, the President of SMACCA as well as the Executive Vice President of TOTAL Mechanical, both of whom were in attendance at the dinner meeting and heard Mr. LaMere's statement, approached Patrick Landgraf, the business manager for the Sheet Metal Workers, about the claims for exclusive jurisdiction made by the Steamfitters. (Tr. 58:1-5). Mr. Lenz explained to Mr. Landgraf that, in light of the Steamfitter's claims, some contractors in the Milwaukee area were now faced with the possibility of not using the Sheet Metal Workers to perform service work. (Tr. 58:13-19). Indeed, Mr. Braun believed that Mr. LaMere was basically saying that the contractors were in violation of the contract with the Steamfitters and that the contractors had to use strictly the Steamfitters for the work. (Tr. 141:4-6). Moreover, Mr. LaMere told Mr. Braun that he knew how disproportionate the allotment had been between the Sheet Metal Workers and the Steamfitters in terms of who received more work from TOTAL Mechanical. (Tr. 141-142).

Mr. Landgraf reacted negatively to the news regarding the Steamfitters' claims and told Mr. Lenz and Mr. Braun that "avenues" existed to handle the situation. (Tr. 180:22-23). Mr. Landgraf testified at the hearing that he would have resolved the dispute "with ever[y] way was necessary to make sure my guys didn't get laid off or become unemployed with TOTAL Mechanical." (Tr. 187:11-13).

Although the Steamfitters did not pursue immediate action to enforce its claims to exclusive jurisdiction over the work, both Peter Lentz and Timothy Braun understood that the Steamfitters would attempt to organize the displaced journeymen of the Sheet Metal Workers into their union which Mr. Lentz and Mr. Braun believed constituted a coercive action. (Tr. 76:19-77:1) Also, Mr. Braun understood that the Steamfitters had engaged in selective strikes of TOTAL Mechanical in 2004 and again in 2010. (Tr. 146:13-14). Mr. LaMere also testified that he believed that signatories

to both the National Maintenance and Service Agreement and the local collective bargaining agreement could not use the no-strike clause in the national agreement as protection from a labor dispute generated by the expiration of the local agreement. (Tr. 211:1-5).

In response, Mr. Landgraf stated that the Sheet Metal Workers would fight for the work and use any avenue at their disposal in doing so. (Tr. 59:1-4). Indeed, Mr. Landgraf continued to correspond both in writing and verbally with Mr. Lenz and Mr. Braun throughout the beginning and middle part of March 2012 regarding how to challenge the Steamfitter's exclusivity claims. (Tr. 182-183). He never indicated to Mr. Lentz or Mr. Braun that he would be submitting a letter indicating the union's willingness to strike if the work was assigned exclusively to the Steamfitters. (Tr. 190:14-21). In fact, he never indicated to anyone at the Alliance or anyone at TOTAL Mechanical that the union would not follow through and, in fact, picket or strike. (Tr. 190:22-25).

After some discussion between the parties as to what avenues to pursue in order to resolve the dispute--and some confusion over who could initiate the process--Mr. Lenz and Mr. Braun eventually sent Mr. Landgraf a letter on March 21, 2012, stating that the associations comprising the Alliance had "taken the position that those employers may have to assign service work solely to UA affiliated workers in the future." (Tr. 64:7-15; Charging Party, Exhibit 1). This letter reflected a growing consensus among the contractors that the Steamfitters were making a claim for exclusive jurisdiction over the work and that the Sheet Metal Workers would not be assigned work. (Tr. 91:1-14).

Mr. Landgraf wrote a reply letter dated March 26, 2012, to Peter Lentz in which the Sheet Metal Workers threatened to picket TOTAL Mechanical and other member contractors if the service work was given exclusively to the Steamfitters. (Charging Party, Exh. 2). Mr. Landgraf explained that the work in question was "covered by our labor agreement and historically performed by employees represented by Local 18." (*Id.*) He further advised that, "if the work is assigned

exclusively to employees represented by another union, we will picket the Association contractors and engaged in other activity to protect our jurisdiction." (*Id.*)

TOTAL Mechanical filed an unfair labor practices complaint on April 4, 2012, asserting that both the Sheet Metal Workers and Steamfitters were in violation of Section 8(b)(4)(D) by threatening, coercing, or restraining it and other contractors how it assigned work. (Board Exh. 1(a)). TOTAL Mechanical further stated that the company alone should maintain the discretion to dispatch whichever member of the union it saw fit in order to remain productive, keep its customers satisfied, control costs, and preserve management over its organization. (Tr. 136:6-11). Moreover, TOTAL Mechanical recognized that a switch to an exclusive provider would impose a financial burden upon it. (Tr. 141:21).

In view of all the evidence given at the hearing, the Sheet Metal Workers submit that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated and that both unions are entitled to an award of work not only for TOTAL Mechanical, but for all other projects in the contested jurisdiction as well.

ARGUMENT

III. REASONABLE CAUSE EXISTS TO BELIEVE THAT SECTION 8(b)(4)(D) HAS BEEN VIOLATED.

Section 8(b)(4)(D) prohibits strikes, picketing, boycotts, threats, and coercion where an object is "forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in other labor organizations or in another trade, craft, or class. 29 U.S.C. § 158(b)(4)(D). "[T]he Board is empowered and directed, by § 10(k), to hear and determine the dispute out of which such unfair labor practice shall have arisen." The words "'hear and determine the dispute' convey not only the idea of hearing but also the idea of deciding a controversy." *NLRB v. Radio & Television Broadcast Engineers Union (Columbia Broadcasting)*, 364 US 573, 577 (1961).

"Before the Board may proceed with determining a dispute pursuant to Section 10(k) of the Act, there must be reasonable cause to believe that Section 8(b)(4)(D) has been violated. This standard requires that there is reasonable cause to believe that: (1) there are competing claims for the disputed work among rival grounds of employees; (2) that a party has used proscribed means to enforce its claim to the work in dispute; and (3) the parties have no agreed-upon method for the voluntary adjustment of the dispute." *Southwest Regional Council of Carpenters (Standard Drywall Inc.),* 348 NLRB 1250, 1252-53 (2006). In resolving jurisdictional issues under the Act, the Board "is not charged with finding that a violation actually occurred, but only that there is reasonable cause to believe that Sec. 8(b)(4)(D) has been violated." *Teamster Local 282 (Mount Hope Trucking Co.)*, 316 NLRB 305, 307 n. 8 (1995). The record presented at the one day hearing in this case clearly establishes that there was such reasonable cause shown.

A. There Are Competing Claims For The Disputed Work Among The Sheet Metal Workers And The Steamfitters.

The Board has concluded that there can be no jurisdictional dispute within the meaning of Section 8(b)(4)(D) unless there are two competing claims to the particular work, stressing that the purpose of the section is to protect a neutral employer from a dispute between two groups claiming the same work. *Teamsters Local 839 (Shurtleff & Andrews Constructors)*, 249 NLRB 176, 104 LRRM 1103 (1980), (citations omitted). The claim for the work can take the form of picketing or threats to picket from either or both rival unions. *Guards (IGUA) Local 1 (Indies Terminal Co. dba Stevedoring Servs. of Am.)*, 279 NLRB 1294, 122 LRRM 1231 (1986).

The Steamfitters have made a claim for the exclusive jurisdiction over the work at issue in this case. (Tr. 56:3-6). Kevin LaMere, the business manager for the Steamfitters, stated at the informal dinner meeting with members of the Alliance on February 21, 2012, that all service work in the region should be under the exclusive jurisdiction of his union pursuant to the terms of the National Service and Maintenance Agreement. (Tr. 75:24-25). Joel Zielke, the financial secretary of

the Steamfitters, confirmed this position. (Tr. 56:8). It was clear that the Steamfitters were at that point claiming exclusive jurisdiction and, in fact, even offered to organize the displaced journeymen from the Sheet Metal Workers into the Steamfitters in order to continue performing service work. (Tr. 56:20-25). Mr. LaMere's statements marked a stark departure from the established pattern in the industry, which until that point had proceeded smoothly via a dual assignment (Tr. 57:6-7), and all the contractors in attendance understood and believed that the Steamfitters were making an exclusive claim for the service work. (Tr 114:7-10). Since then, the Steamfitters have not disclaimed the work. *Carpenters Local 210 (Component Assemblies System)*, 327 NLRB 1, 2 n. 2 (1998)(where rival union did not disclaim work and participated fully in hearing, Board found that it was claiming work).

After learning of the Steamfitter's claims for exclusive jurisdiction, Patrick Landgraf wrote a letter dated March 26, 2012, to Peter Lentz in which the Sheet Metal Workers threatened to picket TOTAL Mechanical and other member contractors if the service work was given exclusively to the Steamfitters. (Charging Party, Exh. 2). Mr. Landgraf explained that the work in question was "covered by our labor agreement and historically performed by employees represented by Local 18." He further advised that, "if the work is assigned exclusively to employees represented by another union, we will picket the Association contractors and engaged in other activity to protect our jurisdiction." (Id.).

Intervenor unsuccessfully argues that competing claims for work did not actually exist because the Sheet Metal Workers' threat to picket was not serious. *Iron Workers Local 1 (Goebel Forming, Inc.)*, 340 NLRB No. 136, 173 LRRM 1524 (2003) (sufficient that union claimed it "might have to" pull its employees off job site if work was not assigned to it). Whether a threat to strike or picket has an effect on the employer's work assignment is not relevant. *J.E. White Contracting Co.*, 290 NLRB 300, 129 LRRM 1095. The union whose members are already performing the disputed

work can be charged in violation of §8(b)(4)(D), which provides the Board with jurisdiction. *Lumber & Sawmill Workers Local 2592 (Louisiana Pacific Corp.)* 268 NLRB 126, 114 LRRM 1235 (1983). In this case, Mr. Landgraf advised the Alliance that "if the work is assigned exclusively to employees represented by another union, we will picket the Association contractors and engaged in other activity to protect our jurisdiction." (Id.) Mr. Landgraft testified at the hearing that he would have resolved the dispute "with ever[y] way was necessary to make sure my guys didn't get laid off or become unemployed with TOTAL Mechanical." (Tr. 187:11-13). He never indicated to Mr. Lentz or Mr. Braun that he would be submitting a letter indicating the union's willingness to strike if the work was assigned exclusively to the Steamfitters. (Tr. 190:14-21). In fact, he never indicated to anyone at the Alliance or anyone at TOTAL Mechanical that the union would not follow through and, in fact, picket or strike. (Tr. 190:22-25).

Similarly, Intervenor unsuccessfully argues that competing claims for work did not actually exist because the dispute was created by TOTAL Mechanical to invoke the jurisdiction of the Board. *Iron Workers Local 468 (AMPAT/Midwest Corp.)*, 266 NLRB 963, 113 LRRM 1077 (1983). Simply put, Intervenor produced no affirmative evidence of collusion for the Board to agree with its contention that the dispute in questions is a "sham" arising from cooperation between the employer and competing union. *Laborers (Eshbach Bros., LLP)*, 344 NLRB No. 4 (2005). Although members of the Alliance and Mr. Landgraf corresponded over what actions to take and who could take them to alleviate the Steamfitter's exclusivity claims, they never discussed what avenues the Sheet Metal Workers would take to confront the threat. Indeed, Mr. Landgraf reacted negatively to the news regarding the Steamfitters' claims and told Mr. Lenz and Mr. Braun that "avenues" existed to handle the situation. (Tr. 180:22-23). However, he never used the words "the NLRB", "the Government," or "the Federal Government" or "10(k)" when discussing which avenues to take and certainly intended to use all avenues at his disposal. (Tr. 180:18-25).

Given these factual admissions, the Board should find that there are competing claims for the disputed work among the Sheet Metal Workers and the Steamfitters.

B. The Unions Have Used Proscribed Means To Enforce Their Claims To The Work In Dispute.

Competing claims to disputed work exist and a jurisdictional dispute is present even if the union that threatened to strike was the union performing the disputed work. *Mailers Local 12 (Cleveland)(art Gravure Corp.)*, 223 NLRB 1402, 92 LRRM 1152 (1976).

At the hearing, all the witnesses testified that Kevin LaMere stated at the informal dinner meeting with members of the Alliance on February 21, 2012, that all service work in the region should be under the exclusive jurisdiction of his union pursuant to the terms of the National Service and Maintenance Agreement. (Tr. 56:3-6; 141:4-6; 194:16-20; 208:9-10). Although the Steamfitters did not pursue immediate action to enforce its claims to exclusive jurisdiction over the work, both Peter Lentz and Timothy Braun understood that the Steamfitters would attempt to organize the displaced journeymen of the Sheet Metal Workers which they believed constituted a coercive action. (Tr. 76:19-77:1). Also, Mr. Braun understood that the Steamfitters had engaged in selective strikes of TOTAL Mechanical in 2004 and again in 2010 and could do so again. (Tr. 146:13-14). Mr. LaMere also testified that he believed that signatories to both the National Maintenance and Service Agreement and the local collective bargaining agreement could not use the no-strike clause in the national agreement as protection from a labor dispute generated by the expiration of the local agreement. (Tr. 211:1-5).

Moreover, Mr. Landgraf wrote a letter dated March 26, 2012, to Peter Lentz in which the Sheet Metal Workers threatened to picket TOTAL Mechanical and other member contractors if the service work was given exclusively to the Steamfitters. (Charging Party, Exh. 2) Mr. Landgraf advised that, "if the work is assigned exclusively to employees represented by another union, we will picket the Association contractors and engaged in other activity to protect our jurisdiction." (Id).

Given these factual assertions, the Board should find that the Unions engaged in proscribed means to enforce their claims to the work in dispute.

C. There Is No Voluntary Adjustment For The Dispute In This Case.

If the Board has satisfactory evidence that the parties have agreed to a private method of adjusting the underlying work-assignment dispute, it will either refrain from issuing a notice of hearing or, if one has already been issued, quash it. *Seafarers (SIU) Atlantic, Gulf, Lakes & Inland Water Dis. (Delta S.S. Lines). 172 NLRB 694, 68 LRRM 1431 (1968).* In this case, all parties stipulated there "is no agreed on method for voluntary adjustment of the work."

As such, the Board should find that there is no voluntary adjustment for the dispute in this case and should endeavor to resolve the claim, based on common sense and experience, that both unions are entitled to an award of work not only for TOTAL Mechanical but for all other projects as well.

IV. COMMON SENSE AND EXPERIENCE DICTATE THAT BOTH UNIONS ARE ENTITLED TO AN AWARD OF WORK NOT ONLY FOR TOTAL MECHANICAL BUT FOR ALL OTHER PROJECTS IN THE CONTESTED JURISDICTION AS WELL.

A Section 10(k) hearing requires the Board to make an affirmative award of disputed work after considering various factors. *Columbia Broadcasting*, supra. 364 US at 573. 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. *Machinsts Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402 (1962). In particular, the Board considers

> the skills and work involved, certifications by the Board, company and industry practice, agreements between unions and between employers and unions, award of arbitrators, joint boards . . . the assignment made by the employer, and the efficient operation of the employer's business. (*Id.*)

As will follow, "common sense and experience," especially in light of TOTAL Mechanical's choice to continue using both unions and its reasons for making that choice, clearly warrant an award of work to both unions.

A. Certification And Collective Bargaining Agreement

TOTAL Mechanical has a collective bargaining agreement with both unions to perform the service technician work. TOTAL Mechanical is a member of the Milwaukee Chapter of the Sheet Metal and Air Conditioning Contractors' Association of Milwaukee (SMACCA) which entered into a collective bargaining agreement with the Sheet Metal Workers in 2011-2012. (Tr. 25:18-19; Jt. Exh. 2). TOTAL Mechanical is also a member of the Plumbing and Mechanical Contractors' Association of Milwaukee and Southeastern Wisconsin, Inc. (PMC) which entered into a collective bargaining agreement with the Steamfitters covering 2011 and 2012. (Tr. 26:5-9; Jt. Exh. 3). TOTAL Mechanical is also a party representative to the National Service and Maintenance Agreement that is effective from August 1, 2010, to July 31, 2015, covering work with the Steamfitters. (Tr. 36:3-15; Jt. Exh. 1). All three agreements relate to service technician work on TOTAL Mechanical jobs for commercial, industrial, and residential customers in a fourteen county area in Southern Wisconsin and prove conclusively that this work should remain apportioned between both unions.

B. Employer Preference and Past Practice

As noted in several instances above, TOTAL Mechanical has chosen to assign work in this case to both unions. (Tr. 146: 13-14). Timothy Braun, the Executive Vice President of TOTAL Mechanical, stated at the hearing that his company alone should maintain the discretion to dispatch whichever member of the union it saw fit in order to remain productive, keep its customers satisfied, control costs, and preserve control over its organization. (Tr. 136:6-11). He further stated the both unions' "training skills are virtually the same. We just prefer to have both 18 and 601." (Tr 146:13-14).). Indeed, between January 1, 2011, through March 31, 2012, TOTAL Mechanical assigned work to nearly 40 Sheet Metal Workers employees totaling forty-nine thousand (49,000) hours work while assigning nearly 20 Steamfitters employees to twenty-seven thousand (27,000) hours of work. (Tr. 124-125). Overall, however, both unions supply TOTAL Mechanical well-trained technicians.

(Tr. 132:14). As such, this factor weighs in favor of awarding the work jointly to both unions.

C. Area And Industry Practice.

The Sheet Metal Workers have performed work on various projects through the State of Wisconsin for many, many years. Consistent with this scope of work are the far-reaching provisions of the collective bargaining agreements maintain between the Sheet Metal Workers and their signatories. The jurisdiction provision and the work at issue in this case reads as follows:

> **Section 1.** This agreement covers the rates of pay and conditions of employment of all employees of the employer engaged in but not limited to the (a) *manufacture, fabrication, assembling, handling, erection, installation, dismantling, conditioning, adjustment, alteration, repairing and servicing* of all ferrous or nonferrous metal work and all other materials used in lieu thereof and of all air-veyor systems and air handling systems regardless of material used including the setting of all equipment and all reinforcements in connection therewith; (b) all lagging over insulation and all duct lining; (c) testing and balancing of all air handling equipment and duct work; (d) the preparation of all shop and field sketches used in fabrication and erection including those taken from original architectural and engineering drawings or sketches, regardless of whether they are made by hand, by CAD, or other computer programs, (this does not apply to systems design drawings or sketches) and (e) all other work included in the jurisdictional claims of Sheet Metal Workers' International Association.
>
> **Section 2**. (a) It is recognized that employees, covered by this Labor Agreement and represented by the Union, have historically performed the work described in subsection (b) of this Section while employed by Employers covered by, and subject to, this Agreement; and the Employer hereby expressly assigns the performance of such work to the employees covered by this Agreement.
>
> (b) The work, referred to in subsection (a) of this section shall include but not be limited to the following: the operation of welding machines, fork lifts, scissors lifts, snorkel lifts, dewatering pumps, generators, air compressors, self-propelled elevating work platforms, and boom supported elevating work platforms.

(emphasis added)(Tr. 34:7-20; Exhibit 2). Similarly, the Steamfitters labor agreement also contained a broad description of the work involved and the location in which to perform it:

> Section 31.1. This Agreement covers the rate of pay, hours and working conditions of all Employees engaged in the installation and service of all refrigeration, HV AC and

mechanical systems and component parts related to this Industry, including but not limited to fabrication, assembling, erection, installation, testing, balancing, dismantling, repairing, reconditioning, adjusting, altering, servicing and handling, unloading, distributing, rigging and hoisting of all materials and equipment by any methods, including all hangers and supports of every description, erection of walk-in coolers and any other work included in the trade jurisdiction of the International Union, as well as all work set forth in Appendix A, which is incorporated herein and made a part of this Agreement.

Section 31.2. Mechanical service and maintenance work, either by contract or emergency call basis, includes the work relating to evacuation, charging, startup, inspection, operating, maintenance and service calls necessary to keep a mechanical system of refrigeration, air conditioning, heating and/or ventilation or any other newly installed, remodeled, revamped or redesigned mechanical system in operational order. Mechanical service and maintenance shall include, but not be limited to, all the maintaining, cleaning, adjusting, repairing, overhauling, starting, balancing and loop checking of any system or component part thereof, including low voltage Wiring, fiber optics, and any other instrument of controls, regardless of size or location, including all other service and maintenance. work assigned to the Employer by the customer. Non-bargaining unit employees of the Employer, or the Employer's vendors, may offer advice of a technical nature related to diagnosing problems or for the purpose of instruction and training.

Given the history between the unions of claiming such work as well as the breadth of the provisions in their collective bargaining agreements covering this work, this factor favors an award of work to both unions.

D. Relative Skills

Both unions provide highly-skilled technicians through its apprenticeship programs. Both programs are designed to last approximately five (5) years and both include on-the-job training. (Tr. 45:4-5). Apprentices in the Steamfitter's program must complete eight-thousand hours of work whereas apprentices in the Sheet Metal Worker's must complete nine-thousand hours or work. (Id.) There is a considerable amount of overlap between the two training programs with the respective unions. (Tr. 48:2-7). This overlap is seen as a positive result by the Alliance because both unions are forced to adapt and improve its curriculum to meet the changing needs of the industry and technology. (Tr. 48:9-14).

Since the inception of the unions' training programs, contractors have recognized that there is a benefit to having a diverse workforce with workers emerging from more than one training

program. (Tr. 48:24 – 49:1-8). The diversity in the workforce—the cross-pollination of knowledge—and the friendly competition between the unions not only improves the quality of service but both programs have developed highly trained technicians in the industry. (Id.) Indeed, many of the contractors in the Alliance institute a business model that embraces using technicians from both training programs. (Tr. 49:22-23). It's been a successful model for many contractors, some of whom remain extremely vocal exponents of the arrangement. (Tr. 49:22-25). Moreover, Specific assignments are made through two dispatchers at TOTAL Mechanic's offices who make the determination of who goes where, typically by who is closest to the site where the call originated. (Tr. 131:4-8). Customers who request a particular technician or who maintain a relationship with certain technicians are accommodated since familiarity and expertise are highly valued. (Tr. 132:1-6). Overall, however, both unions supply TOTAL Mechanical with well-trained technicians. (Tr. 132:14). In view of this background, this factor should also weigh in favor of both unions being awarded a dual assignment.

E. Economy And Efficiency Of Operations.

Employer preference in tandem with cost and operational considerations plays an important role in apportioning disputed work between competing unions. *Southwest Regional Council of Carpenters (Standard Drywall Inc.)*, 348 NLRB 1250, 1255 (2006) (assigning work to union because it provided "reduced overhead costs, reduced employee turnover, and increased employee satisfaction.") In this case, Timothy Braun testified that if work were apportioned solely to the Steamfitters that the Steamfitters would be unable to supply the necessary number of technicians needed to meet its customers' demands. (Tr. 145:20-24). Moreover, customers who requested specific technicians to perform service work would most likely find another contractor to work with who could supply consistent technicians. (Tr. 146:1-3). Indeed, Mr. Braun stated that "it would be a huge financial hardship for the company" if only one union retained all of the service technician work. (Tr. 146:3).

As such, this factor should warrant an award of work to both unions over the disputed work.

V. CONCLUSION

Application of the traditional criteria governing Section 10(k) matters such as this one clearly warrants an award of work to both unions on the basis of employer preference. For the reasons discussed herein, the Sheet Metal Workers respectfully request the Board permit both unions to continue working jointly with TOTAL Mechanical under a dual assignment.

Date: May 14, 2012

Respectfully Submitted,

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