

UNITED STATES OF AMERICA  
THE NATIONAL LABOR RELATIONS BOARD  
REGION 8

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

Case No. 08-CD-103113

and

BALLAST CONSTRUCTION, INC.  
*Charging Party*

and

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

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LABORERS' INTERNATIONAL UNION  
OF NORTH AMERICA, LOCAL 860  
*Charged Party – Labor Organization*

Case No. 08-CD-103657

and

MR. EXCAVATOR  
*Charging Party - Employer*

and

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

LABORERS' INTERNATIONAL UNION  
OF NORTH AMERICA, LOCAL 310  
*Charged Party – Labor Organization*

Case No. 08-CD-103660

and

MR. EXCAVATOR  
*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'S POST-  
HEARING BRIEF**

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Respectfully Submitted,

*Timothy Fadel / SOG*

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## I. INTRODUCTION

This matter does not concern rival unions, each making a claim to an innocent employer for the assignment of work. Rather, the genesis of the present matter can be traced to an agreement between the Laborers' International Union of North America, Local 860 ("LIUNA 860"), Laborers' International Union of North America, Local 310 ("LIUNA 310") and a select few construction contractors to manipulate the provisions of the National Labor Relations Act ("Act" or "NLRA") in order to utilize Sec. 10(k) proceedings as a tool to bypass the duly negotiated work preservation clauses contained within each of the International Union of Operating Engineer's ("Local 18" or "Union") collective bargaining agreements ("CBAs"). As such, there is no reasonable cause to believe that Sec. 8(b)(4)(D) of the Act has been violated. Indeed, as it pertains to Mr. Excavator, Local 18 is merely asserting its right to collect damages under the terms of its agreement which specifies a financial penalty in the event equipment identified in Local 18's CBA is assigned to someone other than a member of Local 18. Pursuant to unquestionably established principles of administrative law, a union's enforcement of a work preservation clause is not within the aegis of the Board's jurisdiction, as it involves neither an innocent employer caught between two unions competing for work, nor competing demands for work. As such, there is no jurisdictional dispute, and Mr. Excavator's ULP charge is not amenable to resolution under Sec. 10(k) of the Act.

As to Ballast, Local 18 has simply sought vindication of its contractual rights by enforcing a lawful subcontracting clause contained within a collective bargaining agreement ("CBA"), to which McNally-Kiewit ECT JV ("McNally-Kiewit"), an entity not a party to the instant matter, is a signatory. The Board has long held that peaceful enforcement of such subcontracting clauses divests it of jurisdiction to engage in Sec. 10(k) proceedings. Ballast's

ULP charge acknowledges as much, as it made *no claims* against Local 18 alleging any demands by the Union for the work identified in the ULP charge or any coercive conduct by Local 18 violative of Sec. 8(b)(4)(D).

Moreover, Region 8's August 16 Notice of Hearing should be quashed because it fails to abide by the elementary requirements of due process, as elucidated by Board and Federal law. That is, Local 18 was not afforded a fair opportunity to present its argument because Region 8 never informed Local 18 as to the description of the operative jobsites for the instant matter until the September 4 hearing was called to order. The belated identification of the jobsites at issue effectively denied Local 18 the opportunity to discern the nature of the charges and prepare its case for hearing. Indeed, waiting to identify the jobsites at issue until the hearing convened afforded Local 18 no more time to prepare than if the jobsites had never been identified at all.

Nonetheless, in the event the Board deems it fit to make a determination under Sec. 10(k) of the Act, it should award the disputed work to Local 18 because it clearly prevails on the factors of collective bargaining agreements, area and industry practice, economy and efficiency of operations, employer preference, and relative skills and training. And even if Local 18 is not awarded the work at issue, a contrary award should be limited to the projects at issue, as the jobsites have not been a continuous source of controversy in the relevant geographic area, related disputes are unlikely to reoccur, and Local 18 has not shown a proclivity to use proscribed means in an attempt to secure similar disputed work.

## **II. PARTIES**

### **A. The International Union of Operating Engineers, Local 18**

For over seventy years, Local 18 has represented the interests of construction and heavy equipment operators ("operating engineers" or "Local 18 members") working in the State of

Ohio. Currently, Local 18 represents approximately 15,000 operating engineers working in 85 of Ohio's 88 counties along with four counties in Northern Kentucky. (Jt. Exh. 1A, Art. I; Jt. Exh. 1B, Art. 1; Jt. Exh. 1C, Art. I.) Headquartered in Cleveland, Ohio, Local 18 operates six district offices across the state. (Id.) For decades, the Union has negotiated and administered several contracts covering both the building and heavy highway construction industry. (Jt. Exh. 1(C), 1(B).) These contracts have consistently identified skid steers as heavy highway and utility industry equipment that is exclusively within Local 18's craft jurisdiction. (E.g., Jt. Exh. 1C(1), ¶ 10, Exh. "A.") In order to preserve and protect the work performed by its members, each of and every collective bargaining agreement negotiated by Local 18 has historically included a work preservation clause mandating a specific economic penalty in the event a signatory employer elects to assign a piece of equipment identified in the agreement to someone other than an operating engineer.

B. Ohio Contractors Association

The Ohio Contractors Association ("OCA") is a multi-employer bargaining association, representing heavy highway and utility industry companies operating in Ohio. The scope of the OCA's representational activities includes negotiating collective bargaining agreements on behalf of those heavy highway and utility industry employers that have specifically assigned their collective bargaining rights to the OCA. For decades, Local 18 has negotiated a series of contracts with the OCA governing the terms and conditions of employment for Local 18 members performing building construction work within a specific geographic location and industrial range. For decades, these successive OCA Agreements have specifically identified skid steers as construction equipment that is exclusively within Local 18's craft jurisdiction. (E.g., Jt. Exh. 1B(1), ¶ 10, Jt. Exh. 1C(1), ¶ 10, Exh. "A.") These agreements have also

historically contained a work preservation clause mandating a specific economic penalty in the event a signatory employer elects to assign a piece of equipment identified in the agreement to someone other than an operating engineer.

C. Construction Employers Association

The Construction Employers Association (“CEA”) is a multi-employer bargaining association, representing building construction companies operating in and around Cleveland, Ohio. The scope of the CEA’s representational activities includes negotiating collective bargaining agreements on behalf of those construction employers that have specifically assigned their collective bargaining rights to the CEA. For decades, Local 18 has negotiated a series of contracts with the CEA governing the terms and conditions of employment for Local 18 members performing building construction work within a specific geographic location and industrial range in Northeast Ohio.<sup>1</sup> These successive CEA Agreements have specifically identified skid steers as construction equipment that is exclusively within Local 18’s craft jurisdiction. (E.g., Jt. Exh. 1B(1), ¶ 10.) Similar to its agreement with the OCA, Local 18’s agreement with the CEA also contains a work preservation clause mandating a specific economic penalty in the event a signatory employer elects to assign a piece of equipment identified in the agreement to someone other than an operating engineer.

D. The Laborers’ International Union of North America, Local 310 and the Laborers’ International Union of North America, Local 860

In addition to negotiating building construction and heavy highway agreements with Local 18, both the CEA and the OCA also negotiate separate agreements with various other labor organizations including local affiliates of the Laborers’ International Union of North America (“LIUNA”). For building construction work performed in and around Cleveland, Ohio, the CEA

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<sup>1</sup> Specifically, the geographic jurisdiction covered by the CEA includes the following Ohio counties: Ashtabula; Cuyahoga; Erie; Geauga, Huron; Lake; Lorain; and Medina.

negotiates with the Laborers' International Union of North America, Local 310 ("LIUNA 310"). (Jt. Exhs. 2, 4). Meanwhile, for heavy highway work performed in and around Cleveland, Ohio, the OCA negotiates with the Laborers' International Union of North America, Local 860 ("LIUNA 860"). (Jt. Exhs. 3, 5.) Unlike Local 18's agreement with the OCA and the CEA, the contracts negotiated by LIUNA 310 and LIUNA 860 fail to include any specific provision requiring or imposing any economic sanction in the event work or equipment contractually stipulated as belonging to a LIUNA affiliate is transferred to another non-LIUNA employee. (Jt. Exhs. 2-3.)

E. McNally-Kiewit ECT JV

McNally-Kiewit ECT JV ("McNally-Kiewit") is a joint venture between McNally International, Inc. and Kiewit Corporation, both heavy construction companies. McNally-Kiewit was created for the specific purpose of building Euclid Creek Tunnel Project; a large tunnel being constructed for the Northeast Ohio Regional Sewer District in Cleveland to accommodate sewer overflows. (Tr. 297-298.) McNally-Kiewit is signatory to Local 18's current OCA Agreement. (Tr. 488-489; L18 Exh. 17.) Pursuant to Paragraph 6 of the OCA Agreement, on February 7, 2011, Local 18 and McNally-Kiewit conducted a pre-job meeting in order to discuss the scope of the Euclid Creek Tunnel Project and McNally-Kiewit's labor needs for the project. (Id.) McNally-Kiewit clearly indicated that that the jobsite would require skid steers and, in accordance with the terms of the OCA agreement, agreed to assign that equipment to Local 18 members. (Tr. 491-493; L18 Exh. 7.)

F. Ballast Construction, Inc.

Ballast Construction, Inc. ("Ballast") is a subcontractor that installs fences for commercial construction projects, such as airports, sports stadiums, highways, roads, and water

facilities. (Tr. 289.) At least as recently as 2010, Ballast has agreed to be bound by the terms of the current CBA negotiated by and between LIUNA 860 and the OCA. (Jt. Exh. 3, 6.) Ballast was subcontracted by McNally-Kiewit to install chain link fence around five shafts and a barrier wall that are part of the Euclid Creek Tunnel Project in June 2011. (Tr. 298.)

G. Mr. Excavator

Mr. Excavator is a family-owned construction company that performs excavation, grading, and underground utility installation for commercial industrial sites throughout northeast Ohio. (Tr. 43.) For over a decade, Mr. Excavator has agreed to be bound by the terms and provisions contained within the OCA and CEA Agreements. (Tr. 46; Jt. Exh. 1(C); L18 Exh. 1.) Mr. Excavator's Executive Vice President, Timothy Flesher, also testified that Mr. Excavator has agreed to be bound by the terms of the current CBA negotiated by and between LIUNA 860 and the OCA, as well as the current CBA negotiated by LIUNA 310 and the OCA. (Tr. 43-45.)

### **III. COLLECTIVE BARGAINING AGREEMENTS**

A. Local 18's Subcontracting Clause in the OCA and CEA Agreements

Under Paragraph 98 of the OCA Agreement and Paragraph 104 of the CEA Agreement, "all subcontractors shall be subject to the terms and provisions of this Agreement. . ." (Jt. Exh. 1(C)(1), Jt. Exh. 1(B)(1).) As such, Paragraph 98 protects the wage scales and employee benefits provided to Local 18's membership by mandating that signatory employers may only subcontract work traditionally performed by Local 18 members to those subcontractors that observe equivalent wages, hours, and other terms and conditions of employment for employees performing bargaining work. (Tr. 543.) A non-signatory subcontractor need only to comply with the CBA in effect between the Union and the signatory contractor (i.e., the OCA or CEA Agreements), by honoring the wage and other terms and conditions contained within the

applicable agreement and by utilizing Local 18's exclusive hiring hall. (Tr. 543-548.) Specifically, a subcontractor may have its employees fill out a registration card (L18 Exh. 11), which contains information including, *inter alia*, the equipment that individual can operate. (Id.) To participate in the hiring hall and referral procedure, the employees need not become union members. (Tr. 544.) Once the referral process has been completed, the subcontractor may then make a specific assignment for its employees out of the Union hiring hall. (Tr. 602-603.)

Local 18 has routinely settled prior subcontracting grievances under the OCA Agreement without resort to Board involvement.(L18 Exhs. 13-15; Tr. 561-563, 566-569, 571-573.)<sup>2</sup> Two of these prior grievances involved contractors utilizing Ballast employees. In January 2012, Local 18 filed a grievance against Kokosing Construction Company, alleging that it was in breach of Paragraph 98 of the OCA Agreement by using non-signatory Ballast employees who were not utilizing Local 18's referral hall nor were operating engineers on equipment – namely, skid steers – within Local 18's craft jurisdiction on the I-71/I-670 interchange jobsite in Franklin County, Ohio. (L18 Exh. 14; Tr. 566-569.) As a result, Kokosing agreed that it would assign its own operating engineers to the work in question for the duration of Ballast's work on the project at issue. (Id.)

In April 2012, Local 18 filed a grievance against Ric-Man Construction, alleging that it was in breach of Paragraph 98 of the OCA Agreement by subcontracting bargaining unit work to Ballast. (L18 Exh. 15; Tr. 571-573.) To settle the matter, Ric-Man agreed to pay damages to Local 18. (Id.)

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<sup>2</sup> In these grievances, non-signatory subcontractors were not utilizing operating engineers on equipment within Local 18's craft jurisdiction. In none of these grievances, did Local 18 ever make a demand for work in any way, shape, or form to the subcontractor or the contractor, engage with the subcontractor regarding the same, or seek reassignment of the work in its grievances.

Local 18's enforcement of Paragraph 98 has not been limited to the subcontracting of work to Ballast. In March 2012, Local 18 filed a grievance against Kokosing, alleging that it was in breach of Paragraph 98 of the OCA Agreement by using non-signatory employees from ACS Fence Company who were not utilizing Local 18's referral hall nor were operating engineers on equipment – namely, skid steers – within Local 18's craft jurisdiction on the I-70 jobsite in Morrow County, Ohio. (L18 Exh. 13; Tr. 561-563.) As a result, Kokosing agreed to pay damages. (Id.)

Local 18 has also regularly settled prior subcontracting grievances under the CEA Agreement without resort to Board involvement. For example, Local 18 filed a grievance against Independence Excavating, pursuant to the CEA Agreement's subcontracting clause (Paragraph 104) alleging that it was in breach of the CEA Agreement by using non-signatory employees from subcontractor Down To Earth who were not utilizing Local 18's referral hall nor were operating engineers on equipment within Local 18's craft jurisdiction on the Medical Mart jobsite in Cleveland, Ohio. (L18 Exh. 12; Tr. 558-560.) As a result, Independence Excavating agreed to pay contractually-mandated damages. (Id.)

B. Local 18's Work Preservation Clause in the OCA and CEA Agreements

In order to preserve the scope and jurisdiction of all work performed by its membership – including the operation of skid steers – and avoid jurisdictional disputes with other unions, Local 18 has routinely and consistently negotiated and consistently enforced work preservation clauses into its OCA and CEA Agreements. (Jt. Exh. 1(C)(1), Jt. Exh. 1(B)(1).) Each of these work preservation clauses mandates an economic sanction in the event that a signatory employer elects to assign equipment that is within Local 18's contractually mandated craft jurisdiction (i.e., skid steers) to someone other than an operating engineer. (Tr. 540; Jt. Exh. 1(C)(1), ¶¶ 4, 13, Jt. Exh.

1(B)(1), ¶ 21.) These clauses mandate an economic sanction as the sole remedy and expressly disclaim an assignment of work. (Id.) In this manner, while Local 18's work preservation clauses explicitly allow an employer to assign work as it sees fit, it also creates an economic disincentive for a signatory employer disregard Local 18's contractually mandated craft jurisdiction. (Tr. 541-542.) In processing a work preservation grievance, Local 18 utilizes a procedure whereby an offending contractor is provided a written statement regarding the nature of the alleged breach. This written statement, colloquially referred to as a "Miranda Card", specifically advises the contractor that Local 18 is not seeking any assignment reassignment of work but is instead seeking only damages as mandated by the applicable agreement. (Tr. 511, 523; L18 Exh. 10.)

Mr. Excavator is signatory to and bound by the terms and provisions of the current OCA and CEA Agreements. Mr. Excavator is also keenly aware that Local 18's work preservation clauses merely create an economic disincentive to ignore its contractual obligations regarding the Union's craft jurisdiction and do not request nor demand a reassignment of work. (Tr. 146-147; L18 Exh. 1, p. 2.) For example, on March 12, 2013, Local 18 filed a grievance with Mr. Excavator alleging that it breached the terms of its agreement with Local 18 by assigning the operation of a skid steer to someone other than an operating engineer at the Zane State College Science Center project in Zanesville, Ohio ("Zanesville"). (Tr. 160; Emp. Exh. 19.) Thereafter, a written grievance asserting a breach of the work preservation clause, pursuant to the OCA Agreement (Jt. Exh. 1(C)(1), ¶¶ 4, 13) was filed with Mr. Excavator. (Id.) Local 18 sought, in accordance with the terms of its duly negotiated work preservation clause, damages from Mr. Excavator in the form of lost pay and fringe benefits. On March 21, 2013, Mr. Excavator and Local 18 reached a settlement of this grievance. (Tr. 168; Emp. Exh. 19.) Pursuant to this

settlement, Mr. Excavator paid damages to Local 18 in the form of lost pay and fringe benefits and agreed that in the future all skid steer work would be assigned to operating engineers. (Id.)

On August 30, 2012, Local 18 and Mr. Excavator engaged in the same dance when the latter breached the terms of the current CEA Agreement (Jt. Exh. 1(B)(1)) by assigning the operation of a skid steer to someone other than an operating engineer at the Orchard School of Science project, in Cleveland, Ohio (“Orchard”). (L18 Exh. 2.) After the breach was observed, a written grievance asserting a breach of the work preservation clause, pursuant to the CEA Agreement (Jt. Exh. 1(B)(1), ¶ 21), was filed with Mr. Excavator. (L18 Exh. 2.) In this grievance, Local 18 sought, in accordance with the terms of this duly negotiated work preservation clause, damages from Mr. Excavator in the form of lost pay and fringe benefits. Thereafter, Mr. Excavator agreed to this resolution. (Tr. 155-157.)

Local 18’s work preservation activities are not novel in their application nor are they limited to or solely focused on Mr. Excavator. Over the course of decades, Local 18 has consistently enforced its work preservation clauses as it relates to numerous types of construction equipment. (Tr. 497-499; L18 Exh. 8.)<sup>3</sup> More recently, between September 2012 and May 2013, Local 18 has processed to resolution numerous work preservation grievances involving a multitude of other contractor’s signatories to the OCA and CEA Agreements who were utilizing individuals other than operating engineers on skid steers for jobsites throughout the Cleveland area. (Tr. 513-525; L18 Exh. 9.) In each of these instances, these grievances were resolved after the employer agreed to pay an economic sanction under the terms of the applicable agreement. (Id.)

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<sup>3</sup> At the September 4 hearing, the Hearing Officer placed Local 18’s Exhibit 8 in the rejected exhibits file. However, it is still Local 18’s contention that Exhibit 8 is relevant and important evidence to support the fact that Local 18 has consistently enforced its work preservation clauses as it relates to numerous types of construction equipment.

#### IV. STATEMENT OF FACTS

##### A. Ballast's ULP Charge

On January 28, 2013, Local 18's representatives attempted to investigate and document a suspected breach of Paragraph 98 of the OCA Agreement by interviewing and photographing a Ballast employee that was performing bargaining unit work at the Euclid Creek Tunnel Project, on behalf of McNally-Kiewit. (L18 Exh. 18.) To the extent that Local 18 representatives interacted with the Ballast employee at all, it was *only* to determine the nature of the work being performed. Specifically, Local 18 representatives discovered that a Ballast employee manning the skid steer was not an operating engineer, was not referred to employment through Local 18's exclusive hiring hall, and was not enjoying the terms and conditions of employment contained within Local 18's agreement with McNally-Kiewit. (Tr. 585.) As testified by Ann Nerone, Ballast's President, Local 18 did not investigate whether Ballast was a signatory to any CBAs nor did they determine what, if any union, was representing Ballast employees, as it was irrelevant for the purposes of the subcontracting grievance. (Tr. 372-373.) Rather, as it had routinely done with prior subcontracting grievances, Local 18 was simply interested in determining whether McNally-Kiewit's subcontractor, Ballast, was observing equivalent union wages, hours, and other terms and conditions of employment for employees that were performing that bargaining unit work including the operation of skid steers for drilling holes, clearing dirt, and cleaning work areas for up to 50 percent of the work day. (Tr. 341-342.)

Essentially, *at no time* did any Local 18 representative otherwise engage in any conduct toward any Ballast supervisor or employee that could be construed as a demand for work. Immediately after observing the violation, a Local 18 representative orally advised a McNally-Kiewit official that the company was in violation of Paragraph 98 by virtue of having

subcontracted work traditionally performed by Local 18 members to a subcontractor that was failing to observe equivalent union wages, hours, and other terms and conditions of employment for employees that were performing that bargaining unit work. (L18 Exh. 18.) Specifically, Local 18 advised McNally-Kiewit that it subcontracted work involving the operation of skid steers – Local 18 bargaining unit work – to Ballast, and that Ballast’s failure to observe equivalent union wages, hours, and other terms and conditions of employment for those employees operating said skid steers constituted a breach *by McNally-Kiewit* of the OCA Agreement. (L18 Exh. 18.)

Ballast unexpectedly filed a ULP Charge on April 18, 2013 against LIUNA 860, alleging that LIUNA 860 violated Sec. 8(b)(4)(D) of the Act by threatening to strike on or about April 17, 2013 if Ballast assigned skid loader work at the Euclid Creek project to Local 18 members. Notably, the charge contained *no allegations* against Local 18 claiming that it either engaged in coercive conduct pursuant to Sec. 8(b)(4)(D) or otherwise made any claims to the work at the Euclid Creek project. Moreover, LIUNA 860’s Business Manager, Anthony Liberatore, testified that he could not recall *any* prior instances where the union had engaged in strikes or pickets. (Tr. 426-427.)

B. Mr. Excavator’s ULP Charges

On April 25, 2013, Mr. Excavator filed two ULP charges against LIUNA 860 and LIUNA 310, respectively. Until the actual date of the hearing, September 4, 2013, Local 18 had no knowledge or information as to the context or origin of the dispute underlying these charges, which state that both LIUNA 860 and LIUNA 310 “threatened to strike if the below named employer [Mr. Excavator] assigned skid strerer [sic] work to the International Union of Operating Engineers Local 18.” Additionally, these charges failed to contain any description of the work in dispute, in terms of actual jobsites. It was only until Region 8 had commenced its

investigation of these charges and Local 18 had proffered a position statement to the Region, pursuant to its mandate, did Mr. Excavator file amended ULP Charges. However, these charges' amendments did essentially nothing to clarify the alleged work in dispute, as they simply listed that all of Mr. Excavator's sites at which skid steers were being operated were the jobsites in dispute. However, most importantly, these charges, even as amended, contained *no allegations* against Local 18 claiming that it either engaged in coercive conduct pursuant to Sec. 8(b)(4)(D) or otherwise made any claims to the work at any of Mr. Excavator's jobsites.

At the hearing it was revealed by Mr. Excavator's counsel that the jobsites they were willing to identify "in issue" were the Baldwin Road Project in Kirtland Hills, Ohio ("Baldwin Road"); the Metro Health Project in Middleburg Heights, Ohio ("Metro Health"); and the Cleveland Hopkins Airport Project in Cleveland, Ohio. ("Cleveland Hopkins.") (Tr. 23-24.) As to these three sites, Local 18's actions were limited to simply filing grievances that were virtual clones of the March 2013 and September 2012 grievances Local 18 previously filed against Mr. Excavator. That is, Local 18 filed grievances with Mr. Excavator on August 8, 2013, October 22, 2012, and October 31, 2012 alleging that Mr. Excavator breached the terms of the OCA Agreement by assigning the operation of a skid steer to someone other than an operating engineer at the Cleveland Hopkins, Baldwin Road, and Metro Health projects, respectively. (Emp. Exhs. 14, 15, 28.) These written grievances asserted a breach of the work preservation clause, pursuant to Paragraphs 4 and 13 of the OCA Agreement. Thus, Local 18 sought, in accordance with the terms of this duly negotiated work preservation clause, damages from Mr. Excavator in the form of lost pay and fringe benefits. Mr. Excavator understood that this was the basis of the grievances. (Tr. 187.) Moreover, when Local 18 representatives first observed the contractual violations, they provided a "Miranda Card" to a Mr. Excavator supervisor which

explicitly disclaimed a request for reassignment and instead requested damages as mandated by the parties' agreement. (Tr. 511; L18 Exh. 10; Emp. Exhs. 14, 15, 28.) As testified to by Local 18's President, Richard Dalton, the "Miranda" card makes it "crystal clear to the contractor that [Local 18 is] not seeking a reassignment of the work." (Tr. 523.)

It was further elucidated at the hearing that Mr. Excavator has historically utilized operating engineers to operate skid steers under the OCA Agreement. Indeed, there were multiple individuals that Mr. Excavator employed at jobsites – including the Baldwin Road project – throughout 2012 that were operating engineers and who were assigned the operation of skid steers at those jobsites. (L18 Exh. 6; Tr. 54-55.)

#### **V. STATEMENT OF THE CASE**

On June 28, 2013, the Region formally issued a Notice of Hearing in Case No. 08-CD-103113 (the "Ballast Case"). Pursuant to that formal notice, a hearing under Sec. 10(k) of the Act in the Ballast Case was scheduled to open on July 15, 2013. That notice further indicated that during the hearing, the parties would have the right to appear and present testimony regarding "work performed utilizing a skid steer/skid loader by the Employer on its fence, gate and barrier wall installation project performed on the Euclid Creek Tunnel Project in Cleveland, Ohio."

On Friday, June 28, 2013, the Region also formally issued a Notice of Hearing in Case Nos. 08-CD-103657 and 08-CD-103660 (collectively the "Mr. Excavator Case"). Pursuant to that formal notice, a hearing under Section 10(k) in the Mr. Excavator Case was scheduled to open on July 11, 2013. That notice further indicated that during the hearing in the Mr. Excavator Case, the parties would have the right to appear and present testimony regarding "[t]he operation of skid steer/skid loader work at all of the Employers' current jobsites."

Shortly after the above notices were issued, counsel for Ballast and Mr. Excavator, counsel for LIUNA 860 and LIUNA 310, and counsel for Local 18 were all contacted by the Region regarding the parties' positions on the consolidation of the hearings in Ballast Case and the Mr. Excavator Case. At that time, only counsel for LIUNA 310 and LIUNA 860 agreed to the consolidation. Counsel for Local 18 and counsel for Ballast and Mr. Excavator opposed any consolidation of the Cases. As a result, the Region informed the parties that each matter would remain scheduled for separate hearings.

At the same time as the consolidation issue was being resolved, the parties, acting upon the recommendation of the Region, conferred with each other regarding the joint scheduling of hearings for each case. As a result of these discussions, the parties submitted a Joint Request for Postponement of the Opening Date of Hearing in the Mr. Excavator cases and a Joint Request for Postponement of Opening Date of Hearing in the Ballast case. Pursuant to these Joint Requests, the parties jointly requested that the hearing in the Ballast matter be scheduled for August 19, 2013, and jointly requested that the hearing in the Mr. Excavator matter be scheduled for September 4, 2013. On July 10, 2013 the Region issued new notices complying with the parties' joint request. As a result, Local 18 began preparing for two separate hearings scheduled for two separate dates. These preparations including scheduling the appearance of witnesses with relevant testimony in each separate case, issuing subpoenas *duces tecum* and *ad testificandum*, and the scheduling of counsel's calendar to accommodate both the time necessary to prepare for, and appear at, each separate hearing.

On August 7, 2013 – nearly one month after the parties and the Region initially agreed to schedule separate hearings on separate dates and less than two weeks before the Ballast case was set to open – counsel for LIUNA 860 and LIUNA 310 filed a Motion to Consolidate the Mr.

Excavator cases and the Ballast case. This Motion asserted that consolidation would not only effectuate the purposes of the Act but would avoid unnecessary costs and delay. On August 8, 2013, Local 18 filed a Brief in Opposition to the Motion to Consolidate.

In its Brief in Opposition, Local 18 argued that consolidation of the Ballast case and the Mr. Excavator cases would not further the purposes of the Act or serve to avoid unnecessary expense or delay. Rather, because the issues presented in the two cases involved separate employers, separate projects, separate locations, and separate legal arguments and analysis, consolidation was unwarranted. Local 18 also argued that consolidation of these cases at such a late hour would wreak havoc upon the accommodations made by the parties to schedule the time necessary to prepare for, and appear at, two separate hearings. Indeed, prior to consolidation, both counsel for Local 18 and the witnesses Local 18 intended upon calling at each respective hearing scheduled their respective calendars in order to accommodate the previously agreed upon hearing dates. Moreover, prior to consolidation, counsel for Local 18 scheduled his calendar in order to accommodate the time it would take to adequately prepare for each hearing and served subpoenas upon parties compelling their attendance and appearance as witnesses.

On Friday, August 9, 2013, the Region informed the parties that it was granting the Motion to Consolidate the above-captioned matters. Pursuant to this informal notice the parties were advised that that the consolidated hearing would begin on September 4, 2013, and that an order formally granting the Motion and confirming new hearing arrangements would issue early the following week.

By the afternoon of Tuesday, August 13, 2013, the Region had yet to issue any formal notice regarding the consolidation of hearings for the Ballast and Mr. Excavator matters. Accordingly, Local 18 contacted the hearing officer and the Assistant Regional Director via

email and inquired into when a formal notice would issue. In addition, Local 18 requested that the Region issue several subpoenas to Local 18 for use in these consolidated cases.

On the afternoon of Wednesday August 14, 2013, the Region responded to Local 18's email. In this response, the Region indicated that Local 18's subpoena requests had been forwarded to the Regional Director for review and approval. The Region also indicated that a formal notice regarding both the consolidation of and the hearing arrangements for the Ballast and Mr. Excavator matters would now be issued before the end of the week. At last, on Friday, August 16, 2013, at 3:53 PST, the Region finally issued a formal Order Granting Motion To Consolidate Cases and Notice of Rescheduled Section 10(k) Hearing ("Notice"). Pursuant to this Notice, the parties were officially advised that the hearing in the Ballast case and the hearing in the Mr. Excavator cases were consolidated and that a consolidated hearing in both cases was now scheduled for September 4, 2013.

In addition to formally apprising the parties of the date and location of the newly consolidated hearing, the Notice also indicated – for the very first time – that the scope of the hearing into the Ballast Case was being expanded. Under the Region's original notice, the scope of the Sec. 10(k) hearing in the Ballast case was limited to "work performed utilizing a skid steer/skid loader by the Employer on its fence, gate and barrier wall installation project performed on the Euclid Creek Tunnel Project in Cleveland, Ohio." The Notice issued by the Region on August 16, however, expanded the scope of the Ballast 10(k) hearing to include "[t]he operation of skid steer/skid loader work at all of the Employers' current jobsites." No explanation was provided by the Region as to why the scope of the hearing was expanded. Particularly worrisome was the Notice of Hearing's erroneous statement that Local 18 did not object to the consolidation, despite properly filing and serving a brief in opposition against the

consolidation. It was only until the Board's August 29 Order (notably received by Local 18 on September 3) ruling on Ballast's Petition to Revoke portions of Local 18's subpoenas that it, in footnote 3, "advised that the parameters identified in the original Notice of Hearing for all three cases remain unchanged." And it was only until the September 4 hearing that any particular jobsites pertaining to Mr. Excavator's ULP charges were identified, at the insistence of Local 18.

## VI. LAW & ANALYSIS

### A. The Regional Director's August 16 Order Should be Quashed Because No Reasonable Cause Exists to Believe That Sec. 8(b)(4)(D) of the Act Has Been Violated.

Before the National Labor Relations Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must first be satisfied that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated. *Laborers Dist. Council (Capitol Drilling Supplies, Inc.)*, 318 NLRB 809, 810 (1995). This determination requires a finding that there is reasonable cause to believe that: (1) a party has used proscribed means to enforce its claims to the work in dispute; (2) there are competing claims to the disputed work between rival groups of employees; and (3) the parties have not agreed on a method for the voluntary adjustment of the dispute. *Carpenters Local 275 (Lymo Construction Co.)*, 334 NLRB 422, 423 (2001). The factual predicate for asserting a colorable Sec. 10(k) dispute is therefore found when an employer faces a proscribed means of enforcing a claim to disputed work as a result of a jurisdictional dispute that is not of his own making and in which he has no interest. *Internatl. Longshormen's & Warehousemen's Union Local 62-B v. NLRB*, 781 F.2d 919, 924 (D.C.Cir.1986). When examining evidence proffered to satisfy the "reasonable cause" standard, evidence must be "viewed in its entirety" and the Region must do so by looking at the "specific language used and surrounding conduct and events." *Bricklayers Local 20 (Altounian Builders,*

*Inc.*), 338 NLRB 1100, 1101 (2003). For the following reasons, both Ballast's and Mr. Excavator's ULP charges alleging violations of Sec. 8(b)(4)(D) of the Act by the LIUNA 860 and LIUNA 310 are in *no way, shape, or form* amenable to resolution via a Sec. 10(k) proceeding.

1. *Ballast*

It is a fundamental tenet of Board law that in the construction industry, a union's efforts to enforce a lawful union signatory subcontracting clause against a general contractor through a grievance, arbitration, or court action does *not* constitute a claim against the subcontractor for the work, thus being insufficient to trigger Sec. 8(b)(4)(D) allegations and subsequent Sec. 10(k) proceedings, provided that the union *limits* itself to peacefully pursuing the contractual grievance against the general contractor. *E.g., Laborers Dist. Council (Capitol Drilling)*, 318 NLRB at 809. Indeed, where the union pursuing a subcontracting clause grievance against a general contractor does not otherwise "engage[] in any dispute" with the subcontractor or seek to "enforce its position by either threatening to, or actually, picketing, striking, or boycotting," the Board will find no competing claims to the work (even where the other union may have made claims for work or otherwise engaged in coercive conduct), pursuant to *Capitol Drilling*, and quash the notice of hearing. *Laborers Local 1086 (Miron Constr. Co.)*, 320 NLRB 99, 100 (1995).

The Board found in *Capitol Drilling* that if the "peaceful pursuit" of subcontracting grievances was treated as a competing claim in a Sec. 10(k) dispute, "the contracting arrangements that Congress sought to shield from statutory prohibition" would be "too easily subverted by the ability of parties that profit from the breach of the subcontracting provision to initiate 10(k) proceedings." *Laborers Dist. Council (Capitol Drilling)*, 318 NLRB at 811. That is, if the Board exercised its jurisdiction regarding these subcontracting grievances, the "resources

of the Board and the parties” will “have been taken up over a dispute that raised none of the concerns that animated Congress in enacting Section 10(k).” *Id.* at 811. Indeed, the Board recognized that declining jurisdiction by not treating subcontracting grievances as triggers to Sec. 8(b)(4)(D) allegations would “effectuate the policies of the Act by recognizing a party’s right, and enabling a party to effectively exercise the right, to enforce a lawful union signatory clause in a collective-bargaining agreement, while continuing to provide an avenue for innocent employers, who are subject to competing jurisdictional claims, to obtain relief from the Board through a 10(k) proceeding and award.” *Id.* at 812.

Local 18’s subcontracting clause contained in Paragraph 98 of the OCA Agreement and Paragraph 104 of the CEA Agreement reasonably requires that signatory employers such as McNally-Kiewit utilize subcontractors that adhere to the standards of the OCA Agreement. The only type of conduct by a union – otherwise claiming that it is peacefully pursuing a subcontracting clause grievance against a general contractor – that invokes Sec. 8(b)(4)(D) includes alleged statements by union officials against the subcontractor that their grievance, though directed to the general contractor, would go away if the *subcontractor* hired the union’s members for the work at issue. *Glass Workers (Olympian Precast Inc.)*, 333 NLRB 92, 93-94 (2001). That is, the union is making a direct claim to the entity – the subcontractor – who has actually *assigned* the work. *J.P. Patti Co.*, 332 NLRB 830, 831 (2000). There is *absolutely* no evidence that Local 18 has done anything *but* simply pursue its contractual grievance against McNally-Kiewit.

Local 18’s interactions with any Ballast employee during what they suspected was a breach of Paragraph 98 of the OCA Agreement at the Euclid Creek Tunnel project was *only* to determine the if McNally-Kiewit was adhering to the terms of its agreement as it relates to the

subcontracting of bargaining unit work. The Union did not look into Ballast's collective bargaining relationship, if any, with other unions. (Tr. 372-373.) Ms. Nerone's claim that Local 18 made repeated demands for or work is utterly false. Rather, Local 18's dealings with Ballast have been limited to pursuing grievances against prime contractors that have subcontracted bargaining unit work. If anything, it was Ms. Nerone, as President of Ballast, who insisted upon injecting herself in Local 18's prior lawful subcontracting grievances. For example, Ms. Nerone went out of *her* way to contact Local 18, when the Union had not involved Ballast, through language, conduct, or otherwise, in its subcontractor grievance against Kokosing. (Tr. 381-382.) All the while, Ms. Nerone was already been aware of the sum and substance of Local 18's subcontracting grievances by virtue of corresponding with Ric-Man in a variety of instances. (Tr. 361-363; L18 Exh. 3.) Even counsel for LIUNA 310 and LIUNA 860 stated that Local 18's "grievance that was filed against the prime or general contractors are [sic] not claims for work . . ." (Tr. 368.) Ballast's offer of vague evidence that a Local 18 representative – who the Ballast representative could identify or recall in any detail – sought to identify whether the Ballast employees operating the skid steers were operating engineers (tr. 400-402) cannot be accorded any weight, as it was complete hearsay offered by a Ballast employee and such conduct is permissible within the context of a subcontracting grievance.

Furthermore, Local 18 had previously settled, without Board intervention, other subcontracting grievances with Independence Excavating and Kokosing, pursuant to the CEA and OCA Agreements, respectively. (Tr. 558-560, 561-563; L18 Exhs. 12-13.) Thus, under *Laborers Local 1086* and its progeny, as Local 18, via its subcontracting grievance against McNally-Kiewit, raised no dispute with Ballast or sought to "enforce its position by either

threatening to, or actually, picketing, striking, or boycotting,” there were no competing claims for work, and thus no jurisdictional dispute.

At its core, Local 18’s subcontracting grievance regarding the Euclid Creek Tunnel Project was with McNally-Kiewit. Local 18 alleged that by subcontracting work involving the operation of skid steers – Local 18 bargaining unit work – McNally-Kiewit was in breach of the OCA Agreement as Ballast failed to observe equivalent union wages, hours, and other terms and conditions of employment under the OCA Agreement. (L18 Exh. 18.) In so doing, Local 18 was following industry and past practice as the Union has successfully settled prior subcontracting grievances based on the same violations by other Cleveland contractors without resort to Board involvement. In none of these instances, did Local 18 ever make a demand for work to the subcontractor or the contractor, engage with the subcontractor regarding the same, or seek reassignment of the work in its grievances (L18 Exhs. 12-15; Tr. 557-570, 571-573, 576-577.)

Furthermore, any and all pre-job discussions and forms held and created, respectively, between Local 18 and McNally-Kiewit, were in no way demands for work to Ballast, absent any explicit and express claims for work made to Ballast by Local 18. Local 18’s pre-job form created with McNally-Kiewit was not an affirmative demand for work to Ballast but rather a memorialization that McNally-Kiewit agreed to abide by the craft jurisdiction for Local 18 members as contained within the OCA Agreement. (Tr. 491-493; L18 Exh. 7). As such, Local 18’s pre-job forms and conduct cannot be said to rise to the level of reasonable cause to believe that Local 18 has violated Section 8(b)(4)(D) of the Act. *See Plumbers, Local 149 (H.E. Freitag Inc.)*, 200 NLRB 223, 224 (1972). *See also IBEW, Local 196 (Aldridge Electric Inc.)*, 358 NLRB No. 87, \*9 (2012).

In sum, there is a total lack of evidence to demonstrate a reasonable cause believe that Sec. 8(b)(4)(D) was violated, that Local 18 made any claims to the work at issue as against Ballast, or otherwise engaged in coercive behavior violative of Sec. 8(b)(4)(D). Moreover, even if Local 18's subcontracting grievance against McNally-Kiewit would result in the reassignment of skid steer work to Local 18 members at the Euclid Creek Tunnel Project, such a result is utterly irrelevant for the purposes of determining that the Board has no jurisdiction in this matter.

As the Board has eloquently put it:

Although the first union's successful prosecution of its grievance may, as a practical matter, induce the general contractor to withdraw the work from the subcontractor or otherwise bring about the removal of the employees represented by the second union, the fact remains that the first union never engaged in any dispute with the subcontractor. And in such a case the general contractor's actions reflect merely its fulfillment of its union signatory subcontracting obligation under the collective-bargaining agreement with the first union.

*Laborers Dist. Council (Capitol Drilling)*, 318 NLRB at 810. The continuing importance and relevance of *Capitol Drilling* cannot be understated. Indeed, this opinion was the final distillation of Board decisions that essentially recognized its central holding. In a prior decision, the Board stated that when a union peacefully pursues a lawful union signatory subcontracting clause against a general contractor without any other conduct towards the subcontractor, the subcontractor is not a party to the grievance and the general contractor can never be considered a "neutral employer" with respect to the grievance in the context of a potential Sec. 10(k) proceeding. *Carpenters Local 33*, 289 NLRB 1482, 1484 (1988). As such, a union's grievance will "not amount to unlawful coercion within the meaning of the Act." *Id.* Never at any point was Ballast a party to Local 18's January 29, 2013 grievance against McNally-Kiewit. This grievance was made *vis-à-vis* Local 18 and McNally-Kiewit. To the extent Ballast was involved, it happened to merely be the subcontractor that was failing to observe equivalent union wages,

hours, and other terms and conditions of employment for employees that were performing Local 18's bargaining unit work. These terms and conditions of employment are within the purview of the grievance and arbitration process only, and are otherwise irrelevant and have no bearing on the applicability of *Capitol Drilling* to this matter. However, for the sake of clarity, Local 18 alleges the standards contained in Paragraphs 6, 17-18, 20, and 29-33 were not upheld by Ballast, resulting in Local 18's grievance against McNally-Kiewit for its violation of the Paragraph 98 subcontracting clause. Accordingly, Ballast is simply *not a neutral employer* caught between the competing demands of two unions. Thus, this matter cannot be characterized as a work claim dispute and it is totally immaterial as to whether any voluntary adjustment procedure exists as between LIUNA Local 860 and Local 18.

Notably, Ballast's charge contained *no allegations* against Local 18 claiming that it either engaged in coercive conduct pursuant to Sec. 8(b)(4)(D) or otherwise made any claims to the work at the Euclid Creek project. Indeed, Ms. Nerone admitted that she was completely unaware of the nature or progress of Local 18's grievance against McNally-Kiewit. (Tr. 373.) Rather, in an orchestrated fashion, LIUNA 860 sent a cookie cutter letter to Ballast that it would picket and strike any and all projects where its alleged possibility of skid steer re-assignments would take place. (Jt. Exh 10.) However, LIUNA 860's Business Manager, Anthony Liberatore, could not recall any other jurisdictional strikes or concerted slowdowns by LIUNA 860 during his tenure as Business Manager or prior as a rank-and-file member of LIUNA 860. (Tr. 426-427.) Furthermore, LIUNA 860's CBA with Ballast specifically provides that the union would not strike in the event that any disagreements arose between it and Ballast. (Jt. Exh. 3, ¶ 59, Jt. Exh. 6.) Thus, a threat to strike letter by Mr. Liberatore rings hollow; it is disingenuous at best and

potentially illegal at worst. As a Charged Party, LIUNA 860 was not committing arguably “coercive conduct,” but rather *concerted* conduct with Ballast.

As such, by acting in concert via questionable ULP charges and otherwise actively participating in the events and circumstances leading up to the purported jurisdictional disputes, Ballast has shed its façade of an innocent subcontractor caught between the demands of two competing unions. It instead stands as an active participant in a jurisdictional dispute it has created in an attempt to avoid its contractual obligations to render monetary damages to Local 18 pursuant to its valid subcontracting clause. Additionally, the evidence taken as a whole affirmatively establishes, as required by the Board, that LIUNA 860’s threat to strike was a sham. *See, e.g., Stage Employees Local 6 (Savvis Center)*, 334 NLRB 214, 215 (2001). As such, the Region’s notice of Hearing as it relates to Ballast should be quashed.

## 2. *Mr. Excavator*

Collective bargaining is an effort to erect a system of industrial self-government utilizing agreed-upon rules of law which seeks to avoid leaving “matters subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces.” *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580-581, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). As such, it has long been federal policy to promote industrial stabilization through the voluntary use of collective bargaining agreements. National labor policy encourages the grievance-arbitration procedure as the preferred method of resolving labor-management disputes arising under collective bargaining agreement. *Id. Accord ILWU Local 7 (Georgia-Pacific Corp.)*, 291 NLRB 89, 93 (1988). Congressional support of this policy is clearly set forth in Section 203(d) of the Act, which states: “Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance

disputes arising over the application or interpretation of an existing collective-bargaining agreement.” In *AT&T Technologies v. Communications Workers*, the Supreme Court reaffirmed the preferred status of labor arbitration stating that contract provisions that calls for arbitration of disputes “have served the industrial relations community well, and have led to continued reliance on arbitration, rather than strikes or lockouts, as the preferred method of resolving disputes, arising during the term of a collective-bargaining agreement.” 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). See also *United Paperworkers Internatl. Union v. Misco, Inc.*, 484 U.S. 29, 36-37, 108 S.Ct. 364, 89 L.Ed.2d 286 (1987). With this policy in mind, the Board has determined that it is oftentimes prudent to refrain from exercising its authority to adjudicate alleged unfair labor practices in order to facilitate private dispute resolution under the grievance-arbitration process. E.g., *United Technologies Corp.*, 268 NLRB 557 (1984); *Collyer Insulated Wire*, 192 NLRB 837 (1971); *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). Moreover, the Board’s policy for promoting valid work preservation clauses because they are key components to maintaining “industrial peace,” *Machinists District 190 (SSA Terminal LLC)*, 344 NLRB 1018, 1020 (2005), *enfd.* 253 Fed. Appx. 625 (9th Cir.2007), dovetails with the Congressional policy that favors arbitration rather than Board resolution of labor disputes in cases that technically appear to be Section 10(k) disputes, but are in fact work preservation disputes at heart. See, e.g., *USCP-WESCO, Inc. v. NLRB*, 827 F.2d 581, 586 (9th Cir.1987).

With regard to jurisdictional disputes between labor organizations, the Board has adopted the Supreme Court’s premise in *Carey v. Westinghouse Corp.*, 375 U.S. 261, 84 S.Ct. 401, 11 L.Ed.2d 320 (1964), that the grievance and arbitration process has a major role to play in settling these disputes. Specifically, the Board stated that:

“The [Supreme] Court held in *Carey* that prior to a Board 10(k) award, a union involved in a jurisdictional dispute may file a contractual grievance, pursue it to

arbitration, and seek to enforce an arbitration award under Section 301. The Court stated that the ‘underlying objective of the national labor laws is to promote collective bargaining agreements and to help give substance to such agreements through the arbitration process’; that ‘[g]rievance arbitration is [a common] method of settling disputes over work assignments’; and that ‘[s]ince § 10(k) not only tolerates but actively encourages voluntary settlements of work assignment controversies between unions, we conclude that grievance procedures pursued to arbitration further the policies of the Act.’”

*ILWU Local 7 (Georgia-Pacific Corp.)*, 291 NLRB at 93, quoting *Carey*, 375 U.S. at 265-266.

This position is not only in accordance with federal policy embracing the role that arbitration plays in resolving disputes arising under collective bargaining agreements, but is also consonant with the legislative history of Section 10(k) itself. In discussing the merits and liabilities of the then-proposed LMRA Bill S.1126, Senator Thomas stated that “[w]e are confident that the mere threat of governmental action [via Board action under Section 10(k)] will have a beneficial effect in stimulating labor organizations to set up appropriate machinery for the settlement of such [jurisdictional] controversies within their own ranks, where they should properly be settled.” S. Min. Rep. No. 105., 80th Cong., 1st Sess., I Leg. Hist. 480-481 (LMRA 1947). Similarly, Senator Taft, co-sponsor of the LMRA, stated that the “desired objectives” of enacting, *inter alia*, Section 10(k) of the LMRA were “prompt elimination of the obstructions to the free flow of commerce and encouragement of the practice and procedure of free and private collective bargaining.” S. Rep. No. 245, 80th Cong., 1st Sess., I Legislative History of the Labor Management Relations Act (“Leg. Hist.”) 414 (LMRA 1947).

Without doubt, Mr. Excavator, LIUNA 310 and LIUNA 860 will assert that the Board has previously held that when a union makes a work preservation claim or files a so-called pay-in-lieu grievance it is in effect asserting a claim for work in dispute and thus triggers a jurisdictional dispute cognizable under Section 10(k). *See, e.g., Laborers Local 113 (Super Excavators Inc.)*, 327 NLRB 113, 114 (1998). Each of these cases, however, is distinguishable

from the facts and circumstances in the present matter inasmuch as none of the prior cases that addressed so-called pay-in-lieu grievances involved a valid and legitimate work preservation clause, as is present in the OCA and CEA Agreements that Local 18 has with Mr. Excavator. Paragraph 21 of the CEA Agreement and paragraphs 4 and 13 of the OCA Agreement provide a proper basis for Local 18's grievances that supersedes any Section 10(k) jurisdictional dispute mechanisms. These paragraphs specifically mandate the sole remedy for when the employer signatory to the CEA or OCA Agreement assigns work to a non-Local 18 member that is otherwise within Local 18's craft jurisdiction – provided that Local 18 members have historically performed the work at issue since the work preservation clause was negotiated, as is true in the instant matter – economic sanctions are imposed on the signatory employer. As such, Local 18's grievances do not seek to have the disputed work awarded to its members nor do they constitute an unlawful threat if the work is assigned to another bargaining unit. Rather, Local 18's grievances simply seek the actual benefit it bargained for under its agreement with Mr. Excavator when Local 18 agreed to forgo any rights it may have to pursue reassignment of disputed work and limit its relief to contractually specified damages.

The ultimate touchstone for determining the validity of a work preservation clause is finding that, under a totality of circumstances, the clause demonstrates that the union's objective is to preserve the work of its unit members, such that "the agreement or its maintenance is addressed to the labor relations of the . . . employer *vis-à-vis* his own employees." *National Woodwork Mfrs. Assn. v. NLRB*, 386 U.S. 612, 645, 87 S.Ct. 1250, 18 L.Ed.2d 357 (1967). *See also Teamsters Local 578 (USCP-Wesco)*, 280 NLRB 818 (1986), *enfd.* 827 F.2d 581 (9th Cir.1987) (Where a CBA prohibits the assignment of jurisdictionally covered work to individuals who are not union members, such an agreement includes a legitimate work preservation clause).

A lawful work preservation agreement will “have as its objective the preservation of work traditionally performed by employees represented by the union” and the “employer must have the power to give the employees the work in question . . .” *NLRB v. Internatl. Longshoremen’s Assn.*, 447 U.S. 490, 504, 100 S.Ct. 2305, 65 L.Ed.2d 289 (1980). *See also Becker Elec. Co. v. Internatl. Bhd. of Elec. Workers, Local Union 212*, 927 F.2d 895, 897 (6th Cir.1991).

While this “right-to-control test is primarily ‘an exercise in factfinding . . .’” *Ohio Valley Coal Co. v. Pleasant Ridge Synfuels*, 54 Fed.Appx. 610, 616 (6th Cir.2002), quoting *United Paperworkers Internatl. Union.*, 484 U.S. at 44, the “traditional work test” may be satisfied when the union asserting its work preservation clause successfully demonstrates that the work is “fairly claimable” by the union members “because it requires skills and abilities similar to those of the traditional work performed.” *Ohio Valley Coal Co.*, 54 Fed.Appx. at 617. *Accord Newspaper Deliverers (Hudson Cty. News)*, 298 NLRB 564, 566 (1990). In fact, work can be fairly claimable even if the union members have performed such work at other sites for other employers. *Ohio Valley Coal Co.*, 54 Fed.Appx. at 617. It is “unrealistic to define the area” of a union’s “legitimate job protection efforts” too narrowly, for the work preservation objective is valid if it is aimed at the “type” of jobs that a union’s members historically perform and for which they have “the skills and experience.” *Canada Dry Corp. v. NLRB*, 421 F.2d 907, 909 (6th Cir.1970).

Where the language of the work preservation clause indicates that it seeks the preservation of work traditionally performed by the union’s members pursuant to the terms of the CBA in order to enforce the employer’s collective bargaining obligations and the “legitimate expectation[s]” of its employees who would “otherwise be deprived of contractual benefits,” even if there is not an “actual threat” of work loss, the work preservation clause is justified. *See*

*Painters Dist. Council 51 (Manganaro Corp.)*, 321 NLRB 158, 165-166 (1996). *Accord Mine Workers (UMW) (Dixie Mining Co.)*, 188 NLRB 753, 754 (1971) (Board has found a valid work preservation clause where the union attempts to protect and preserve unit jobs by imposing a financial penalty on the employer, thus removing economic incentive to divert work to a cheaper workforce). Moreover, “the term ‘traditional work’ includes work which unit employees have performed and are still performing at the time they negotiated a work-preservation clause.” *Am. Boiler Mfrs. Assn. v. NLRB*, 404 F.2d 547, 552, 554 (8th Cir.1968). That is, a “collective bargaining agreement which seeks to . . . reacquire” work performed at the time a valid work preservation clause is negotiated. *Id.* at 554. In relying on the Eighth Circuit’s decision, the Board has found that “exclusivity of performance” is not a prerequisite to a claim of work preservation or that work cannot be properly reacquired. *Longshoremen (ILA) (Consolidated Express, Inc.)*, 221 NLRB 956, 978 (1978), *enfd.* 537 F.2d 706 (2nd Cir.1976).

Local 18’s work preservation objectives render the instant matter a non-jurisdictional dispute that excludes Board adjudication. Where a union subject to a Section 10(k) jurisdictional dispute has already pursued its contractual claims regarding the work at issue via a grievance, as a “noncoercive avenue[] of redress,” and the union is “not attempting to expand its work jurisdiction . . .”, the Board has suggested it would defer Section 10(k) proceedings to the application of contractual work preservation agreements between the employer and union. *See Teamsters Local 107 (Reber-Friel Co.)*, 336 NLRB 518, 520-521 (2001). Generally, any purported attempt by a union to preserve the work of its members is legitimate so long as the union’s goal is not to have its members replace those already working for the employer and represented by another union. *Longshoremen & Warehousemen (Waterway Terminals Co.)*, 185 NLRB 186, 188 (1970). More specifically, when a work preservation clause defines work to be

performed by the unit employees, does not impose legally cognizable obligations on third parties, does not regulate the labor policies of third parties or non-unit employees, and is only used in the context of disputes between the contracting employer and union, the “clause represents a genuine effort to preserve the work of employees in the contract unit” represented by the union. *Plumbers & Pipefitters Union (American Boiler Mfrs. Assn.)*, 154 NLRB 285, 295 (1965) (Member Brown, dissenting).

As a primary matter, Local 18 has historically engaged in work on skid steers for Mr. Excavator itself. There were multiple individuals that Mr. Excavator employed at jobsites – including the Baldwin Road project – throughout 2012 that were operating engineers that ran skid steers. (L18 Exh. 6.) The evidence clearly identified individuals who were operating engineers by virtue of being called for work via Local 18’s referral hall and were utilizing equipment that was numerically categorized on Mr. Excavator’s informational timesheets, representing their usage of skid steers. (Tr. 54-55.) That is, Local 18 members traditionally performed the work on skid steers and forklifts from the time that the work preservation clause was negotiated into the CEA Agreement through the present time. Additionally, Local 18 has received over 215 letters of assignments for skid steer work (both for full-time and intermittent work) from Ohio contractors within the last eight years. (Jt. Exh. 20.) Moreover, half of these letters have been received in the last three years and a third of these letters account for work purely done within the northeastern Ohio region. (Id.) Furthermore, it was uncontroverted that from January 2009 to August 2013, Local 18 received 554 referrals requests from contractors for skid steers/bobcats/skid loader operators. (Tr. 472-473.) As such, the operation of skid steers is fairly claimable by Local 18, as it requires skills and abilities similar to that which has historically been performed by Local 18 members. *Ohio Valley Coal Co.*, 54 Fed.Appx. at 617;

*Newspaper Deliverers (Hudson Cty. News)*, 298 NLRB at 566. In order to be fairly claimable, Local 18 need not demonstrate that it was the exclusive union that operated the type of skid steers and forklifts at issue in the instant matter, as “the legitimacy of a work-preservation objective would be virtually precluded in any situation where it could be established that other employees at other sites were doing or had done the work for which protection was being sought.” *Longshoremen (ILA) (Consolidated Express, Inc.)*, 221 NLRB at 978.

Local 18 has a valid and enforceable work preservation clause contained within the OCA and CEA Agreements to which it is a signatory. Local 18’s conduct under the OCA and CEA Agreements in the instant matter adheres to the conduct required by the Board to establish a valid work preservation objective that would supersede any attempts to subordinate such an objective to Section 10(k) proceedings. Local 18 has pursued its contractual claims via grievances and it has not made any attempts to expand its work jurisdiction. Under the OCA and CEA Agreements and their predecessor agreements, skid steers are equipment that have been specifically agreed upon by the parties as being within Local 18’s contractual work jurisdiction. (Jt. Exh. 1(B), 1(C).) These agreements mandate a specific penalty in the event an employer elects to assign equipment within Local 18’s contract to someone other than an operating engineer. These clauses – paragraphs 4 and 13 of the OCA Agreement and paragraph 21 of the CEA Agreement – are the sole bargained-for remedies available to Local 18 when an employer breaches the CEA Agreement. Moreover, Local 18’s utilization of its “Miranda” cards merely reflected and reinforced its work preservation objective of the OCA and CEA Agreements when signatory contractors were unaware that they were violating the provisions of the CBA, as they expressly disclaimed a request for reassignment and only described appropriate damages. (Tr. 511; L18 Exh. 10; Emp. Exhs. 14, 15, 28.) That is, Local 18 designed these “Miranda” card to make it

“crystal clear to the contractor that [Local 18 is] not seeking a reassignment of the work. (Tr. 523.) As such, these provisions clearly fall within the scope of an enforceable and legitimate work preservation clause as contemplated by the Board in *Mine Workers (UMW) (Dixie Mining Co.)* and *Painters District Council 51 (Manganaro Corp.)*.

With regard to the application of the work preservation clause to Mr. Excavator, throughout the grievance processing procedure with Mr. Excavator at the Zanesville, Orchard, Baldwin Road, Metro Health, and Cleveland Hopkins projects, Local 18 made explicit that the economic damages clause contained within the parties’ agreement effectively prohibited Local 18 from seeking the actual reassignment of work and instead limited Local 18’s relief to economic damages as specified in the contract. (Tr. 155-157, 160, 168; L18 Exh. 2; Emp. Exhs. 14, 15, 19, 28.) Mr. Excavator itself acknowledged that Local 18’s work preservation argument creates an economic disincentive to ignore its contractual obligations to the Union’s craft jurisdiction. (Tr. 146-147; L18 Exh. 1, p. 2.) Mr. Excavator further acknowledged that the work preservation clause was the basis of Local 18’s grievances under the OCA Agreement. (Tr. 187.) But most damningly, Mr. Excavator recognized the legitimacy and objective of Local 18’s work preservation clauses when it reached settlements of the Zanesville and Orchard grievances by agreeing to pay damages to Local 18 in the form of lost pay and fringe benefits and agreed that in the future all skid steer work would be assigned to operating engineers. (Tr. 155-157, 168; Emp. Exh. 19.) Indeed, the legitimacy of Local 18’s work preservation objective is buttressed by the immovable fact that between September 2012 and May 2013, Local 18 has processed to resolution by payment of damages ten additional work preservation grievances involving a multitude of other contractors signatories to the OCA and CEA Agreements who were utilizing

individuals other than operating engineers on skid steers for jobsites throughout the Cleveland area. (Tr. 513-525; L18 Exh. 9.)

Any threats of strike or unlawful action made against Mr. Excavator by LIUNA 310 and LIUNA 860 were invited only by Mr. Excavator in an effort to avoid paying damages to Local 18. Where the employer is responsible for inducing the alleged jurisdictional dispute between the unions, the employer “by its own actions . . . has created a work preservation dispute.” *Machinists District 190 (SSA Terminal LLC)*, 344 NLRB at 1020. *Accord Internatl. Longshoremen’s & Warehousemen’s Union, Local 62-B*, 781 F.2d at 925. In the present matter, LIUNA 860 and 310 sent cookie cutter letters to Mr. Excavator that they would picket and strike any and all projects where its alleged possibility of skid steer re-assignments would take place. (Jt. Exhs. 8-9.) However, Mr. Excavator’s Executive Vice President, Timothy Flesher, testified that he had no anticipation as to whether these letters would actually provoke a threat of strike. (Tr. 214.) Furthermore, LIUNA 860’s Business Manager, Anthony Liberatore, could not recall any other jurisdictional strikes or concerted slowdowns by LIUNA 860 during his tenure as Business Manager or prior as a rank-and-file member of LIUNA 860. (Tr. 426-427.)<sup>4</sup> Notably, both LIUNA 310’s CEA Agreement with Mr. Excavator (Jt. Exh. 2, Art. VIII, Sec. 1, Jt. Exh. 4) and LIUNA 860’s OCA Agreement with Mr. Excavator (Jt. Exh. 3, ¶ 59, Jt. Exh. 5) contain no-strike clauses that exist for the duration of the contract, which specifically provide that the unions would not strike in the event that any disagreements arose between them and Mr. Excavator. LIUNA 310’s CEA Agreement also contains a provision that *permits* the signatory contractor to

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<sup>4</sup> While Terry Joyce, LIUNA 310’s Business Manager alleged that LIUNA 310 had engaged in prior jurisdictional strikes during his tenure as Business Manager or as rank-and-file member (tr. 449-450), in other Sec. 10(k) hearings; *to wit, Donley, Inc. et al.*, Case No. 08-CD-091643, and *Donley’s, Inc* Case No. 08-CD-081837, Mr. Joyce provided inconsistent testimony in which he indicated that he both *could not* and *could* recall prior jurisdictional strikes or concerted slowdowns undertaken by LIUNA 310 during his tenure as Business Manager or as rank-and-file member (Case No. 08-CD-091643, Tr. 588-589; Case No. 08-CD-081847, Tr. 688-694.)

make a temporary work assignment during an ongoing jurisdictional dispute. (Jt. Exh. 2, Jurisdictional Disputes, Sec. 2.) As such, pursuant to LIUNA 310's belief that the instant matter is a jurisdictional dispute, it expressly *permits* Mr. Excavator, by virtue of its agreement, to make an assignment of its choosing. Thus, any threat to strike letters sent by LIUNA 310 and LIUNA 860 cannot reasonably be construed in any fashion as a threat. Ultimately, the evidence taken as a whole affirmatively establishes, as required by the Board, that LIUNA 860 and 310's threat to strike was a sham. *See, e.g., Stage Employees Local 6 (Savvis Center)*, 334 NLRB 214, 215 (2001).

In the present matter, to subordinate Local 18's grievances to unwarranted Section 10(k) proceedings would, in effect, reward Mr. Excavator for placing itself in an alleged jurisdictional dispute that is of its own making. Mr. Excavator has shed its façade of an impartial employer caught between the demands of two competing unions. It instead stands as an active participant in a jurisdictional dispute it has created in an attempt to avoid its contractual obligations to render monetary damages to Local 18 pursuant to a valid work preservation clause. A Section 10(k) procedure, however, is not "an absolution for employers that find themselves stuck between conflicting contractual obligations they created" nor is designed to "exonerate employees with unclean hands" but rather resolves legitimate "jurisdictional disputes that arise between unions without costly work stoppages . . ." *Moore-Duncan v. Sheet Metal Workers Intl. Assn. Local 27*, 624 F.Supp.2d 367, 377 (D.N.J. 2008). As such, when the alleged jurisdictional dispute is of the employer's own making, the employer is not neutral in the dispute as required under Section 10(k) of the Act. Rather, the employer has an interest in one group over another to perform the work at issue. In those instances where the employer has "unclean hands," the fact

alone that a union demanded the work is insufficient to establish a jurisdictional dispute. *Internatl. Longshoremen's & Warehousemen's Union Local 62-B*, 781 F.2d at 925.

Considering these facts, especially given that Local 18 has historically performed the work – skid steer operation – at issue, a finding that Local 18's grievances constitute a means of enforcing a claim to disputed work would be outside the purview of a Section 10(k) hearing, as well as contrary to the basic principles and purpose of the Act which protect the rights of parties to collectively bargain and promote the use of arbitral proceedings to resolve disputes between contracting parties. Overall, "preservation of unit work is a legitimate union goal . . . and its attainment through financial penalties when the agreement [regarding work preservation] is violated is equally valid . . ." *Borden, Inc.*, 196 NLRB 1170, 1173 (1972). The Board policy behind "respect[ing]" and "protect[ing]" genuine work preservation clauses is that they "help maintain industrial peace, and the Board should not assert its jurisdiction in a manner which ensures that legitimate work preservation provisions would become unenforceable." *Machinists District 190 (SSA Terminal LLC)*, 344 NLRB at 1020, quoting *Teamsters Local 578*, 280 NLRB at 821. Presently, Mr. Excavator has elected to assign equipment that is within the contractually mandated craft jurisdiction of Local 18 to someone other than an operating engineer. While Charging Parties have the contractual right to elect this course of action, Local 18 has the concurrent right to file a grievance in order to collect monetary damages pursuant to its legitimate work preservation clause and objective. In this manner, Mr. Excavator is not in the traditional position of innocent employers caught between two competing demands yet unable to fulfill both simultaneously. Rather, it may satisfy the demands of LIUNA 310 and 860 by assigning the work to their members and satisfy Local 18's grievances by paying the contractually bargained-for penalty.

### 3. *Ohio Operating Engineers Fringe Benefits Fund*

Neither the ULP charges filed by Ballast and Mr. Excavator, nor the Regional Director's August 16 Notice of Hearing, identify the Ohio Operating Engineers Fringe Benefits fund as an entity that is a party to the instant matter nor a party that has made a demand for work. The Charging Parties' attempt, however, to allege at the September 4 hearing that any audits made by the Ohio Operating Engineers Fringe Benefits Fund are claims for skid steer work at the jobsites in issue on behalf of Local 18 should be accorded no weight. The Hearing Officer correctly noted that the documentary evidence supporting such allegations could not be formally admitted, and rejected Mr. Excavator's attempt to admit the same. (Tr. 111.) Moreover, any such conduct by the Fringe Benefits Fund is irrelevant for determining whether there is reasonable cause to believe that Sec. 8(b)(4)(D) of the Act has been violated. The Fund itself is a non-party that is a completely separate entity from any labor union, including Local 18. *See* 29 U.S.C. 186(c)(5)-(6) (Under the Taft-Hartley Act, the multiemployer plans are separate entities from the union with their own boards of trustees, split evenly between employer representatives and union representatives). And from a jurisdictional standpoint, any adjudication of the legality of a Benefits Fund's conduct is *exclusively* within the purview of the federal courts. *E.g., Stuhlreyer v. Armco, Inc.*, 849 F. Supp. 583, 587-88 (S.D. Ohio 1992), *aff'd*, 12 F.3d 75 (6th Cir. 1993) (holding that federal courts have exclusive jurisdiction over ERISA claims pursuant to 29 U.S.C. 1132(e)(1)). Indeed, "a jurisdictional dispute between two unions over the assignment of work . . . does not necessarily impact the Plaintiff funds' ability to recover contributions that are properly due under the Agreement." *Plasterers Local 67 Pension Trust Fund v. Niles Group, LTD*, No. 06-12216, 2007 U.S. Dist. LEXIS 18001, \*7 (E.D. Mich. Feb. 23, 2007) (rejecting defendant's argument that the "case really involves a jurisdictional dispute between two unions" regarding

work assignments, and granting plaintiff-funds' motion for summary judgment, which required defendant to "double pay" contributions). It is an established point of law that as Congress has given federal courts exclusive authority to decide ERISA matters, the Board lacks jurisdiction over ERISA matters, including payment of contributions pursuant to applicable agreements, such as the OCA and CEA Agreements. *See, e.g., Old Dutch Foods*, 968 F. Supp.1292, 1297 (N.D. Ill. 1997) (defendant's argument that issue was jurisdictional one and thus "reserved under the NLRA for the NLRB" was "misplaced" in "the ERISA context).

B. The Regional Director's August 16 Order Should be Quashed Because its Notice of Hearing Found Therein Contains Insufficient Facts to Afford Local 18 Appropriate Procedural Due Process for Purpose of Presenting its Arguments.

Pursuant to Sec. 102.90 Board Rules and Regulations, if the Regional Director believes that a ULP charge alleging violations of Sec. 8(b)(4)(D) has merit and the parties to the dispute have not submitted proper evidence of voluntary adjustment of such a dispute, the Regional Director will serve a notice of hearing pursuant to Sec. 10(k) of the Act on all the parties. This notice must contain, pursuant to Sec. 102.90, a "statement of the issues involved." Such a statement must comport with notions of fairness, as "[d]ue process requires that a respondent have notice of the allegations against it so that it may present an appropriate defense." *KenMor Electric Co.*, 355 NLRB 1024, 1029 (2010). *Accord Earthgrains Co.*, 351 NLRB 733, 735 (2007). The factual requirements of a complaint issued by a Regional Director in an unfair labor practice proceeding may be reasonably said to guide the requirements of a notice of hearing. Thus, the requirements that a complaint contain "a clear and concise description of the acts which are claimed to constitute unfair labor practices, including . . . the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed," *Soule Glass & Glazing Party Co. v. NLRB*, 652 F.2d 1055, 1073-1074 (1st

Cir.1981), are also binding on a notice of hearing. Indeed, the requisite subject matter “is designed to notify the adverse party of claims to be adjudicated so he may prepare his case, and sets the standard of relevance at the hearing before the ALJ.” *Id.*

The requirement to comport with procedural due process in Board hearings and adjudications is hardly a novel concept. Federal courts have long-recognized that in complex cases before the Board involving multiple charges based on a variety of occurrences, “[f]ailure to clearly define the issues and advise . . . [a party] charged with a violation of the law of the specific complaint he must meet and provide a full hearing upon the issue presented is, of course, to deny procedural due process of law.” *NLRB v. Pepsi-Cola Bottling Co.*, 613 F.2d 267, 274-275 (10th Cir.1980), quoting *J.C. Penney Co. v. NLRB*, 384 F.2d 479, 483 (10th Cir.1967). “In short, the ‘charge’ must allege the unfair labor practice to invoke the jurisdiction of the Board; and, by way of limitation, the complaint issued by the Board must deal with the same subject matter and sequence of events . . .” *Douds v. Internatl. Longshoremen’s Assn., Independent*, 241 F.2d 278, 284 (2nd Cir.1957).

The Region’s August 16 Notice of Hearing has failed to comport with these elementary requirements of due process. The test for evaluating a due process violation is one of “fairness” under the circumstances of each case in determining whether the party aggrieved by the due process violation “knew what conduct was in issue and had a fair opportunity to present his . . . [argument].” *Soule Glass & Glazing Party Co.*, 652 F.2d at 1073-1074. If the aggrieved party could not know of the operative conduct, there are multiple allegations and the legal elements do not substantially overlap, it is “fair to say” the aggrieved party would be unable to have a fair opportunity to present his argument. *Id.* In the present matter, up until the hearing, the parties did not merely disagree on the scope of the work in dispute, thus allowing the Hearing Officer to

then permit sufficient evidence at the Sec. 10(k) hearing for the Board to make a determination of the work in dispute. *See Machinists, Dist. Lodge 190 (Sea-Land Service)*, 322 NLRB 830, 831 (1997). Rather, in the instant case, Local 18 did not even *know* nor was ever afforded notice of what the entire scope of the potential work in dispute entailed, as the August 16 Notice of Hearing simply stated that *all* jobsites by the Employers would be at issue. Indeed, the Board has specifically addressed due process concerns in the context of Sec. 10(k) proceedings: a party's elementary due process rights are denied where it does not receive proper notice of events where its contractual and other rights would be affected thereof. *See Laborers, Local 576 (Franki Foundation Co.)*, 197 NLRB 351 (1972). *See also Operating Engineers, Local 450 (Austin Co.)*, 119 NLRB 1424 (1958) (after Board has quashed a notice of hearing brought pursuant to Sec. 10(k), the employer may not attempt to insert a new issue to be litigated via a motion for reconsideration, where it was not alleged in the charge or in notice of hearing, as the other parties would have no notice that such an issue was to be litigated and would otherwise "contravene the . . . guarantees of due process . . .").

The facts at hand clearly demonstrate that Local 18 had no way of knowing the conduct at issue by either the Charging Parties or the Charged Parties due to the paucity of information regarding the charges alleged in the Region's August 16 Notice of Hearing. The Region's June 28 Notice of Hearing as to Ballast's ULP charge indicated that the parties would have the right to appear and present testimony regarding "work performed utilizing a skid steer/skid loader by the Employer on its fence, gate and barrier wall installation project performed on the Euclid Creek Tunnel Project in Cleveland, Ohio." Yet, the Region's June 28 Notice of Hearing as to Mr. Excavator's ULP charges merely indicated that the parties would have the right to appear and present testimony regarding "[t]he operation of skid steer/skid loader work at *all* of the

Employers' current jobsites." (Emphasis added.) Seeing as the ULP charges alleged by Ballast and Mr. Excavator are completely unrelated, it would be reasonable to expect that the Region's August 16 Notice of Hearing for the consolidated cases would have essentially bifurcated the jobsites at issue. However, that Notice alarmingly identified the work in dispute as the "operation of skid steer / skid loader work at *all* of the Employers' current jobsites," (emphasis added) with a footnote that the specific jobsites would not be identified *until* the hearing on September 4. The Region's August 29 Order did little to resolve the matter, as it was issued a mere five calendar days prior to the September 4 hearing and received by the Union mere *single* day before the September 4 hearing. Accordingly, Local 18 had no way of knowing what jobsites were at issue without taking substantial and challenging pre-hearing discovery maneuvers. Moreover, because Region had found the scope of work to be *all* of the Employers' current jobsites, there were multiple allegations at hand. Simply identifying the three jobsites at issue for Mr. Excavator's ULP charge – Baldwin Road, Metro Health, and Cleveland Hopkins – *at* the hearing made no functional difference in the Union's inability to prepare for the possible disputes at hand. Identifying the jobsites at the hearing afforded Local 18 no more time to prepare than if the jobsites had never been identified at all. As such, the "fairness" test elucidated in *Soule Glass & Glazing Party Co.* for determining the presence of due process remains utterly unsatisfied.

- C. Even Assuming *Arguendo* That the Board Has Reasonable Cause to Believe that Section 8(b)(4)(D) of the Act Has Been Violated and Determines the Instant Matter on its Merits Pursuant to Section 10(k) of the Act, it Should Award the Disputed Work to Local 18.

Pursuant to Section 10(k) of the Act, the Board is required to resolve jurisdictional disputes by making an affirmative award of disputed work on the merits of the conflict. *NLRB v. Radio & Television Broadcast Engineers Union*, 364 U.S. 573, 579 (1961). In so doing, the Board will not formulate general rules for making jurisdictional awards, but must decide every

case on its own facts. *Machinists Lodge 1743 (J.A. Jones Constr. Co.)*, 135 NLRB 1402, 1410 (1961). A representative list of relevant factors includes the presence of CBAs between the parties, employer preference, employer practice (both present and past), area and industry practice, relative skills and training, economy and efficiency of operations, and any interunion agreements. *Id. Accord Iron Workers Local 1 (Goebel Forming Inc.)*, 340 NLRB 1158, 1161-1162 (2003). No one factor is dispositive, as the Board makes a jurisdictional determination upon consideration of all pertinent factors. *See Printing Pressmen Local 269 (Thompson Brush-Moore Newspapers, Inc.)*, 216 NLRB 154, 157 (1975). The union awarded the disputed work may prevail by not necessarily demonstrating that *all* of the relevant factors weigh in its favor, but rather that the majority of them are favorable. *See Plumbers Local 447 (Rudolph & Sletten Inc.)*, 350 NLRB 276, 282 (2007). *See also IBEW Local 363 (U.S. Information Systems)*, 326 NLRB 1382, 1383-1384 (1998). Under this calculus, if the Board deigns to construe the instant matter as a jurisdictional dispute under Section 10(k) of the Act, it should award the disputed work to Local 18 because it clearly prevails on the factors of collective bargaining agreements, area and industry practice, economy and efficiency of operations, employer preference, and relative skills and training.

#### *1. Collective Bargaining Agreements*

Where the unions in a Sec. 10(k) dispute do not have equivalent collective bargaining agreements with the employer in said dispute, this factor will tend to weigh in favor of the union with the effective CBA that covers the work in dispute. *Laborers Internatl. Union of North America (Eshbach Bros. LP)*, 344 NLRB 201, 203 (2005). In the instant matter, Local 18 has an effective CBA via the CEA and OCA Agreements with the CEA and OCA signatories covering the work in dispute. (Jt. Exhs. 1(B), 1(C).) Likewise, LIUNA 310 and 860 also have effective

CBA's with Mr. Excavator and Ballast for the work in dispute. (Jt. Exhs. 2-6.) Normally, where the unions in dispute have effective CBA's with the employer covering the same disputed work, this factor will not favor any union. *Laborers Local 113 (Super Excavators)*, 327 NLRB 113, 115 (1993). However, there is one important consideration that shifts this factor in favor of Local 18.

To the extent that the CBA's between the CEA, OCA and LIUNA 310 and 860 contain language in their jurisdictional clause that purports to cover skid steer work, the jurisdictional language covers the work in such a fashion that would render this factor in favor of Local 18. Unlike Local 18's agreement with the OCA and CEA, the contracts negotiated by LIUNA 310 and 860 fail to include any specific provision requiring or imposing any economic sanction in the event work or equipment contractually stipulated as belonging to a LIUNA affiliate is transferred to another non-LIUNA employee. (Jt. Exhs. 2-6.) Furthermore, LIUNA 310 only provided the signatory page of its AGC Agreement with Mr. Excavator, so there is no way to know what the craft jurisdiction purportedly contained therein states. Additionally, neither LIUNA 310 nor LIUNA 860 provided predecessor agreements. By contrast, skid steers were identified construction equipment that is exclusively within Local 18's craft jurisdiction, both in the current CEA Agreement *and* its predecessors. (Jt. Exhs. 1(A), 1(B), 1(C), 2.) These contractual circumstances support a finding that this factor weighs in favor of Local 18 because "the Board looks to whether one of [the CBA's] gives a superior claim." *Bridge Workers Local 1 (Goebel Forming Inc.)*, 340 NLRB 1158, 1161 (2003). This more nuanced balancing test utilized by the Board in analyzing the CBA factor has been upheld in other contexts as well. *See Laborers District Council of Ohio Local 265 (AMS Constr.)*, 356 NLRB No. 57, \*19-20 (2010) (where Union A's CBA specifically referred to the disputed work, but the Union B's CBA was worded

in more general terms, the CBA factor was in favor of Union A). Thus, on balance, the CBA factor should be accorded to Local 18.

## 2. *Area and Industry Practice*

Area and industry practice for the assignment of the disputed work clearly favors Local 18. As an Ohio-wide labor organization encompassing, *inter alia*, the geographical areas containing the Euclid Creek, Zanesville, Orchard, Baldwin Road, Metro Health, and Cleveland Hopkins projects, it is uncontested that Local 18 has received over 215 letters of assignments for skid steer work (both for full-time and intermittent work) from Ohio contractors within the last eight years. (Jt. Exh. 20.) Moreover, half of these letters have been received in the last three years and a third of these letters account for work purely done within the northeastern Ohio region. (Id.) It was uncontroverted that from January 2009 to August 2013, Local 18 received 554 referrals from contractors throughout Ohio for skid steers/bobcats/skid loaders. (Tr. 472-473.) Additionally, these numbers only reflect Local 18 members individually dispatched through the Union's office; there are additional Local 18 members operating skid steers who remain employed with the same contractors year after year and are not counted among the referral numbers. By contrast, LIUNA 310 has presented only 94 letters of assignment, all of them, save for 18, directed to multiple Ohio LIUNA Locals which are not parties to the case in dispute. (Jt. Exh. 11.) Additionally, many of these letters are less than recent and are specifically limited to the purpose of supplying masonry materials to bricklayers. (Id.)

Here, Local 18's superior showing of letters of assignment and work referrals both in quantity and type tend to favor a finding that this factor is in its favor. *IBEW Local 71 (Capital Electric Line Builders Inc.)*, 355 NLRB 140, 143 (2010). *Accord Operating Engineers Local 825 (Nichols Electric Co.)*, 137 NLRB 1425, 1433 (1962), *enf.* 315 F.2d 695 (3rd Cir.1963).

Furthermore, there was uncontroverted testimony that two Ohio contractors – Kokosing Construction and Great Lakes Construction – who perform work in the Cleveland area have traditionally utilized operating engineers on skid steers. (Tr. 487.) Thus, on balance, the area and industry factor should be accorded to Local 18.

### 3. *Economy and Efficiency of Operations and Employer Preference*

While conventional analyses of both economy and efficiency of operations and employer preference involve the Board investigating the nature of the work performed by the competing unions, *e.g.*, *Laborers' Local 860 (Anthony Allega Cement Contractor, Inc.)*, 336 NLRB 358, 363 (2001), the unique facts of the instant dispute beg an inquiry in another direction. Namely, the finding that it would be more economical to award the disputed work to LIUNA 310 and LIUNA 860 would result in an absurd situation in which the Board essentially gives sanction to the Charging Parties' breach of the work preservation and subcontracting clauses in the OCA and CEA Agreements with Local 18. (Jt. Exh. 1(B)(1), ¶ 21, Jt. Exh. 1(C)(1), ¶¶ 4, 13, 98.) By not awarding Local 18 the disputed work, the Charging Parties would be subject to both the labor costs associated with LIUNA 310 and LIUNA 860 *and* damages costs associated with Local 18 pursuing any and all grievances that allege a breach of contractual provisions in the CEA and OCA Agreements, pursuant to their respective work preservation and subcontracting clauses. In examining this factor, the Board has previously addressed conflicts between contractual terms and workplace economy by recognizing that where conditions in CBA clauses would result in impractical costs to the employer, it would not award the disputed work to the union that would activate such unnecessary expenditures. *E.g.*, *Teamsters Local 1187 (Anheuser-Busch, Inc.)*, 258 NLRB 997, 1001 (1981) (where awarding work to Union A would result in contractually mandated job-bidding restrictions and work guarantees potentially subjecting the employer, *inter*

*alia*, to greater costs, the Board found this factor in favor of Union B). *Accord Glaziers Local 1621 (Hart Glass Co.)*, 216 NLRB 641, 643 (1975).

The same logic applies to the employer preference factor. While the Board will not generally examine the reasons behind an employer's preference, *Laborers Local 829 (Mississippi Lime Co.)*, 335 NLRB 1358, 1360 (2001), fn. 5, the Board will treat employer preference with great skepticism when it appears that the preference is not "representative of a free and unencumbered choice." *ILWU Local 50 (Brady-Hamilton Stevedore Co.)*, 223 NLRB 1034, 1037 (1976), *rev'd on other grounds*, 224 NLRB 275 (1979). In the instant matter, Charging Parties' preference is inextricably linked with their prospect of being subject to damages under the work preservation and subcontracting clauses of Local 18's OCA Agreement and the work preservation clause of the OCA and CEA Agreements. To find that the employer preference factor weighs in favor of LIUNA 310 and LIUNA 860 would essentially mean that the Charging Parties' labor preference is based on an illegitimate desire to avoid their lawfully negotiated collective bargaining terms with Local 18. Their preference is neither "free" nor "unencumbered" but based on a sham. Thus, the factors of economy and efficiency of operations and employer preference should be accorded to Local 18 because to do otherwise would cause the Board to vitiate the duly negotiated CBA between Local 18 and the CEA and OCA that was executed pursuant to employee collective bargaining rights under Section 7 of the Act.

#### 4. *Relative Skills and Training*

In comparing the relative skills and training of the conflicting unions over the disputed work, the Board has held that, all else being equal, formal training is preferable to on-the-job training, which results in a finding of this factor in favor of the union that demonstrates a greater usage of formal training. *Construction & General Laborers' District Council of Chicago and*

*Vicinity (Henkels & McCoy)*, 336 NLRB 1044, 1045 (2001). Local 18 developed a formal “alliance” relationship with OSHA in 2011 to provide rigorous training resources that will provide Local 18 members with, *inter alia*, all necessary information and guidance to engage in the usage of construction equipment. (Jt. Exh. 17.) Although testimony was offered that LIUNA 310 and LIUNA 860 offer training for their members, training occurs at a sole site located at their Union Halls not necessarily faithful to actual working conditions, in addition to one state-wide training ground. (Tr 418-419, 461-464.) On the other hand, Local 18 has developed a state-wide training program, via the Ohio Operating Engineers Apprenticeship and Journeyman Training Program (“Training Program”) to establish four comprehensive training sites throughout Ohio (Ritchfield, Logan, Miamisburg, and Cygnet) with both outdoor and indoor all-weather locations and each with specific training for skid steers and forklifts that faithfully replicate actual working conditions. (Jt. Exhs. 14, 18-19.) The stipulation also includes an observation by Donald Black, the Administrator of the Training Program, that such training is necessary as operation of skid steers and farm tractors is within the craft jurisdiction of Local 18. (Jt. Exh. 14, 18.) Moreover, such training includes required classroom attendance and field work until working proficiency is obtained, as well a detailed training manual for skid steers, applicable to all the various attachments that may be added to the skid steer in its industrial operation. Jt. Exhs. 14-16, 18.).

In sum, the record clearly establishes that there should not be a “stalemate” due to “equally credible testimony” regarding relative skills and training. *Laborers Internatl. Union of North America (Eshbach Bros. LP)*, 344 NLRB at 204. Rather, Local 18 has demonstrated that it has a historically more robust training and skills-development program resulting in members

who are better suited to perform the disputed work with Charging Parties. Thus, this factor should be accorded to Local 18.

D. If, and Only If, The Board Determines That Local 18 Is Not Entitled To The Disputed Work, Charging Parties Are Not Entitled To A Broad Award.

In the event that Local 18 is not awarded the disputed work at the Euclid Creek, Zanesville, Orchard, Baldwin Road, Metro Health, and Cleveland Hopkins projects, a contrary award should be limited to the job sites at issue. The Board will only consider increasing the scope of its award if the disputed work has been a continuous source of controversy in the relevant geographic area, related disputes are likely to reoccur, and the charged union has shown a proclivity to use proscribed means in an attempt to secure similar disputed work. *Operating Engineers Local 318 (Foeste Masonry)*, 322 NLRB 709, 714 (1996), citing *Iron Workers Local 1 (Fabcon)*, 311 NLRB 87, 93 (1993). *Accord Bricklayers Local 21 (Sesco Inc.)*, 303 NLRB 401, 403 (1991). All three of these prerequisites must be satisfied and the evidentiary burden in doing so is demanding because “a 10(k) award is ordinarily limited in scope to the particular job-site or jobsites where the proscribed 8(b)(4)(D) conduct has occurred.” *IBEW Local 104 (Standard Sign & Signal Co.)*, 248 NLRB 1144, 1148 (1980).

Here, it cannot be demonstrated that a broad award is warranted because the exacting evidentiary standard that would allow the Board to abandon the default application of a Sec. 10(k) jurisdictional award is unavailable based on the facts of the instant case. The record is absent of any evidence that would indicate the disputed work has been a continuous source of controversy that would cause similar reoccurrences *and* that Local 18 has demonstrated a habit to use proscribed means to secure similarly disputed work. The existence alone of Local 18’s work preservation and subcontracting grievances as against Charging Parties and other Cleveland-area contractors is *insufficient* to justify a broad award absent evidence of other threatening behavior

by the union against whom the award is made. See *IBEW Local 211 (Sammons Communications)*, 287 NLRB 930, 934 (1987) (broad 10(k) award granted in consideration of prior jurisdictional awards *only if* coupled with threat by union against whom award was made to “cause trouble on every other” employer job site). These grievances are merely part and parcel of Local 18’s attempt to enforce its above-described legitimate work preservation and subcontracting objectives. The record contains no evidence of any purported continuous threatening behavior by Local 18. As such, if the Board decides to not award the disputed work to Local 18, it should confine the adverse award to the Euclid Creek, Zanesville, Orchard, Baldwin Road, Metro Health, and Cleveland Hopkins projects.

Moreover, “[t]he Board customarily declines to grant a broad, area-wide award in cases where the charged party represents the employees to whom the work is awarded and to whom the employer contemplates continuing to assign the work.” *E.g., Ohio and Vicinity Regional Council of Carpenters (Competitive Interiors)*, 348 NLRB 266, 271 (2006). If the Board deigns to award the work to the Charged Party LIUNA 310 and LIUNA 860 and the Charging Parties choose to continue assigning the work at issue to LIUNA 310 and LIUNA 860, the notion of an area-wide award lacks complete merit in this dispute.

## VII. CONCLUSION

Based on all the foregoing, there is no reasonable cause to believe that Sec. 8(b)(4)(D) has been violated as Local 18 has made no claims to the work at issue nor engaged in any relevant coercive conduct, but rather merely sought vindication of its contractual rights by resolution of a wholly arbitrable manner outside the scope of the Board’s jurisdiction. Accordingly, Local 18 respectfully requests that the August 16 Order Consolidating Cases and Rescheduling Hearing be quashed and the hearing in this matter canceled.

Respectfully Submitted,

*Timothy Fadel/SDG*

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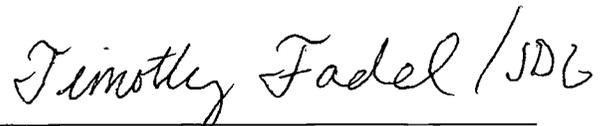
## CERTIFICATE OF SERVICE

A copy of the foregoing Post-Hearing Brief was filed with National Labor Relations Board *via* priority U.S. Mail, postage pre-paid and served *via* regular U.S. Mail, postage pre-paid and email to the following on this 7th day of October, 2013:

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October 7, 2013

Gary Shinnors, Executive Secretary  
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Re: **LIUNA (Mr. Excavator), Case Nos. 08-CD-103660 and 08-CD-103657**  
**LIUNA (Ballast Construction, Inc.) Case No. 08-CD-103113**

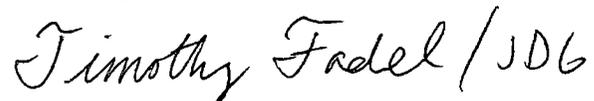
Dear Mr. Shinnors:

Enclosed please find the original and nine (9) copies of the International Union of Operating Engineers, Local 18's Post Hearing Brief.

Please file the International Union of Operating Engineers, Local 18's Post Hearing Brief in the course of your normal business and return a time stamped copy to me in the enclosed self-addressed stamped envelope.

If you have any questions, please do not hesitate to contact me.

Sincerely,



Timothy R. Fadel

JDG: kks

Enclosures

cc: Carl H. Gluek (via Email and U.S. Mail)  
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Basil Mangano (via Email and U.S. Mail Only)  
Frederick Calatrello, Regional Director, Region 8 (NLRB) (via U.S. Mail Only)