

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

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

and

CASE NO. 08-CD-103113

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*  
and

MR. EXCAVATOR  
*Charging Party – Employer*

CASE NO. 08-CD-103657

and

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

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

and

CASE NO. 08-CD-103660

MR. EXCAVATOR  
*Charging Party – Employer*

and

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

**POST-HEARING BRIEF ON BEHALF OF MR. EXCAVATOR**

Respectfully Submitted,



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## OVERVIEW AND INTRODUCTION

This matter arises out of a jurisdictional dispute over whose members have the right to perform skid steer work for Mr. Excavator: the Laborers' International Union of North America, Local 860 ("Laborers 860") and Laborers Local 310 ("Laborers 310") (collectively, "Laborers") or the International Union of Operating Engineers, Local 18 ("Operating Engineers").

In the mid-1990's, Mr. Excavator began using skid steers in its work. Mr. Excavator initially assigned an operator to run the skid steer, but the Laborers objected. The business agents for the Laborers and the Operating Engineers discussed the matter and determined that the Operating Engineers would yield to the Laborers with respect to the skid steer work. Since that time, Mr. Excavator has consistently assigned skid steer work to Laborers without any objection from the Operating Engineers until the fall of 2012.

Beginning in the fall of 2012 and continuing, the Operating Engineers began a campaign of filing unwarranted grievances against Mr. Excavator. The grievances all alleged that Mr. Excavator had breached its contract by assigning skid steer work to someone other than an operator. These grievances began after a Business Agent for the Operating Engineers told Mr. Excavator that the Operating Engineers were now – 22 years later – claiming skid steer work. After two grievances had been filed, but before they had been resolved, the Fringe Benefit Funds arm of the Operating Engineers performed a special audit of Mr. Excavator's records. This special audit followed a routine audit conducted just five months earlier, in which no deficiencies were found. The prior audit encompassed much of the same time period as the special audit. The special audit, however, found a deficiency of over \$74,000.00 – all linked to hours worked by three of Mr. Excavators' laborers who had performed skid steer work on the jobsites where the Operating Engineers had filed grievances. This alleged deficiency was issued despite the fact that Mr. Excavator had made

contributions to the applicable Laborers' funds for the three laborers who actually performed the work.

Due to the audit findings and the continuing pressure from the Operating Engineers to reassign the skid steer work, Mr. Excavator notified both Laborers 310 and Laborers 860 that it may be forced to begin assigning the skid steer work to the Operating Engineers. In response, both Laborers 310 and Laborers 860 notified Mr. Excavator that they would strike if and when Mr. Excavator did reassign the skid steer work. Upon receiving notice that the Laborers would strike, Mr. Excavator filed the instant ULP charges, requesting a Section 10(k) hearing to resolve the jurisdictional dispute over skid steer work. The instant charges were consolidated with Case No. 08-CD-103113 (Ballast Construction, Inc.) and a hearing on all three cases was held September 4, 2013 through September 6, 2013.

Mr. Excavator now submits its post-hearing brief and respectfully requests that the skid steer work be assigned to Laborers 310 and Laborers 860. Mr. Excavator is also requesting an area-wide ruling, as this dispute is ongoing and certain to recur. Moreover, the Operating Engineers have demonstrated a proclivity for engaging in unlawful activity in their quest to regain the skid steer work. As such, an area-wide ruling is appropriate.

## **I. JURISDICTION**

The parties have stipulated that Mr. Excavator is an Ohio corporation with its principal office located in Kirtland, Ohio. (Tr. 13). In the twelve months preceding the filing of the charge in the instant case, Mr. Excavator purchased and received goods valued in excess of \$50,000.00 directly from points outside the state of Ohio. (*Id.*).

The parties have also stipulated that Laborers 310, Laborers 860 and the Operating Engineers are all labor organizations within the meaning of Section 2(5) of the National Labor Relations Act (the “Act”). (Tr. 17).

## **II. THE DISPUTE**

### **A. *Work in Dispute.***

The parties have stipulated that the work in dispute is the operation of skid steers, commonly referred to as “Bobcats,” as well as all of the implement attachments. (Tr. 18). The work in dispute does not extend to include a traditional forklift or all-terrain forklift. (*Id.*).

### **B. *Background & Facts of the Dispute.***

#### **1. Past Practice of Mr. Excavator and Industry Competitors.**

Mr. Excavator is an excavation company located in Kirtland, Ohio. (Tr. 14). Mr. Excavator has been in existence for approximately fifty years. (Tr. 43). Timothy Flesher, who is currently the Executive Vice-President, has worked for Mr. Excavator for fifteen years. (Tr. 44). Mr. Flesher’s father started the company. (Tr. 131). As the name implies, Mr. Excavator is engaged in site excavation and grading on work sites, roadways, and underground utility work. (Tr. 14). Mr. Excavator operates both as the prime contractor and as a subcontractor at various jobsites, both within and outside the State of Ohio. (*Id.*).

Mr. Excavator is a member of both the Ohio Contractors Association (“OCA”) and the Construction Employers’ Association (“CEA”). (Tr. 43). OCA and CEA are Mr. Excavator’s designated bargaining agents with respect to its contracts with the Laborers and the Operating Engineers. (Tr. 44). Timothy Flesher, Executive Vice President, testified that Mr. Excavator has had bargaining relationships with Laborers 310 and Laborers 860 longer than he has been with the

company.<sup>1</sup> (Tr. 44-45). Mr. Excavator's bargaining relationship with the Operating Engineers extends back approximately twelve to thirteen years.<sup>2</sup> Mr. Excavator only employs union members as laborers and operators. (Tr. 46). Mr. Excavator deducts and pays all union dues and makes fringe benefit contributions to the fringe benefit divisions of the respective unions. (*Id.*). When Mr. Excavator needs laborers or operating engineers, it arranges for their employment through the local union halls. (Tr. 47).

Mr. Excavator currently has approximately twenty active projects. (Tr. 48). Mr. Excavator uses skid steers as part of its day-to-day operations and has approximately ten skid steers in its fleet. (Tr. 47). The skid steers are used primarily as an automated wheelbarrow or broom to sweep roads, relocate materials on site, and occasionally, carry pallets of material. (Tr. 48). In a typical day, the skid steer is used intermittently, for a total of two to three hours. (*Id.*). No special training or licensure is required to operate a skid steer. (Tr. 120). Both Laborers and Operating Engineers have exhibited the ability to operate skid steers. (Tr. 121).

Mr. Excavator typically assigns the skid steer work to Laborers and has done so since the mid-1990's. (Tr. 48, 238). This is primarily because, when the laborers are not using the skid steer, they can perform other functions. (Tr. 49, 115). Assigning the skid steer work to laborers is also consistent with industry practice. (Tr. 115-16, citing a list of competitors who also assign skid steer work to laborers). It is Mr. Excavator's preference to continue assigning the skid steer work to laborers. (Tr. 115, 117).

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<sup>1</sup> Joint Ex. 2 is the contract between CEA and Laborers 310. Joint Ex. 3 is the contract between OCA and Laborers 860.  
<sup>2</sup> Joint Ex. 1(B)(1) is the contract between CEA and the Operating Engineers. Joint Ex. 1(C)(1) is the contract between OCA and the Operating Engineers.

2. The Operating Engineers' First Claim for Skid Steer Work.

In July 2012, Mr. Excavator received correspondence from Patrick Sink, Business Manager for the Operating Engineers, indicating that Laborers 310 had renegotiated its contract with OCA, purportedly attributing certain classifications of work to laborers that had not previously been attributed to them, including the operation of skid steers. (Tr. 68, Employer Ex. 18). The correspondence further indicated that the Operating Engineers believed this work to be within its jurisdiction and that they would file claims for breach of contract and damages against any signatories found to be assigning this work to anyone other than an operating engineer. (*Id.*). Prior to receiving this letter, Mr. Excavator was not aware that the Operating Engineers had any objection to Mr. Excavator's assignment of the skid steer work to laborers. (Tr. 70).

3. The Operating Engineers' Second Claim for Skid Steer Work.

Also in July 2012, for the first time, the Operating Engineers held a pre-job conference with Mr. Excavator. (Tr. 70, 74). The pre-job conference was held in connection with Mr. Excavator's work on the Metro Health project in Middleburg Heights, Ohio. (*Id.*). David Russell, Business Agent for the Operating Engineers, arrived at Mr. Excavator's offices in Kirtland, Ohio and met with Mr. Flesher. (Tr. 71). Mr. Russell discussed with Mr. Flesher the scope of the project, the equipment that was to be used, and who Mr. Excavator would be assigning to operate the various pieces of equipment. (Tr. 73). They had a long discussion about skid steers because Mr. Russell indicated that the Operating Engineers were now claiming the skid steer work. (*Id.*). Mr. Flesher explained that Mr. Excavator had historically assigned this work to Laborers. (*Id.*). Mr. Russell responded, "[T]hat's not the way it is anymore." (Tr. 73-4). Mr. Russell further stated that "From this date forward, if he – he will come to the jobsite and sees anywhere [sic] other than the operator on the skid steer, he will file a grievance." (Tr. 74). Mr. Russell and Mr. Flesher agreed to disagree

regarding the assignment of skid steer work. The pre-job conference form, completed by Mr. Russell, reflects this disagreement. (Employer's Ex. 13).

4. The Operating Engineers' Third Claim for Skid Steer Work.

The Operating Engineers proved Mr. Russell's words true shortly thereafter. In October 2012, Mr. Excavator was performing road widening at the Baldwin Road project in Kirtland Hills, Ohio. (Tr. 76). Specifically, Mr. Excavator was increasing the width of the road, adding to the berm, and performing some underground utility and culvert work. (*Id.*). Skid steers were being used and were being operated by Laborers Clint Gott and Tony Colombo. (Tr. 93).

On October 22, 2012, the Operating Engineers filed a grievance against Mr. Excavator after Jack Klopman, Business Agent for the Operating Engineers, observed laborers operating skid steers on the Baldwin Road Project. (Tr. 76, 93; Employer Ex. 15). The grievance alleged that Mr. Excavator had breached the applicable CBA by failing to use an operating engineer to operate the skid steer. (*Id.*). A "Miranda card" was included with the grievance paperwork, which stated that Mr. Excavator purportedly could not correct the breach by reassigning the work. (Employer's Ex. 15). The Miranda card was signed by Jack Klopman. (*Id.*).

5. The Operating Engineers' Fourth Claim for Skid Steer Work.

Approximately ten days later, the Operating Engineers again proved Mr. Russell's words true. At this time, Mr. Excavator was performing work on the Metro Health project, which was comprised of preparation of the site parking lot and the underground utilities. (Tr. 75). Skid steers were used on the project to re-spread topsoil, grade around the buildings, and haul away dirt. (Tr. 249). Typically, the skid steer was used two to three hours per day. (Tr. 249).

On October 26, 2012, the Operating Engineers filed a second grievance against Mr. Excavator after it observed a laborer, John Huffnagle, operating a skid steer on the Metro Health

project.<sup>3</sup> (Tr. 76-77, 93). Attached to the grievance was a Miranda card, virtually identical to the one attached to the Baldwin Road project grievance, signed by Mr. Russell. (Employer's Ex. 14).

Pursuant to the grievance procedure, a Step 2 meeting was held on November 12, 2012, in which both the Baldwin Road and Metro Health grievances were discussed. (Tr. 77-78). Mr. Russell and Mr. Klopman attended the Step 2 meeting on behalf of the Operating Engineers. (Tr. 78). Mr. Russell and Mr. Klopman indicated that "it's a black and white issue . . . either [Mr. Excavator] agree[s] to pay the next available member, or we would have to proceed with the grievance procedure." (*Id.*). No attempt to compromise was made by the Operating Engineers. (*Id.*). As such, no resolution was reached at the Step 2 meeting. (Tr. 79). No further activity has occurred with respect to either of the grievances. (*Id.*).

6. The Operating Engineers' Fifth Claim for Skid Steer Work.

On March 14, 2013, Mr. Excavator received another grievance from the Operating Engineers in connection with the use of a laborer on a skid steer at its Zane State College project. (Tr. 80-81). Mr. Excavator was preparing the site for a new building and parking lot, as well as installing the underground utilities and detention basins. (Tr. 81). Mr. Excavator opted to settle this particular grievance because the Step 2 meeting would have required travel to Columbus. (Tr. 82). As a result, Mr. Excavator determined that settling this particular grievance was in its best interest. (*Id.*). Mr. Excavator paid the next available operator for ten hours of work. (*Id.*). Mr. Excavator continued to assign laborers to the skid steer work on this project after the grievance was resolved. (*Id.*).

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<sup>3</sup> The Operating Engineers had filed an additional grievance against Mr. Excavator during this same timeframe, also in connection with the Metro Health project, when they observed a non-working foreman operating a skid steer. (Tr. 78-9). Mr. Excavator opted to settle this particular grievance because the foreman was not a member of any union. (*Id.*). Mr. Excavator continued to assign skid steer work to laborers, even after the grievance was resolved. (Tr. 127). No subsequent grievances were filed on this project by the Operating Engineers. (*Id.*).

7. The Operating Engineers' Sixth Claim for Skid Steer Work.

In March 2013, the Fringe Benefit Funds arm of the Operating Engineers conducted a special audit of Mr. Excavator's payroll records. (Tr. 93-94). The audit specifically requested documents related to John Huffnagle, Clint Gott, and Tony Colombo – the three laborers who had been operating skid steers at the Baldwin Road and Metro Health projects – for the time period January 1, 2011 through December 31, 2012. (Tr. 96, 109). Mr. Excavator was asked to provide a listing of all work completed by these gentlemen, including the jobs at which they worked and the hours worked. (*Id.*). Mr. Huffnagle, Mr. Gott, and Mr. Colombo are all members of either Laborers 310 or Laborers 860 and contributions were made to their respective Funds for the work performed. (*Id.*, Tr. 46). These were the only records requested – Mr. Excavator was not asked to provide documents relating to any other employees. (*Id.*). Mr. Excavator had never previously been asked to provide this type of detailed information related to specific employees. (*Id.*).

Mr. Excavator had just completed a routine audit in October 2012, covering the time period from November 2011 through September 2012, in which no adverse findings were made. (Tr. 98). Mr. Flesher testified that the audits were generally done on one-year to 18-month cycles. (Tr. 98, 100). No adverse findings had been found in any prior audits conducted by the Operating Engineers. (Tr. 101).

The Fringe Benefits Funds subsequently notified Mr. Excavator that it had been assessed a delinquency of over \$74,000, as a result of the March 2013 audit. (Tr. 101). The letter notifying Mr. Excavator of the delinquency carbon copied legal counsel for Operating Engineers, as well as Richard Dalton, President of Operating Engineers, and Patrick Sink, Business Manager. (Tr. 125). Mr. Excavator interpreted the letter from the Fringe Benefits Funds as a claim for work because the

only three employees identified in the audit were the same three employees who were operating the skid steers on the days identified in the Baldwin Road and Metro Health grievances. (Tr. 109-110).

7. The Operating Engineers' Seventh Claim for Skid Steer Work.

On August 8, 2013, the Operating Engineers filed a grievance against Mr. Excavator in connection with its work on the Cleveland Hopkins International Airport project ("Cleveland Hopkins project"). (Employer Ex. 28). Mr. Excavator was preparing the site, including grading, excavation, and installation of underground utilities, for a new airport control tower. (Tr. 92). The grievance was filed after Mr. Russell observed a laborer operating a skid steer on the project site. (Tr. 91). John Huffnagle, a laborer with Mr. Excavator, was working on the day in question. (Tr. 250). The Operating Engineers have not attempted to schedule the Step 2 meeting in connection with this grievance. (Tr. 92).

8. Mr. Excavator's Communications with Laborers 310 and 860.

Due to the audit findings and the continual pressure from the Operating Engineers, Mr. Excavator eventually reached a point where it felt it had to consider reassigning the skid steer work to the Operating Engineers. (Tr. 112-13). Mr. Excavator sent letters to both Laborers 310 and Laborers 860, explaining that it was contemplating reassigning the work. (Tr. 112, 117, Employer Ex. 20, 22). After sending the letters, Mr. Flesher called Mr. Liberatore, Business Manager of Laborers 860, to make sure he received the letter. Mr. Flesher and Mr. Liberatore had a brief conversation during which Mr. Flesher explained that, although he'd historically assigned the skid steer work to the Laborers, he could not afford to pay wages and benefits to both laborers and operators. (Tr. 112-13). As a result, he was being forced to assign the work to the operators. (*Id.*). Mr. Flesher had a similar conversation with Mr. Joyce, Business Manager for Laborers 310. (Tr. 118-19).

Laborers 310 and Laborers 860 both responded by indicating that they would strike if Mr. Excavator reassigned the skid steer work to the Operating Engineers. (Tr. 114, 119, Joint Exs. 8 and 9). Mr. Flesher took the threats seriously and believed that both Laborers 310 and Laborers 860 would strike if Mr. Excavator reassigned the work. (Tr. 195). As a result, Mr. Excavator filed the instant ULP charges.

***C. The Operating Engineers' Motion to Quash.***

Prior to the hearing in this matter, the Operating Engineers filed a Motion to Quash the hearing. (Board Ex. 3a). The Operating Engineers based their Motion on two grounds: (1) that their due process rights were violated because the Board's notice as to what jobsites were at issue was inadequate; and (2) that there is no jurisdiction for a 10(k) hearing because there are no competing claims for work. The Motion was denied, but renewed by counsel at the hearing. The Hearing Officer denied the renewed Motion. It is anticipated, however, that the Operating Engineers will renew the Motion once again in their brief. As demonstrated below, the Motion to Quash has no merit and should remain denied.

1. The Operating Engineers Received Adequate Notice.

The initial Notice of Hearing for the instant matter indicated that the parties would have the right to appear and present testimony regarding "the operation of skid steer/skid loader work at all of the Employer's jobsites." (Board Ex. 3a, p. 15-16). The most recent Notice similarly stated 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."<sup>4</sup> (*Id.* at 16). The Operating Engineers contend that the Notices of Hearing were so vague that the Operating Engineers "ha[d] no way to know of the conduct at issue."

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<sup>4</sup> At this point, the Mr. Excavator cases had been consolidated with the Ballast case (Case No. 08-CD-103113).

The Hearing Officer heard the Operating Engineers' arguments to this effect at the hearing. Ultimately, the Hearing Officer denied the renewed Motion, but limited the scope of the hearing to the three unresolved grievances that the Operating Engineers had filed against Mr. Excavator. (Tr. 23-25). Those grievances involved the Baldwin Road project, the Metro Health project, and the Cleveland Hopkins project. (Tr. 25).

To the extent the Operating Engineers continue to claim that they were not provided with sufficient notice as to what was in dispute, they have not presented any evidence that they were not able to adequately prepare a defense for the hearing due to the inadequate notices. Furthermore, the hearing notices identified "the operation of skid steer/skid loader work" as the conduct at issue. The reference to skid steer work provided sufficient notice to the Operating Engineers as to the subject matter of the dispute. It is disingenuous for the Operating Engineers to now claim they could not have known what jobsites were at issue when they themselves are the ones who put those jobsites at issue by filing grievances over the skid steer work. Moreover, the Operating Engineers have not shown that any unfairness resulted or that they did not have a fair opportunity to present a defense as a result of the purported inadequacy of the hearing notices. *Soule Glass & Glazing Party Co. v. NLRB*, 652 F.2d 1055, 1073-1074 (1<sup>st</sup> Cir. 1981). Indeed, as demonstrated at the hearing, the Operating Engineers were well prepared with respect to the three jobsites specified by the Hearing Officer and had more than a fair opportunity to present a defense to all allegations concerning those three jobsites. Accordingly, the Operating Engineers' allegation that notice was inadequate has no merit.

2. The Operating Engineers Have Made A Claim for the Skid Steer Work.

The Operating Engineers argue that they have not made a claim for the skid steer work from Mr. Excavator, but rather, they are simply enforcing a preservation of work clause in the applicable

CBA's and collecting damages based on that clause. (Board Ex. 3a, p. 21-24). As such, no jurisdiction exists for a Section 10(k) hearing because there are no competing claims for the work. This transparent tactic to circumvent Section 10(k) by filing "pay-in-lieu" grievances has been attempted by the Operating Engineers numerous times. The Board has long seen through this tactic:

The Operating Engineers contends that there are no competing claims because its grievance requests compliance with its collective-bargaining agreement, not reassignment of the disputed work. We find no merit to this contention. This case presents a traditional situation in which two unions have collective bargaining agreements with the Employer and each union claims its contract covers the same work. (citation omitted). In these circumstances, a claim to the work in dispute based on an asserted contractual right to the work does not remove the case from being a 10(k) dispute. Rather, the contractual claim constitutes a claim to the work and is one of the relevant factors for the Board's consideration in awarding that work. Otherwise, a union could consistently avoid the reach of Section 10(k) and Section 8(b)(4)(D) of the Act by couching its claims in terms of a contract claim for damages. Consequently, we conclude that there exists active competing claims to disputed work between rival groups of employees.

*Laborers Local 931 (Carl Bolander & Sons, Co.)*, 305 NLRB 490, 491 (1991); *see also, Sheet Metal Workers' Int'l Assoc., Local 27 (E.P. Donnelly, Inc.)*, 357 NLRB No. 131, 2011 NLRB LEXIS 693 (Dec. 8, 2011); *Laborers' District Council of Ohio, Local 265 (AMS Construction, Inc.)*, 356 NLRB No. 57, 2010 NLRB LEXIS 518 (2010) (holding that the Operating Engineers' filing of two pay-in-lieu grievances with the employer each constituted a claim for the work); *LIUNA 860 (McNally Kiewit)*, 2013 NLRB LEXIS 230 at \*12 (Apr. 8, 2013) (pay-in-lieu grievance filed by Operating Engineers constituted a claim for work in and of itself).<sup>5</sup>

Courts have also consistently held that "pay-in-lieu" grievances constitute claims for work. *See, Local 30, United Slate, Tile & Composition Roofers Ass'n v. NLRB*, 1 F.3d 1419, 1427 (3d Cir. 1993) ("The distinction . . . between seeking the work and seeking payment for the work is

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<sup>5</sup> Unreported cases are attached for the Board's convenience as Exhibit A.

ephemeral.”); *LIUNA, Local 210 v. McKinney Drilling Co.*, 393 Fed. Appx. 736, 2010 U.S. App. LEXIS 16550 at \*3-4 (2d Cir. 2010) (“A union’s actions to enforce the terms of its CBA with respect to work performed by a non-union member is necessarily a claim for the work.”); *see also*, e.g., *Local 30, United Slate, Tile and Composition Roofers v. NLRB*, 1 F.3d 1419, 1428 (3d Cir. 1993) (“Section 10(k) proceedings are intended to resolve competing claims for work even if both groups of employees claiming the work have legitimate contractual claims).

Thus, the Operating Engineers’ arguments that they are merely attempting to enforce their work preservation clause or that they are only seeking damages are without merit. The grievances filed by the Operating Engineers are claims for work, and therefore place this matter directly in the purview of Section 10(k). Accordingly, the Operating Engineers Motion to Quash has no merit and should remain denied.

***D. The Hearing Officer Erred in Not Allowing Employer’s Exhibits 16 and 27 Into Evidence.***

Employer’s Exhibit 16 is a copy of a letter from the Operating Engineers’ Fringe Benefit Funds to Mr. Excavator, assessing a \$74,345.57 delinquency against Mr. Excavator for “unpaid fringe benefit contributions.” Employer’s Exhibit 27 is a letter from the Fund to Mr. Excavator, informing Mr. Excavator that the current contributions it made were being applied to the delinquency first.<sup>6</sup> The Hearing Officer rejected the exhibits and sustained the objection of counsel for Operating Engineers on the grounds that the Fringe Benefit Funds was not a party to proceedings. (Tr. 111).

Mr. Excavator respectfully disagrees and requests that Employer’s Exhibits 16 and 27 be admitted into evidence. Both exhibits are further evidence that the Operating Engineers were

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<sup>6</sup> Because the current contributions were applied to the delinquency, Mr. Excavator’s current Operating Engineers have either lost or are in danger of losing their health insurance. (Tr. 128).

making a claim for the skid steer work. As the record evidence demonstrates, the March 2013 audit that resulted in the approximate \$74,000.00 delinquency was not a routine audit. It was conducted only after the Operating Engineers had already filed two grievances against Mr. Excavator – one at Baldwin Road on October 22, 2013 and one at Metro Health on October 31, 2012. (Tr. 106). It was also conducted only five months after a routine audit had been completed without any adverse findings. (Tr. 98). The previous audit was completed in October 2012 and covered the time period from November 2011 through September 2012. (Tr. 98). The March audit covered the time period from January 1, 2011 through December 31, 2012. (Tr. 96). Miraculously, even though the audit periods had a nine-month overlap and the first audit came back clean, the Fringe Benefit Funds managed to find a \$74,000-plus delinquency during the second audit. This is even more miraculous when one takes into account that the March 2013 audit was based on the records of only three Mr. Excavator employees – the same employees who were operating the skid steers on the days cited in the grievances filed by Mr. Excavator. (Tr. 96-97). The Funds provided no authority under which they were permitted to audit the time of members of another union not subject to the Operating Engineers' agreements. (Tr. 123, 128-29).

Counsel for the Operating Engineers – not the Fringe Benefit Funds – was copied on the audit results. (Employer's Ex. 16). In Mr. Flesher's experience, this was not commonly done. (Tr. 125). Richard Dalton, President of the Operating Engineers, and Patrick Sink, Business Manager, were also copied on the letter, even though they are not regularly copied on such correspondence. (Tr. 125, 609, 621, 641). Mr. Dalton is also a Trustee of the Pension Fund and the Health and Welfare Fund. (Tr. 604).

There are simply too many commonalities between the underlying jurisdictional dispute and the special audit performed by the Fringe Benefit Funds to be coincidence. The Operating

Engineers clearly directed the Fringe Benefit Funds to perform the special audit. Indeed, Mr. Excavator has evidence that the Operating Engineers specifically instructed the Fringe Benefit Funds to request the records of Mr. Glott, Mr. Colombo, and Mr. Huffnagle – the three laborers who had operated the skid steers. (Tr. 613). The evidence certainly suggests that the Fringe Benefit Funds *was* acting as an agent for the Operating Engineers.

Despite the Operating Engineers protestations at the hearing that this is not possible, the Eighth Circuit has held that a trustee of a union fund can act as an agent of the *union* if he uses his position as trustee to accomplish union objectives. *See NLRB v. Const. General Laborers' Union Local 1140*, 577 F.2d 16, 21 (8<sup>th</sup> Cir. 1978) (holding that fund trustee acted as agent of union by organizing a picket of an employer purportedly on behalf of the fund, but that was truly for the purposes of advancing union objectives). In this case, the Fringe Benefits Funds and the Operating Engineers were using the audit as an additional means of pressuring Mr. Excavator into reassigning the skid steer work. And it worked, as evidenced by the fact that Mr. Excavator informed both Laborers 310 and Laborers 860 that it might be forced to reassign the work shortly after receiving the audit results. (Tr. 112-115).

Furthermore, the Sixth Circuit has found that a union fund's lawsuit for delinquent contributions is not appropriate when there is an underlying jurisdictional dispute that has not been resolved. *See Trustees of B.A.C. Local 32 Ins. Fund v. Ohio Ceiling & Partition Co., Inc. ("Ohio Ceiling")*, 48 Fed. Appx. 188 (6<sup>th</sup> Cir. 2002). In that case, the union fund sued the employer, claiming that the employer owed contributions for work that should have been given to its members/beneficiaries. The employer had paid contributions for the employees that performed the work, but those employees belonged to a different union, and the contributions were therefore made to a different fund. The Court found that the dispute at "the heart of the matter" was a jurisdictional

dispute over which union was permitted to perform the work. The Sixth Circuit shared the district court's concern that the union fund had used ERISA "to press a jurisdictional dispute over the assignment of work." *Id.* at 28. The Court further admonished the fund's actions by stating: "Looking at the basis for the protections afforded to ERISA plans under Section 515, nothing suggests that it was intended to afford ERISA fiduciaries a weapon against employers in undeclared jurisdictional disputes with competing unions." *Id.* at 29.

A factually similar lawsuit filed by the Fringe Benefit Funds for the Operating Engineers against Hunt Construction Group, Inc. ("Hunt") is currently pending in the Southern District of Ohio. *See Raymond Orrand, Administrator, et al. v. Hunt Construction Group, Inc.*, Case No. 2:13-CV-481 (Southern District of Ohio). The Fringe Benefit Funds audited Hunt and found a deficiency, which it filed suit to collect. Hunt, the Laborers, and the Operating Engineers have 10(k) proceedings pending before the NLRB related to disputes over forklifts and skid steers. The audit findings were related to contributions made for the employees who performed the work on the forklifts and skid steers. Hunt requested that the District Court dismiss the Funds' lawsuit, or in the alternative, stay the action pending the Board's decisions in the 10(k) proceedings. On September 26, 2013, the District Court stayed the action. *See Order and Opinion*, attached as Exhibit B. The District Court cited the *Ohio Ceiling* case and expressed the same concerns relating to a fund using ERISA as a weapon against employers in undeclared jurisdictional disputes with competing unions.

The evidence suggests that the Operating Engineers and the Fringe Benefit Funds are applying this same tactic against Mr. Excavator and using the audit findings as a weapon to pressure Mr. Excavator into reassigning the skid steer work. At the very least, Mr. Excavator should have been provided with the opportunity to explore whether the Fringe Benefit Funds or its trustees were acting as agents of the Operating Engineers by conducting the special audit.

Thus, the Hearing Officer erred by rejecting Employer's Exhibits 16 and 27. Accordingly, Mr. Excavator requests that the hearing be reopened.

***E. The Hearing Officer Correctly Rejected Operating Engineers' Exhibits 4 and 5 – the 1954 MOU Between Operating Engineers and Laborers and Subsequent Repudiation.***

It is anticipated that the Operating Engineers will argue that the Hearing Officer erred by rejecting Operating Engineers Exhibits 4 and 5. Exhibit 4 is a "Memorandum of Understanding By and Between the International Union of Operating Engineers and International HOD Carriers' Building and Common Laborers' Union of America."<sup>7</sup> ("1954 MOU"). The purpose of the MOU was purportedly to "arriv[e] at a clarification regarding disputes that have arisen in the construction industry between the members of both Organizations. . . ." (Operating Engineers' Ex. 4, p.1). One of the "clarifications" provided:

- (1) With regard to fork lifts and other similar type of equipment, the operation of same will be by members of the International Union of Operating Engineers; a member or members of [LIUNA] will work in connection with said equipment for the purpose of seeing to it that the load is properly on the lift and to do any necessary tending in the event that part of the load spills, etc. . . .

(*Id.*). The Operating Engineers argue that skid steers are covered by this MOU based on the phrase "similar type of equipment" and language in the preamble, which states: "and cognizant of the fact of the development of machinery and equipment in connection with work in both Organizations. . . ." (*Id.*; Tr. 458-60.)

Rejected Exhibit 5 is a letter from the General President of LIUNA, abrogating or repudiating the 1954 MOU. (Operating Engineers Ex. 5). The Operating Engineers argue that this

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<sup>7</sup> The International HOD Carriers' Building and Common Laborers' Union of America is now the Laborers International Union of North America ("LIUNA").

letter would have been unnecessary unless LIUNA believed the 1954 MOU to be binding. (Tr. 460).

In 2012, the Operating Engineers filed a lawsuit against LIUNA, the Laborers District Council, and a number of local unions, including Laborers 310 and 860, alleging breach of contract claims related to the 1954 MOU. *See Int'l Union of Operating Engineers, Local 18 v. LIUNA, et al.*, United States District Court, Northern District of Ohio, Case No. 1:12-CV-02797. On September 26, 2013, Judge Boyco **dismissed the Operating Engineers' lawsuit, finding that the 1954 MOU did not constitute a contract, and therefore, had no binding authority over the Laborers.** *See "Opinion and Order, dated Sept. 26, 2013, Case No. 1:12-CV-02797* (attached as Exhibit C).

As such, because the 1954 MOU is not a contract and has no binding authority, it is irrelevant to the instant proceedings. The Hearing Officer correctly ruled that the MOU, and LIUNA's purported repudiation thereof, were inadmissible.

***F. Application of the Statute.***

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be established that (1) there are competing claims for the work; (2) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated; and (3) the parties have not agreed on a method for the voluntary adjustment of the dispute. *LIUNA (Eshbach Brothers, LP)*, 344 NLRB 201 at 202 (January 28, 2005).

1. Competing Claims for the Work Exist.

Laborers 310 and Laborers 860 admit that they are claiming the skid steer work. (Tr. 33). Moreover, as the record demonstrates, Mr. Excavator has almost exclusively assigned this work to the Laborers since the mid-1990's. (Tr. 48-49, 239-240).

As discussed in Section C, the Operating Engineers have claimed the work by virtue of their “pay-in-lieu” claims for damages pursuant to the work preservation clause. *Laborers Local 931 (Carl Bolander & Sons, Co.)*, 305 NLRB 490, 491 (1991); *Eshbach Brothers*, 344 NLRB at 202; *Laborers Local 113 (Super Excavators)*, 327 NLRB 113, 114 (1998); *Sheet Metal Workers’ Int’l Assoc., Local 27 (E.P. Donnelly, Inc.)*, 357 NLRB No. 131, 2011 NLRB LEXIS 693 (Dec. 8, 2011); *Laborers’ District Council of Ohio, Local 265 (AMS Construction, Inc.)*, 356 NLRB No. 57, 2010 NLRB LEXIS 518 (2010).

The Operating Engineers also claimed the work during the July 2012 pre-job conference where Mr. Russell “pointed out that Local 18 had claimed the skid steer.” (Tr. 73). During this pre-job conference, Mr. Russell also informed Mr. Flesher that the Operating Engineers would be filing a grievance anytime they saw someone other than an operator on a skid steer. (Tr. 74); *see LIUNA 860 (McNally Kiewit)*, 2013 NLRB LEXIS 230 at \*12 (finding that a verbal request for work at a pre-job conference constituted a claim for work). The July 2012 letter from the Operating Engineers to its members could also be construed as a claim for skid steer work. (Employer’s Ex. 18).

2. Reasonable Cause Exists to Find a Violation of Section 8(b)(4)(D).

Reasonable cause exists to find that a violation of Section 8(b)(4)(D) occurred. First, the Laborers violated Section 8(b)(4)(D) when they threatened to strike if Mr. Excavator reassigned the skid steer work to the Operating Engineers. (Tr. 113, 117, Joint Exs. 8, 9). Mr. Excavator took these threats seriously (Tr. 195) and the Laborers made the threats with the intent to act on them if and when Mr. Excavator did reassign the work.<sup>8</sup> (Tr. 417-18, 444).

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<sup>8</sup> Despite the Operating Engineers’ claims to the contrary, there is absolutely no evidence in the record to suggest that either the Laborers 310’s or Laborers 860’s threat to strike was a sham.

Reasonable cause also exists to believe that the Operating Engineers violated Section 8(b)(4)(D). Section 8(b)(4)(D) prohibits labor organizations from forcing or requiring an employer to assign particular work to employees in a particular labor organization rather than to employees in another labor organization. Since October 2012, the Operating Engineers have filed five grievances against Mr. Excavator, alleging that Mr. Excavator breached the work preservation clause by assigning skid steer work to someone other than an operating engineer. The Operating Engineers' actions in filing these repeated grievances against Mr. Excavator are clearly attempts to force or require Mr. Excavator to assign the work to the Operating Engineers rather than Laborers. Moreover, in a 10(k) proceeding, the Board is only charged with finding that reasonable cause exists for finding a violation of Section 8(b)(4)(D); not that a violation actually did occur. *Lab. Int'l Union of North America, Local No. 113 (Super Excavators, Inc.)*, 327 NLRB 113, 115 (October 30, 1998). Here, there is undeniably reasonable cause to believe that the Operating Engineers violated Section 8(b)(4)(D).

3. No Method for Voluntary Adjustment of the Dispute Exists.

The parties have stipulated that no method for voluntary adjustment of this dispute exists that would be binding on all parties. (Tr. 14).

Accordingly, the preliminary elements for a 10(k) proceeding have been met.

**G. Merits of the Dispute.**

Section 10(k) requires the Board to make an affirmative award of disputed work after considering several factors. *Super Excavators*, 327 NLRB at 115. The Board's determination is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Id.* The factors considered by the Board include: (1) whether there are any Board certifications or collective bargaining agreements that cover the employees and/or the work

in dispute; (2) the employer's preference and past practice; (3) area and industry practice; (4) relative skills and training; and (5) economy and efficiency of operations. As demonstrated below, a balancing of these factors tips the scales in favor of awarding the skid steer work to Laborers 310 and 860.

1. Certifications and Collective Bargaining Agreements.

The parties have stipulated that there are no Board certifications applicable to the employees in dispute. (Tr. 31-32).

All of the contracts at issue purport to cover skid steer work. The Laborers' 310 contract with the CEA specifically lists skid steers as equipment that is included in Local 310's jurisdiction. (Joint Ex. 2, Article I, p. 4). Laborers' 860's contract with the OCA references skid steers in Exhibit B, "Classifications in Wage Group 2." (Joint Ex. 3, p. 46).

The Operating Engineers' contract with CEA lists "Skidsteers" as equipment that falls within the jurisdiction of its members. (Joint Ex. 1(B)(1), para. 10). The Operating Engineers' contract with the Ohio Contractors' Association ("OCA") references skid steers in Classifications B and C. (Joint Ex. 1(C)(1), pp. 52-53, 60).

As such, this factor is neutral and does not favor an award to either group.

2. Employer Preference and Assignment.

It is undisputed that Mr. Excavator has almost exclusively assigned skid steer work to laborers since the mid-1990's. (Tr. 115, 122, 128, 192). It is also undisputed that Mr. Excavator prefers to continue assigning skid steer work to laborers. (Tr. 115, 122). The main reason for this preference is because the skid steers are only used intermittently throughout the day, typically for two to three hours per day. (Tr. 48, 115, 192). When the skid steer is not in use, the laborers can be engaging in other tasks. (Tr. 115, 122). If Mr. Excavator is forced to use an operator on the skid

steers, that operator will sit idle when the skid steer is not in use. As Mr. Flesher testified, Mr. Excavator cannot afford to pay an operator to sit on a skid steer even when the skid steer is not being used. As such, this factor weighs in favor of awarding the skid steer work to the Laborers.

It is anticipated that the Operating Engineers will point to the fact that Mr. Excavator has, on at least one occasion, assigned an operator to run a skid steer. As Mr. Flesher explained, however, in that particular situation, a grinding attachment was being used with the skid steer. (Tr. 482). It was the only time Mr. Excavator has ever used a grinding attachment. (*Id.*). The process that was being conducted was an all-day process. (*Id.*). The entire process took three days. (*Id.*). During the process, the operator was not required to get on and off the skid steer. (*Id.*). Rather, the operator ran the skid steer all three days for the entire shift. (*Id.*). Mr. Flesher testified that this situation was unusual and not a typical use of skid steers for Mr. Excavator (Tr. 482). As such, this one-time assignment of an operator should not be construed as evidence that Mr. Excavator's past practice is to assign skid steer work to the Operating Engineers.

### 3. Area and Industry Practice.

This factor also weighs in favor of awarding the skid steer work to the Laborers. As Mr. Flesher testified, Mr. Excavator's competitors also use laborers to operate the skid steers. (Tr. 115-116).

Mr. Liberatore, Business Manager for Laborers 860, also testified that, in his experience, laborers have been used in the jurisdiction to operate the skid steers. (Tr. 411). He personally had no recollection of observing an Operating Engineer operate a skid steer. (*Id.*). Mr. Joyce, Business Manager for Laborers 310, similarly testified that signatory contractors almost exclusively use laborers to operate skid steers. (Tr. 438). Laborers 310 and 860 also submitted multiple letters of

assignment from construction contractors indicating that skid steer work was being assigned to laborers. (Joint Ex. 11).

The Operating Engineers also submitted letters of assignment in which contractors assigned the skid steer work to the Operating Engineers. (Joint Ex. 20). It should be noted, however, that the letters of assignment submitted by the Operating Engineers cover all industries and are not limited to the construction industry. (Tr. 597). As such, the letters of assignment are not an accurate representation of industry practice.

The Operating Engineers presented some testimony from Mr. Dalton that certain construction contractors assign skid steer work to operating engineers. (Tr. 487). Mr. Dalton specifically mentioned Great Lakes Construction and Kokosing as two contractors who assign operators to skid steers. However, the Operating Engineers also submitted into evidence copies of grievances they filed against both Great Lakes Construction and Kokosing for assigning someone other than an operator to run a skid steer. (Operators' Ex. 9). As such, the testimony of Mr. Dalton as to which contractors use operators versus laborers is not credible. Consequently, the balance of the evidence presented as to area and industry practice weighs more heavily in favor of awarding the skid steer work to the Laborers.

#### 4. Relative Skills and Training.

No special license is needed to operate a skid steer. (Tr. 120). Laborers 310 and 860 and the Operating Engineers all provide training on skid steers to their members. Laborers 310 certify their members through a six-hour training class, which includes observing the operator on the skid steer. (Tr. 462-63; Joint Ex. 12). Mr. Joyce testified that he had never received any complaints indicating that their members were inadequately trained to operate skid steers. (Tr. 464). Laborers 860 provide training in various locations throughout Ohio, including a facility in Howard, Ohio.

(Tr. 418). Laborers 860 also provides training at contractor locations. (*Id.*). Mr. Liberatore testified that Laborers 860 members have the requisite skills and qualifications to operate skid steers. (Tr. 422). He has not received any complaints regarding 860 members being inadequately trained. (*Id.*).

The Operating Engineers submitted several documents describing their training programs, but did not provide any testimony specific to this topic. (Joint Exs. 15-19). It is anticipated that the Operating Engineers will argue that their training programs are superior to those of Laborers 310 and 860. However, such an argument is irrelevant, as there is no evidence in the record to indicate that the training provided by Laborers 310 and 860 is inadequate. Accordingly, this factor is neutral and does not favor an award to either union.

5. Economy and Efficiency of Operation.

Mr. Flesher testified that it is far more efficient and economical for Mr. Excavator to have a Laborer operate the skid steer. (Tr. 115, 122, 192). Laborers who operate the skid steers for Mr. Excavator do so for only approximately two to three hours per day. (Tr. 48). As a result, the majority of the laborers' day is spent performing other tasks – tasks that fall within the Laborers' jurisdiction. (Tr. 115, 122, 192). If an Operating Engineer were assigned to operate the skid steer, he or she would be sitting idle for at least five to six hours per day. This is neither economic nor efficient for any operation. Furthermore, if Mr. Excavator was required to assign the skid steer work to an Operating Engineer, it would effectively force Mr. Excavator to add an additional employee to each jobsite with no increase in the amount of work performed.

In *Super Excavators*, the Board found that the operation of a mini-excavator should be awarded to the Laborers over the Operating Engineers where the mini-excavator was only used three to four hours during an eight-hour shift and the laborers could be performing other tasks

during the time the mini-excavator was not being used. 327 NLRB at 116. Similarly, in *LIUNA, Local 931 (Carl Bolander & Sons, Co.)*, the Board awarded rotary drill work to the Laborers over the Operating Engineers where the rotary drills were only used six hours per day and the remainder of the day was spent on other tasks under the laborers' jurisdiction. 305 NLRB 490, 490.

Here, the skid steers are used even less per day than the mini-excavators in the *Super Excavators* case or the rotary drill in *Carl Bolander & Sons*. As in both of those cases, the use of laborers is more efficient because they can be completing other tasks when the skid steers are not needed. As such, this factor weighs in favor of awarding the skid steer work to the Laborers.

In summary, the factors related to collective bargaining agreements and training are neutral and do not favor either the Laborers or the Operating Engineers. The factors of employer preference and past practice, area and industry practice, and economy and efficiency of operation all favor awarding the skid steer work to the Laborers.

### **III. SCOPE OF THE AWARD**

Mr. Excavator respectfully requests that an area-wide ruling be given in this case. Area-wide rulings are permitted when a union "demonstrates a proclivity to engage in unlawful conduct and there is an indication that the dispute regarding an employer's work is likely to recur." *IBEW Local Union No. 98 (Lucent Technologies)*, 324 NLRB 226, 229 (1997). An area-wide ruling should encompass the geographical area in which an employer does business, as well as the jurisdictions in which the competing unions coincide. *Id.*

As the record demonstrates, the Operating Engineers will not be content to limit their campaign against Mr. Excavator to just the three grievances involved in the instant case. Mr. Russell informed Mr. Fleshing in no uncertain terms that the Operating Engineers intend to file grievances any time they see anyone other than an operator running a skid steer. (Tr. 78). Evidence

presented at the hearing shows that the Operating Engineers have already made good on that promise. Since the Operating Engineers first made known their intent to claim the skid steer work in July 2012, they have filed at least five grievances against Mr. Excavator for assigning skid steer work to someone other than an operator – one grievance at the Baldwin Road project, two grievances at the Metro Health project, one grievance at Zane State College, and one grievance at the Cleveland Hopkins project. (Tr. 76-77, 80-81, 93; Employer Ex. 28). There is no reason to expect the Operating Engineers to cease these unlawful actions simply because a ruling is issued in this particular case.

Furthermore, the record evidence also demonstrates that the Operating Engineers are waging similar campaigns against other employers in the region for the exact same work. The hearing in this matter was consolidated with the Ballast case, in which substantial testimony was given regarding the Operating Engineers' dispute with Ballast over the same skid steer work. Additionally, at the hearing, reference was made to disputes between other employers in the area and the Operating Engineers over the skid steer work. (Tr. 509, 511–14, 518, Operator's Ex. 8). The Operating Engineers also submitted evidence regarding other grievances they have filed in 2012 and 2013 related to skid steer work:

- Great Lakes Construction Company (4/22/13)
- Sitetech, Inc. (3/20/13 and 4/23/13)
- Kokosing Construction Co., Inc. (12/31/12)
- Perk Company, Inc. (4/23/13 and 5/9/13)
- Fabrizi Trucking & Paving Co., Inc. (4/12/13 and 4/16/13)
- Phoenix Cement, Inc. (9/13/12, 9/21/13, and 9/27/13)

(Operator's Ex. 9). There are also several cases pending before the Board on the issue of whether skid steer work should be assigned to Laborers or Operating Engineers, including Case Nos. 08-CD-081840 and 08-CD-081837 (Donley's, Inc.) and Case No. 08-CD-089283 (Ronyak Paving, Inc.). *See also*, Order and Opinion (Exhibit B), referencing underlying 10(k) proceedings between Hunt Construction Group, Inc., Laborers, and Operating Engineers.

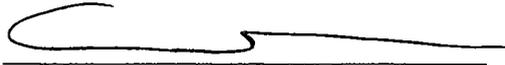
It is obvious that this dispute will continue *ad nauseam* unless an area-wide ruling is issued to resolve it once and for all. It is also clear that the Operating Engineers have no qualms about engaging in unlawful and reckless tactics in their attempt to obtain this work. The Board has issued area-wide rulings in similar situations. *IBEW Local Union 134 (Movers Ass'n of Greater Chicago)*, 205 NLRB 216, 219 (awarding area-wide ruling where evidence of several other disputes over the same work existed); *see also*, *IBEW (Lucent Technologies)*, 338 NLRB 1118 (Apr. 30, 2003); *IBEW (Lucent Technologies)*, 324 NLRB 226 (Aug. 12, 1997)

Accordingly, an area-wide ruling is not only appropriate, but necessary to avoid future disputes over the assignment of skid steer work.

#### **IV. CONCLUSION**

The weight of the evidence clearly favors an award in which Mr. Excavator is allowed to continue assigning the skid steer work to Laborers 310 and Laborers 860. The factors of employer preference, past practice, area and industry practice, and economy and efficiency all further support a finding that the skid steer work be awarded to the Laborers. Furthermore, because the dispute over skid steer work is likely to recur, Mr. Excavator respectfully requests that an area-wide ruling be issued, awarding the skid steer work to Laborers in the geographic area where Mr. Excavator performs work and where the jurisdictions of Laborers 310 and 860 and the Operating Engineers coincide.

Respectfully Submitted,



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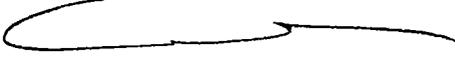
**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Post-Hearing Brief On Behalf Of Mr. Excavator was sent via overnight delivery for filing. Copies were sent via regular U.S. mail, postage pre-paid, to the following on this 3rd day of October, 2013.

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Laborers' District Council of Ohio, Local 265 and AMS Construction, Inc. and  
International Union of Operating Engineers, Local 18.

Case 9-CD-500

NATIONAL LABOR RELATIONS BOARD

*2010 NLRB LEXIS 518; 189 L.R.R.M. 1482; 356 NLRB No. 57*

December 28, 2010

**NOTICE:**

[\*1]

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

**JUDGES:** By Craig Becker, Member; Mark Gaston Pearce, Member; Brian E. Hayes, Member

**OPINION:**

DECISION AND DETERMINATION OF DISPUTE

This is a jurisdictional dispute proceeding under *Section 10(k)* of the National Labor Relations Act (the Act). AMS Construction, Inc. (the Employer) filed a charge on March 11, 2010, alleging that Laborers' District Council of Ohio, Local 265 (Laborers) violated *Section 8(b)(4)(D)* of the Act by threatening to engage in proscribed activity with an object of forcing the Employer to assign certain work to employees represented by Laborers rather than to employees represented by International Union of Operating Engineers, Local 18 (Operating Engineers). The hearing was held on April 30, 2010, before Hearing Officer Naima R. Clarke. After the hearing, Operating Engineers filed a motion to remand to the Regional Director for the taking of additional [\*2] evidence, accompanied by a supporting memorandum, and the Employer and Laborers each filed a memorandum in opposition to Operating Engineers' motion to remand. The Employer, Laborers, and Operating Engineers also filed posthearing briefs.

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

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

I. JURISDICTION

The parties stipulated that the Employer, a corporation with its principal place of business in Ohio, is engaged in the business of underground utility work. They also stipulated that during the 12-month period preceding the hearing, a representative period, the Employer derived gross revenues in excess of \$ 50,000, and purchased and received at its

Maineville, Ohio facility goods and materials valued in excess of \$ 50,000 directly from suppliers located outside the State of Ohio. The parties further stipulated, and we find, that the Employer is engaged in commerce within the meaning of *Section 2(6)* and *(7)* of the Act and that Laborers and Operating Engineers are labor organizations [\*3] within the meaning of *Section 2(5)* of the Act.

## II. THE DISPUTE

### *A. Background and Facts of the Dispute*

The Employer specializes in underground utility construction. The project at issue involves the construction and maintenance of gas pipelines for Duke Energy Corporation utilizing the directional boring method. Utilizing that method, a crew consisting of two employees--one operating a directional drill and the other operating a locator box-bore underground holes for utility piping. Directional boring allows for underground utility construction that limits environmental impact. The directional drill machine's main component is a drill that digs through the ground in a horizontal direction. The drill head contains a beacon that communicates with a locator box by radio signal. The employee operating the locator traces the underground movement of the drill, and, by radio, guides the drill operator. The locator ensures that the drill is following the correct path through the ground and also prevents its contact with obstacles, such as other pipes.

The Employer has had collective-bargaining agreements with Laborers since 1991. It also has had a collective-bargaining agreement with [\*4] Operating Engineers since 2001. From about 1999, when the Employer first began using the directional drill, until 2004, the Employer assigned the directional drill machine work to employees represented by Laborers. In 2004, the Operating Engineers filed a grievance against the Employer, alleging that the assignment of the work violated the Operating Engineers' collective-bargaining agreement. At the time, the Employer employed three two-worker crews comprised entirely of Laborers-represented employees. The Employer resolved the grievance by converting three of its six Laborers-represented employees into Operating Engineers-represented employees, and it executed separate assignment letters with each union covering the directional boring work. n1 Subsequently, the directional boring work was performed by a crew of Laborers-represented employees, a crew of Operating Engineers-represented employees, or a mixed crew.

n1 At the time of the hearing, due to personnel changes over the last several years, the Employer's crews no longer consisted of three Laborers and three Operating Engineers. Instead, the Employer's crews comprised three Laborers, two Operating Engineers, and one unaffiliated employee.

[\*5]

The Employer's most recent collective-bargaining agreement with Laborers Locals 265 and 534, effective August 7, 2006 to August 1, 2010, covers "all phases of the installation of any pipe including directional boring, horizontal drilling, locating of pipe, . . . [and] lining up of the pipe." The agreement specifically includes the use of "directional boring machines."

The Employer's collective-bargaining agreement with Operating Engineers, effective June 1, 2007 to May 31, 2010, covers "installation . . . of distribution pipeline (including work in conjunction with total energy plans) which transport natural gas, liquid gas or vapors . . . including portions of the work with private property boundaries or public streets, from the first metering station or connection at the main transmission line (consistent with this definition in the Mainline Pipeline Agreement) to the Consumer or User."

In 2010, n2 the Employer began work on a gas pipeline project for Duke Energy Company at the Hyde Park module in Cincinnati, Ohio. n3 The Employer utilized the directional boring method with employees represented by Laborers. The Employer's superintendent, John Weber, testified that Foreman Russell [\*6] Osborne informed him that, in January and February, business agents of Operating Engineers visited the Hyde Park jobsite. According to Osborne,

upon learning that employees represented by Laborers were assigned the directional boring work, the Operating Engineers' representatives told workers at the site that this work should be assigned to employees represented by Operating Engineers, not Laborers. Additionally, Operating Engineers filed two pay-in-lieu grievances against the Employer, each for a different part of the Hyde Park area, seeking wages and fringe benefits for all hours worked on the project. The grievances claimed that the Employer was using "someone other than Operating Engineers to operate directional drill and locator on" the Hyde Park site. Weber testified that he and the Employer's owner, John Stephenson, met with Operating Engineers representatives Gary Marsh and Nate Brice to discuss resolution of the grievances. During that meeting, the Operating Engineers representatives maintained that the Employer had to remove all Laborers-represented employees from directional drilling assignments. Operating Engineers also demanded that any newly hired directional crew members [\*7] come from the Operating Engineers' hiring hall. Further, Operating Engineers indicated that it wanted all of the directional boring work for employees it represents. The parties met on several occasions, but could not resolve the grievances.

n2 All dates refer to 2010 unless otherwise indicated.

n3 Modules are geographic areas identified by Duke Energy as targets for underground utility line installation.

While those grievances were pending, Laborers learned that the Employer might reassign the work to Operating Engineers. As a result, Laborers sent a letter to the Employer dated February 9. The letter stated:

It has come to our attention that your company has assigned or may assign directional boring, min-excavating [*sic*] and related tasks to employees represented by the International Union of Operating Engineers. This work falls within our agreement and has been traditionally assigned to Laborers'. Accordingly, Local 265 will take any and all action necessary to preserve our work, including [\*8] but not limited to picketing and work stoppages on the Project. n4

n4 As noted above, Laborers Local 534 is also signatory to the Laborers' contract with the Employer. Local 534 sent a letter similar to that of Laborers Local 265 to the Employer. The Employer did not file a charge against Local 534, and no party contends that Local 534 is otherwise involved in the dispute.

Superintendent Weber testified that after the Employer received the letter, he spoke with Laborers representatives Tony Brice and John Phillips to resolve the issue. Laborers made it clear that it would not compromise on the assignment of work.

#### *B. Work in Dispute*

The parties did not stipulate to the work in dispute. The notice of hearing described the disputed work as "[t]he operation of the directional bore machine and the locator." The Employer, Laborers, and Operating Engineers dispute this description, and the Employer and Laborers offered alternative descriptions. The Employer described the work as the operation of the [\*9] directional bore machine and the locator on distribution pipeline construction. Laborers proposed that the work in dispute be described as the installation of any pipe, including directional boring, horizontal drilling, and locating of pipe on all distribution pipeline construction. We find, based on the record, that the work in dispute is as follows: The operation of the directional drill machine and locator for the construction of gas pipelines for Duke Energy Corporation at the Hyde Park module, Cincinnati, Ohio jobsite.

### C. Contentions of the Parties

Operating Engineers contends that the notice of hearing should be dismissed because it has not claimed the disputed work. Relying on *Laborers (Capitol Drilling Supplies)*, 318 NLRB 809 (1995) (union's action through grievance procedure to enforce claim against general contractor does not constitute claim against subcontractor for work in dispute), Operating Engineers argues that it has pursued only contractual grievances against the Employer for breaches of its collective-bargaining agreement. Operating Engineers also contends that Laborers' letter could not constitute a real or actual threat because Laborers' [\*10] collective-bargaining agreement prohibits strikes or work stoppages. Finally, Operating Engineers contends that Laborers' threat was a "paper threat," contrived to create a jurisdictional dispute under *Section 10(k)* and obtain the work assignment preferred by the Employer. n5

n5 At the hearing, the Operating Engineers excepted to the hearing officer's ruling that prohibited repetitive questioning of John Phillips, Laborers' business manager, regarding whether Laborers' motive in sending the February 9 letter to the Employer was to precipitate a 10(k) hearing. Operating Engineers renewed this exception in its motion to remand for the taking of additional evidence. Operating Engineers argues that the hearing officer erroneously sustained the Laborers' objection, and therefore Operating Engineers should be allowed a proper and adequate opportunity to develop its theory that the Laborers' threat to the Employer in its February 9 letter was a sham. As discussed below, we deny the motion.

The Employer and Laborers [\*11] contend that there is reasonable cause to believe that *Section 8(b)(4)(D)* has been violated because of the Laborers' letter. They further contend that there are competing claims to the disputed work, and therefore the notice of hearing should not be dismissed. In particular, they contend that representatives of Operating Engineers made multiple visits to the Employer's worksite and told Laborers employed on the project that they were performing Operating Engineers' work. Additionally, Laborers argues that Operating Engineers claimed the work by filing two pay-in-lieu grievances seeking wages and benefits paid on the Hyde Park project.

On the merits, the Employer and Laborers assert that the work in dispute should be awarded to employees represented by Laborers based on the factors of collective-bargaining agreements, employer preference, current assignment and past practice, area and industry practice, relative skills, and economy and efficiency of operations. n6 The Employer further contends that a broad award is warranted because the issue of its assignment of work on the directional drill machine and locator will arise on future projects.

n6 In its posthearing brief, Operating Engineers did not set forth any contentions regarding the merits of the dispute. Operating Engineers did, however, introduce some evidence relevant to the merits, and that evidence is considered below. See *U.S. Utility Contractor Co.*, 355 NLRB No. 59, slip op. at 2 fn. 3 (2010).

[\*12]

### D. Applicability of the Statute

Before the Board may proceed with determining a dispute pursuant to *Section 10(k)* of the Act, there must be reasonable cause to believe that *Section 8(b)(4)(D)* has been violated. This standard requires finding that there is reasonable cause to believe that: (1) there are competing claims for the disputed work among rival groups of employees; (2) a party has used proscribed means to enforce its claim to the work in dispute; and (3) the parties have not agreed on a method of voluntary adjustment of the dispute. On this record, we find that this standard has been met.

#### 1. Competing claims for the work

We find that there are competing claims for the work in dispute. Laborers has at all times claimed the work in

dispute for the employees it represents, and those employees have been performing the work. Further, Laborers' February 9 letter claimed the work in dispute for employees represented by Laborers. Operating Engineers' claim to the disputed work is demonstrated by its filing of two pay-in-lieu grievances with the Employer, each effectively claiming the directional boring work. See *Carpenters Los Angeles Council (Swinerton & Walberg)*, 298 NLRB 412, 414 (1990) [\*13] (pay-in-lieu grievance may constitute a competing claim for work). See also *Local 30, United Slate, Tile & Composition Roofers v. NLRB*, 1 F.3d 1419, 1427 (3d Cir. 1993) (attempted distinction "between seeking the work and seeking pay for the work is ephemeral"). Additionally, to resolve these grievances, representatives from Operating Engineers met with the Employer on several occasions to discuss whether the disputed work should be assigned to Operating Engineers' represented employees, further evidencing Operating Engineers' claim to the disputed work. Finally, as set forth above, witnesses for the Employer and Laborers testified that representatives from Operating Engineers made several visits to the worksite, and each time these representatives claimed the disputed work on behalf of Operating Engineers. Although Operating Engineers disputes the validity of this testimony, we find that it is sufficient to establish reasonable cause to believe that the Operating Engineers made a claim for the disputed work. See *U.S. Utility Contractor, supra*, 355 NLRB No. 59, slip op. at 3; *J. P. Patti Co.*, 332 NLRB 830, 832 (2000). n7

n7 The Board need not rule on the validity of testimony in order to proceed to the determination of a 10(k) dispute because the Board need only find reasonable cause to believe that the statute has been violated. *U. S. Utility Contractor*, 355 NLRB No. 59, slip op. at 3 fn. 9. In any event, we note that Operating Engineers' second grievance, dated February 9, states that its business representative Brice spoke with Laborers-represented employee Mark Hedges, who was operating the equipment, to try to resolve the grievance.

Contrary to the Operating Engineers' contention, we find the Board's decision in *Laborers (Capitol Drilling Supplies)*, 318 NLRB 809 (1995), to be distinguishable. *Capitol Drilling* involved a union's grievance against a general contractor, alone, for subcontracting work in breach of a lawful union signatory clause. *Id.* at 810. Absent a direct claim against the subcontractor, the Board found no competing claims for the work and quashed the notice of 10(k) hearing. *Id.* at 810-812. Here, there is no subcontractor involved and both the Laborers and the Operating Engineers have made competing claims to the Employer for the work. See *Laborers' District Council of West Virginia*, 325 NLRB 1058, 1059 fn. 2 (1998).

[\*14]

In sum, we find that there is reasonable cause to believe that there are competing claims to the disputed work between rival groups of employees.

## 2. Use of proscribed means

We also find that there is reasonable cause to believe that Laborers used means proscribed under *Section 8(b)(4)(D)* to enforce its claim. Laborers' February 9 letter to the Employer, threatening it with picketing and work stoppages if it reassigned any of the disputed work to members of Operating Engineers, constituted a threat to take proscribed coercive action in furtherance of a claim to the work in dispute. Further, Laborers testified that it was planning to follow through on the threats made in this letter. Although Operating Engineers urges the Board to find that this threat was a sham in order to obtain the work assignment in this 10(k) proceeding and that Laborers' collective-bargaining agreement prohibits strikes or work stoppages, it offers no evidence that the threat was not genuine or that Laborers colluded with the Employer in this matter. n8 See *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1140 (2005) ("In the absence of affirmative evidence that a threat to take proscribed [\*15] action was a sham or the product of collusion, the Board will find reasonable cause to believe that the statute has been violated."). Moreover, the Board has rejected the argument that a strike threat was a sham simply because it would have violated a no-strike clause. See *Lancaster Typographical Union 70 (C.J.S. Lancaster)*, 325 NLRB 449, 451 (1998) ("The existence of a no-strike clause in a union's collective-bargaining agreement does not provide a basis for a finding that a threat by that union is a sham."). We therefore find reasonable cause to believe that *Section 8(b)(4)(D)* has been violated.

n8 As mentioned above, at the hearing, Operating Engineers questioned Phillips about the Laborers' motivation for sending the letter, and received Phillips' answers. When Operating Engineers began to repeat the same questions, the Laborers objected on the grounds that the questions had been asked and answered. The hearing officer sustained the objection. Based on the foregoing, we find that the hearing officer did not prohibit Operating Engineers from developing its case, but simply prevented repetitive questioning. Therefore, we find that the Operating Engineers was afforded a full opportunity to be heard, to examine and cross-examine witnesses, including Phillips, and to adduce evidence bearing on the issues in this case. Accordingly, we deny the Operating Engineers' motion to remand for the taking of additional evidence.

[\*16]

### 3. No voluntary method for adjustment of dispute

The Employer and Laborers contend that there is no method for voluntary adjustment of the dispute to which all parties are bound. Operating Engineers asserts instead that article 17 of the Laborers' collective-bargaining agreement, which requires that Laborers attempt to seek settlement of disputes, constitutes a method for voluntary adjustment of the dispute. The dispute resolution mechanism in article 17, however, does not bind Operating Engineers, a party to this dispute. In order for an agreement to constitute an agreed-upon method for voluntary adjustment, all parties to the dispute must be bound to that agreement. *Operating Engineers Local 150 (Nickelson Industrial Service)*, 342 NLRB 954, 955 (2004). Thus, because not all the parties to the dispute are bound by article 17 or any other mechanism, we find that there is no voluntary method for adjustment of this dispute.

In view of the evidence above, we find reasonable cause to believe that there are competing claims for the disputed work and that a violation of *Section 8(b)(4)(D)* has occurred. We further find that no voluntary method exists for the adjustment [\*17] of the dispute. Accordingly, we find that this dispute is properly before the Board for determination.

#### *E. Merits of the Dispute*

*Section 10(k)* requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 81 S. Ct. 330, 5 L. Ed. 2d 302 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402, 1410-1411 (1962).

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

#### 1. Certifications and collective-bargaining agreements

There is no evidence of any Board certifications concerning the employees involved in this dispute.

The Employer and Laborers are parties to a collective-bargaining agreement, effective from August 7, 2006 to August 1, 2010. Article 2 of that agreement, entitled, "Scope," provides at paragraph 3:

The work coming under the jurisdiction of the UNION and covered by terms of this Agreement includes, but is [\*18] not limited to, all phases of the installation of any pipe including directional boring, horizontal drilling, locating of pipe, preparation of the pipe for joining, lining up of the pipe, handling of the clamps, joining of the pipes and cleanup after the pipe has been installed. This agreement also includes the use of pipe bending machines, directional boring machines power winches, mini excavators, restoration tractors, skid steer loaders and all walk behind equipment. This Agreement excludes the joining of steel pipe.

We find, based on the above-quoted provision, that the work in dispute is explicitly covered by the Employer's

collective-bargaining agreement with Laborers.

The Employer and Operating Engineers are parties to a collective-bargaining agreement effective from June 1, 2007 to May 31, 2010. Article I, paragraph A of that agreement, entitled, "Coverage," provides:

[W]ork coming under this Agreement is defined as follows:

The construction, installation, treating, repair and/or reconditioning of distribution pipeline (including work in conjunction with total energy plants) which transport natural gas, liquid gas or vapors, crude oil, petroleum products [\*19] or other fuels, including portions of the work with private property boundaries or public streets, from the first metering station or connection at the main transmission line (consistent with this definition in the Mainline Pipeline Agreement) to the Consumer or User.

Additionally, the contract's "working rules" state that Operating Engineers are to maintain and repair equipment under its jurisdiction, and will be assigned "all operating configurations to the horizontal directional drill machine."

"In interpreting collective-bargaining agreements, the specific is favored over the general." *Laborers Local 1184 (Golden State Boring & Pipejacking)*, 337 NLRB 157, 159 (2001) (operation of directional drilling machine awarded to employees represented by Laborers, not Operating Engineers), quoting *Steelworkers Local 392 (BP Minerals)*, 293 NLRB 913, 914-915 (1989). Here, the Laborers' contract specifically refers to the disputed directional drilling work and related work (locating the pipe) and equipment (directional boring machine); the Operating Engineers' contract is worded in more general terms. The factor of collective-bargaining agreements accordingly [\*20] slightly favors an award of the disputed work to employees represented by Laborers.

## 2. Employer preference and current assignment

The Employer currently has assigned the disputed work to employees represented by Laborers, and it prefers to have the disputed work performed by employees represented by Laborers. Although the Employer stated that the Laborers-represented employees' superior relative skills and training was the reason for its preference, the Board does not generally examine the reasons for an employer's preference unless there is evidence that the employer was coerced. See, e.g., *Laborers Local 829 (Mississippi Lime Co.)*, 335 NLRB 1358, 1360 *fn. 5* (2001). There is no evidence of coercion here, and thus the Employer's preference is a valid factor. Further, it is well established that the fact of employer preference is entitled to "substantial weight." See, e.g., *Iron Workers Local 1 (Goebel Forming)*, 340 NLRB 1158, 1163 (2003). Accordingly, we find this factor favors an award of the disputed work to employees represented by Laborers.

## 3. Past practice

On projects previous to the Hyde Park Project, the Employer assigned the directional [\*21] drilling and related work to crews consisting either solely of Laborers, solely of Operating Engineers, or composite crews of employees represented by both unions. This practice has been in place since 2004, when the Employer executed letters of assignment assigning the directional drilling work to employees represented by both unions. Because the Employer's past practice was to assign directional drilling and related work to both Laborers-represented employees and Operating Engineers-represented employees, we find that this factor does not favor awarding the work in dispute to either group of employees.

## 4. Area and industry practice

No party introduced any evidence with respect to industry practice.

The Employer's foreman Russ Osborne testified that employees represented by Laborers have performed work of the kind in dispute in the past for the Brewer Company, one of the Employer's competitors. Additionally, the Brewer

Company is a signatory, along with the Employer and RLA Investments, Inc., to the collective-bargaining agreement with Laborers. Further, Laborers Business Manager Phillips testified that Laborers have performed work of the kind in dispute since 1992.

Operating [\*22] Engineers also offered evidence that its members have performed work of the kind in dispute. Operating Engineers introduced assignment letters for directional drilling work from dozens of area contractors, spanning from 2000 to 2006.

Based on the above, we find that this factor does not favor an award of the work in dispute to either group of employees.

#### 4. Relative skills and training

The Employer and Laborers presented testimony that that Laborers' members possess the requisite skills and training to perform the disputed work and that they are experienced in doing so. Specifically, Foreman Osborne testified that Laborers-represented employees have the requisite skills and training to perform the work in dispute. He testified that every single worker performing the disputed work for the Employer was originally trained as a Laborer, including Operating Engineers who have previously been assigned this work. Employer Superintendent John Weber testified that Laborers-represented employees have the proper skills and training to perform the work, and can do so in a safe manner. Laborers presented evidence that Laborers-represented employees must participate in training that includes classroom [\*23] work and on-the-job training.

The record establishes that employees represented by Operating Engineers had been performing the work for a substantial period of time, and there is no evidence that the Employer considered unsatisfactory any of the work in dispute performed by these employees. Accordingly, we find that this factor favors neither group of employees. n9

*n9 Electrical Workers IBEW Local 486 (New England Power), 311 NLRB 1162, 1164 (1993).*

#### 6. Economy and efficiency of operations

Weber, the Employer's Superintendent, testified that it is more efficient to have employees represented by Laborers perform the disputed work. He explained that Laborers are more capable of performing additional work that is associated with directional drill and locator work, such as digging holes or moving equipment. Weber further testified that Operating Engineers do not always complete tasks and are not always properly trained. For these reasons, the Employer testified that Laborers-represented employees [\*24] deliver better work product than Operating Engineers-represented employees. Operating Engineers did not present evidence with respect to this factor. Laborers-represented employees are thus better equipped to perform the necessary work that stems from directional drilling at Hyde Park than Operating Engineers-represented employees. Accordingly, the factor of economy and efficiency of operations favors an award of the work in dispute to employees represented by Laborers. See, e.g., *Operating Engineers Local 825 (Walters & Lambert), 309 NLRB 142, 145 (1992)* (factor of economy and efficiency of operations favored Laborers over Operating Engineers where evidence showed that, when not performing disputed work, Laborers possessed knowledge and skills necessary to perform additional craft work).

#### Conclusion

After considering all the relevant factors, we conclude that employees represented by Laborers are entitled to perform the work in dispute. We reach this conclusion relying on factors of collective-bargaining agreement, employer preference, employer current assignment, and economy and efficiency of operations. In making this determination, we are awarding the disputed [\*25] work to employees represented by Laborers, not to that labor organization or its members.

*F. Scope of the Award*

The Employer requests a broad, areawide award covering the work in dispute. The Board customarily does not grant an areawide 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. See, e.g., *Laborers Local 243 (A. Amorello & Sons)*, 314 NLRB 501, 503 (1994). Accordingly, we shall limit the present determination to the particular controversy that gives rise to this proceeding.

## DETERMINATION OF DISPUTE

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

Employees of AMS Construction, Inc., represented by Laborers' District Council of Ohio, Local 265, are entitled to perform the operation of the directional drill machine and locator for the construction of gas pipelines for Duke Energy Corporation at the Hyde Park modules, Cincinnati, Ohio jobsite.

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Labor & Employment Law  
Collective Bargaining & Labor Relations  
Interpretation of Agreements  
Labor & Employment Law  
Employment Relationships  
Employment at Will  
Employers  
Labor & Employment Law  
Employment Relationships  
Employment Contracts  
Breach



Laborers' International Union of North America (AFL--CIO), Laborers Local No. 860 and  
McNally/Kiewit ECT JV and International Union of Operating Engineers, Local 18.

Case 08-CD-086140

NATIONAL LABOR RELATIONS BOARD

*2013 NLRB LEXIS 230; 195 L.R.R.M. 1205; 359 NLRB No. 89*

April 8, 2013

**NOTICE:**

[\*1]

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

**JUDGES:** By Mark Gaston Pearce, Chairman, Sharon Block, Member

**OPINION:**

DECISION AND DETERMINATION OF DISPUTE

This is a jurisdictional dispute proceeding under *Section 10(k) of the National Labor Relations Act*. McNally/Kiewit ECT JV (the Employer) filed a charge on July 27, 2012, alleging that the Respondent, Laborers' International Union of North America (AFL--CIO), Laborers Local No. 860 (Laborers), violated *Section 8(b)(4)(D)* of the Act by threatening to engage in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by International Union of Operating Engineers, Local 18 (Operating Engineers). The hearing was held on October 18 and 19, 2012, before Hearing Officer Catherine A. Modic. Thereafter, the Employer, Laborers, and Operating Engineers each filed a posthearing brief. [\*2] Operating Engineers also filed a motion to quash the 10(k) notice of hearing.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. n1

n1 Member Griffin, who is a member of the present panel, has recused himself and took no part in the consideration of this case.

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

I. JURISDICTION

The parties stipulated that within the 12 months preceding the filing of the charge, the Employer purchased and received at its Cleveland jobsite goods and services valued in excess of \$ 50,000 directly from points located outside the State of Ohio. The parties also stipulated, and we find, that the Employer is engaged in commerce within the meaning of *Section 2(6)* and *(7)* of the Act and that Laborers and Operating Engineers are labor organizations within the meaning of *Section 2(5)* of the Act.

## II. THE DISPUTE

### *A. Background and Facts [\*3] of the Dispute*

The Employer is a partnership that was formed to construct the Euclid Creek Tunnel (ECT), an underground sewer tunnel, in Cleveland, Ohio. The tunnel is intended to carry, store, and treat water overflows from heavy rains and to prevent raw sewage from draining into Lake Erie and local rivers. The three job classifications in dispute, described more fully below, are ring builder 1 (RB1), ring builder 2 (RB2), and segment preparation person (SPP).

To excavate the tunnel, the Employer uses a tunnel boring machine (TBM), which was designed and built specifically for the project. The TBM is 370 feet long and 27 feet in diameter, and it moves on a rail line. As the TBM bores a 27-foot-diameter hole, workers simultaneously construct the tunnel lining by connecting segments of precast concrete, brought there by rail car. The TBM's components include a hydraulic loader, used to unload the tunnel lining support segments, and a segment vacuum erector, used to assemble the segments into rings. Each completely constructed ring of six segments measures about 5 feet in length.

Employees in the SPP, RB1, and RB2 positions work together to construct the tunnel lining. The SPP operates [\*4] the hydraulic loader. After unloading each segment, the SPP inspects and cleans it and then moves it to a feed table, where the segment is rotated into the appropriate position for installation and then cleaned again. The SPP hammers dowels into each segment to align it and hold it in place. Once the segments form a ring, the SPP installs foam weather stripping around it. Additionally, the SPP works with two Laborers-represented employees to extend, or "leapfrog," the TBM's rail line. The SPP also cleans the work area using brooms, shovels, and a water hose.

After a new section of tunnel has been bored, the RB1 controls the hydraulics of the TBM's thrust cylinders, which are used to lift the ring segments into place. Each time the TBM is stopped, the RB1 performs a final inspection of each ring segment before it is installed. The RB1 works with the RB2 to verify, through identification marks on each segment, the proper sequence for installation of the six segments. The RB1 jockeys the segments into their proper positions using a hydraulic jack, cleans and clears the area of the TBM where the rings are assembled, and assists Laborers-represented employees with drilling, grouting, cleaning, [\*5] and moving rails for both the segment-delivering rail car and the TBM.

The RB2 takes measurements to verify that the TBM will not collide with each segment being delivered. After the segments are in place, the RB2 bolts the segments together using an impact wrench. The RB2 assists Laborers-represented employees with grouting by drilling verification holes and then patching those holes. The RB2 is also responsible for keeping areas clean and assists in moving rails for both the rail car and the TBM.

Ohio Contractors Association (OCA), of which the Employer is a member, and Operating Engineers are parties to the Ohio Heavy Highway Agreement (Highway Agreement). The Highway Agreement includes "Sewer, Waterworks and Utility Construction" as work performed under the Highway Agreement and identifies "Tunnel Machines and/or Mining Machines" as equipment covered by and subject to its terms and conditions. The Highway Agreement also contains a work preservation clause: it mandates a specific economic penalty in the event that a signatory employer assigns a piece of equipment covered by the Highway Agreement to an employee who is not represented by Operating Engineers. Specifically, the Highway [\*6] Agreement states, "If the Employer assigns any piece of equipment to someone other than an Operating Engineer, the Employer's penalty shall be to pay the first qualified registered applicant the applicable wages and fringe benefits from the first day of the violation."

OCA and Laborers' District Council of Ohio are parties to the Ohio Highway-Heavy-Municipal-Utility State Construction Agreement (Construction Agreement).<sup>n2</sup> The Construction Agreement covers "Sewer, Waterworks, [and] Utility Construction." In addition, several sections of the Construction Agreement employ the terms "tunnel work," "construction of sewers [and] tunnels," and related terms.

<sup>n2</sup> There is no dispute that the Employer is bound by the terms of the Highway Agreement and the Construction Agreement.

The Employer entered into a project labor agreement with each union for the tunnel work. Each project labor agreement incorporates the relevant OCA agreement. The project labor agreement with Operating Engineers was signed on February 2, 2011, and [\*7] the agreement with Laborers was signed on May 2, 2011. There is no mention of the terms "Ring Builder 1," "Ring Builder 2," or "Segment Preparation Person" in the Heavy Highway Agreement, the Construction Agreement, or either of the project labor agreements.

On February 7, 2011, Employer Project Manager Tom Szaraz and Operating Engineers representatives signed a prejob conference form, which indicated that mining machines and Operating Engineers-represented TBM workers and segmenters would be used for the project. Szaraz testified that during the prejob conference, David Russell, a field agent for Operating Engineers, orally requested the work in dispute. Russell also gave Szaraz a blank assignment form on which to designate Operating Engineers-represented employees who would be assigned the work and specific equipment for those employees to use. Szaraz declined to fill out the form. He testified that he never told Russell that he would assign the disputed work to Operating Engineers-represented employees. Szaraz further testified that Russell again requested the work on two occasions in July 2012, when the two men discussed the matter further.

No prejob conference was held between [\*8] the Employer and Laborers, although Laborers requested one in December 2010 and again after signing the project labor agreement in May 2011. On July 23, 2012, Anthony Liberatore, Laborers' business manager and secretary-treasurer, informed Szaraz that Laborers-represented employees would strike if the Employer assigned the tunnel project's "pipe segment installation work" to Operating Engineers. On July 27, 2012, the Employer filed the instant charge.

In August 2012, based on its superintendents' staffing recommendations, the Employer assigned Laborers members to the SPP, RB1, and RB2 positions. Soon afterwards, Operating Engineers filed a grievance alleging that the assignment of work to Laborers violated Operating Engineers' collective-bargaining agreement with the Employer.

#### *B. Work in Dispute*

The notice of hearing described the disputed work as "the segment installation work performed by ring builder 1 and ring builder 2." At the beginning of the hearing, the Employer and Laborers moved to amend the notice to include the work performed by the segment preparation person (SPP). Although Operating Engineers declined to stipulate to the addition, on the grounds that entering [\*9] into a stipulation would be an admission contrary to its legal position that it never made a claim for the work, the testimony dealt with all three positions. There is no dispute that the Employer assigned all three positions to Laborers, and, as further discussed below, the record supports a finding that Operating Engineers claimed the work performed by employees in all three positions. We therefore find that the work in dispute includes the work of the SPP as well as that of the RB1 and RB2.

#### *C. Contentions of the Parties*

Operating Engineers contends that it has not claimed the disputed work and that the notice of hearing should therefore be quashed. Operating Engineers further argues that its claim is one of work preservation rather than work acquisition and that it has pursued only contractual grievances against the Employer for breaching the work assignment provisions of their collective-bargaining agreement. Alternatively, if the notice of hearing is not quashed, Operating

Engineers asserts that employer preference should be disregarded in this case and that the work in dispute should be awarded to employees represented by Operating Engineers, based on the factors of collective-bargaining [\*10] agreements and relative skills and training.

The Employer and Laborers contend that, because there are competing claims to the disputed work, the notice of hearing should not be quashed. They further contend that there is reasonable cause to believe that *Section 8(b)(4)(D)* has been violated because of Laborers' threat to strike. Both the Employer and Laborers assert that there is no agreed-upon method for voluntary adjustment of the dispute. On the merits, Laborers asserts that the work in dispute should be awarded to employees it represents based on the factors of collective-bargaining agreements, employer preference, current assignment and past practice, area and industry practice, relative skills, and economy and efficiency of operations. The Employer also asserts that the work should be awarded to Laborers, largely for the same reasons. In particular, the Employer emphasizes its preference and past practice, and it further asserts that economy and efficiency of operations favor continuing the assignment of the work to Laborers-represented employees.

#### *D. Applicability of the Statute*

The Board may proceed with determining a dispute pursuant to *Section 10(k)* of the Act only [\*11] if there is reasonable cause to believe that *Section 8(b)(4)(D)* has been violated. *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1139 (2005). This standard is met if there is reasonable cause to believe that there are competing claims for the disputed work between rival groups of employees and that a party has used proscribed means to enforce its claim to the work. *Ibid.* Additionally, there must be a finding that the parties have not agreed on a method for the voluntary adjustment of the dispute. *Ibid.* Those requirements have been met here.

##### 1. Competing claims for work

We find that there is reasonable cause to believe that both unions have claimed the work in dispute for the employees they represent. By its own admission, Laborers has done so, and employees it represents have been performing the work.

Operating Engineers contends that its actions did not constitute a competing claim for work. We reject this argument. Operating Engineers representatives orally requested the work on three occasions: during a prejob conference with the Employer in February 2011 and on two occasions in July 2012. Those requests are sufficient to establish a competing claim [\*12] for the work. See *Electrical Workers Local 196 (Aldridge Electric, Inc.)*, 358 NLRB No. 87, slip op. at 3-4 (2012); *J. P. Patti Co.*, 332 NLRB 830, 832 (2000).<sup>n3</sup> Accordingly, we find reasonable cause to believe that there are two competing claims for the disputed work.

<sup>n3</sup> In addition to its explicit claims for the work, Operating Engineers filed a grievance against the Employer to enforce the damages provision of the Highway Agreement, which requires the Employer to pay an Operating Engineers applicant contractual wages and fringe benefits in lieu of employing him or her. We find that Operating Engineers' grievance constitutes a claim for work in and of itself. See *Laborers Local 265 (AMS Construction)*, 356 NLRB No. 57, slip op. at 4 (2010) (holding that "pay-in-lieu" grievance constituted claim for work); *Laborers (Eshbach Bros.)*, 344 NLRB 201, 202 (2005) (same).

##### 2. Use of proscribed means

As described above, by letter dated July 23, 2012, Laborers [\*13] stated that its members would strike if the Employer assigned the tunnel project's pipe segment installation work to Operating Engineers. Such a threat establishes reasonable cause to believe that Laborers used means proscribed by *Section 8(b)(4)(D)* to enforce its claim to the work in dispute. *Electrical Workers Local 48 (Kinder Morgan Terminals)*, 357 NLRB No. 182, slip op. at 3 (2011).

### 3. No voluntary method for adjustment of dispute

There is no evidence in the record of an agreed-upon method for voluntary adjustment of the dispute.

### 4. Work preservation defense

Operating Engineers asserts that the dispute involves a work preservation issue rather than a jurisdictional matter. If a dispute is fundamentally over the preservation of work a union's members have historically performed, it is not a jurisdictional dispute. *Machinists District 190 Local 1414 (SSA Terminal, LLC)*, 344 NLRB 1018, 1020 (2005), affd. 253 Fed. Appx. 625 (9th Cir. 2007); *Seafarers (Recon Refractory & Construction)*, 339 NLRB 825, 827 (2003), review denied sub nom. *Recon Refractory & Construction Inc. v. NLRB*, 424 F.3d 980 (9th Cir. 2005). [\*14] The Board looks to the "real nature and origin of the dispute" to determine whether it actually constitutes a dispute between two unions or whether, instead, one union is "attempt[ing] to retrieve the jobs' of employees the employer chose to supplant by reallocating their work to others." *Teamsters Local 578 (USCP-Wesco)*, 280 NLRB 818, 820-821 (1986) (quoting *Longshoremen ILWU Local 26 (American Plant Protection)*, 210 NLRB 574, 576 (1974)), affd. sub nom. *USCP-Wesco, Inc. v. NLRB*, 827 F.2d 581 (9th Cir. 1987). If the latter, the dispute is outside the scope of Section 10(k).

To prevail on its work preservation defense, Operating Engineers must show that the employees it represents have previously performed the work in dispute and that it is not attempting to expand its work jurisdiction. *Carpenters (Prate Installations, Inc.)*, 341 NLRB 543, 544 (2004); *Stage Employees IATSE Local 39 (Shepard Exposition Services)*, 337 NLRB 721, 723 (2002). Operating Engineers fails to make that showing. Although Operating Engineers-represented employees have filled critical roles on other tunnel projects, including [\*15] operating TBMs, there is no evidence that they have ever performed work analogous to segment handling and ring building. The Employer's project manager, Szaraz, testified that the "tunnel job" in this case involved "a piece of equipment of first impression." The record shows that neither union's members had prior experience with the TBM used here, which was in fact designed specifically for this project. During their prejob conference, Operating Engineers representatives informed Szaraz that they did not yet know of any "segmenters" among their members; Operating Engineers Field Agent Russell testified that he was unaware of any experienced ring builders. The TBM operator and a ring builder for this project were brought in from out of state because they had experience performing the required job tasks. The TBM manufacturer provided training onsite for the employees who were to perform the three jobs. Because the record shows that Operating Engineers' claim here encompassed work unlike any previously performed by employees it represents, Operating Engineers' "objective here was not that of work preservation, but of work acquisition." *Prate Installations, above at 545* (emphasis [\*16] in original) (citing *Stage Employees IATSE Local 39, above at 723*). Accordingly, Operating Engineers fails to establish a work preservation defense.

We therefore find that this dispute is properly before the Board for determination, and we deny Operating Engineers' motion to quash the notice of hearing.

#### *E. Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 577-579, 81 S. Ct. 330, 5 L. Ed. 2d 302 (1961). The Board's determination in a jurisdictional dispute is "an act of judgment based on common sense and experience," reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402, 1410-1411 (1962).

The following factors are relevant in determining the outcome of this dispute.

#### 1. Certifications and collective-bargaining agreements

There is no evidence of a Board certification concerning the job classifications or work involved in this dispute.

As indicated above, the Employer is subject to collective-bargaining agreements with both Operating [\*17] Engineers and Laborers. Each contract contains language that arguably encompasses the work in dispute. Operating Engineers' contract assigns sewer and underground work and "tunnel machine" work to its covered employees; Laborers' contract refers to "tunnel work."

"In interpreting collective-bargaining agreements, the specific is favored over the general." *Laborers Local 1184 (Golden State Boring & Pipejacking)*, 337 NLRB 157, 159 (2001) (quoting *Steelworkers Local 392 (BP Minerals)*, 293 NLRB 913, 914-915 (1989)). In *Laborers Local 265 (AMS Construction)*, 356 NLRB No. 57 (2010), the Board found that the collective-bargaining agreement factor weighed in favor of the union whose contract specifically referred to the disputed work as well as related work and equipment, as opposed to the union whose contract was worded in more general terms. *Id.*, slip op. at 6. In this case, each union's contract contains general language to describe the work within its jurisdiction. Operating Engineers' contract, however, explicitly mentions tunneling equipment in addition to sewer and underground work. Because Operating Engineers' contract describes [\*18] its jurisdiction with greater particularity, the collective-bargaining agreement factor weighs slightly in favor of Operating Engineers.

## 2. Employer preference and past practice

The factor of employer preference is generally entitled to substantial weight. See *Iron Workers Local 1 (Goebel Forming)*, 340 NLRB 1158, 1163 (2003). Project Manager Szaraz consistently testified that it is the Employer's preference for Laborers to perform the three jobs in dispute. n4 Moreover, Laborers are currently performing this work. *Teamsters Local 259 (Globe Newspaper Co.)*, 327 NLRB 619, 623 (1999) (weighing employer's stated preference as well as employer's assignment of work in dispute). Szaraz also testified that, for each previous tunnel construction project on which he has worked, Laborers performed tunnel construction tasks analogous to those in dispute here. More specifically, although Operating Engineers have driven TBMs, Laborers have previously operated the components attached to them and have used tools and techniques to install tunnel support systems that are similar to the tools and techniques required to install the support system here. n5 This factor [\*19] weighs in favor of awarding the work to Laborers.

n4 We reject Operating Engineers' contention that the Employer's preference here should be treated with "skepticism" because it is not "representative of a free and unencumbered choice." See *ILWU Local 50 (Brady-Hamilton Stevedore Co.)*, 223 NLRB 1034, 1037 (1976), reconsideration granted and decision rescinded on other grounds 244 NLRB 275 (1979). In *Brady-Hamilton Stevedore*, the Board accorded little weight to the employer preference factor where the employer's preference changed after the respondent initiated a work action. *Ibid.* Here, in contrast, the Employer has maintained a consistent preference for Laborers-represented employees, even when faced with a pay-in-lieu grievance filed by Operating Engineers. Therefore, we shall accord this factor its customary weight. Moreover, the other factors of skill, efficiency, and safety weigh in favor of the Laborers.

In any event, the situation presented here is typical of a 10(k) case: two unions' contracts arguably cover the work in dispute, and the employer has expressed a preference for one union over the other. The Board has the authority and the responsibility to assign disputed work under such circumstances. Operating Engineers has provided no evidence that would warrant disregarding the Employer's stated preference here.

[\*20]

n5 For instance, Laborers operated TBM components on the Westlake Interceptor and Southwest Interceptor jobs, two tunneling projects in the Cleveland area. On the Westlake Interceptor project, Laborers operated the erector attached to the TBM to lift and install ribs. On the Southwest Interceptor job, Laborers used a drill that was attached to the TBM to install the tunnel lining. On that project, Laborers also used an erector

attached to the TBM to install steel ribs that formed the tunnel support lining system.

### 3. Area and industry practice

Laborers Business Manager Liberatore testified that Laborers have performed the tunnel lining work for every construction project within Laborers' jurisdiction, for the Employer as well as for other contractors in the region. Employer Project Manager Szaraz also testified that Laborers is the only union whose members have performed tunnel lining installation on projects in the region. There is no evidence in the record that a different trade performed this type of work. Accordingly, this factor weighs in favor of awarding the work in dispute to Laborers. [\*21]

### 4. Relative skills and training

The record shows that employees represented by Laborers receive training at the Ohio Laborers' Training Center (Center) in subjects relevant to the instant project. Indeed, Liberatore testified that the Center offers safety courses as well as training on the subjects of soil identification, rigging, fall protection, and confined space protection, all of which are relevant to the tunnel project here. The Center also offers a tunneling course. Beyond the Center, Laborers have received additional training for the three jobs in dispute from the TBM manufacturer at the jobsite. n6 As for relative skills, there is ample evidence in the record that employees represented by Laborers regularly handle the tools required for the work in dispute. The record evidence does not establish that employees represented by Operating Engineers have received relevant training or that they possess the skills to perform the work in dispute. Accordingly, this factor favors awarding the disputed work to Laborers.

n6 Operating Engineers correctly notes that its members could also participate in the TBM manufacturer's onsite training for the work in dispute. Operating Engineers, however, did not satisfactorily demonstrate that employees it represents have done so.

[\*22]

### 5. Economy and efficiency of operations

The Employer and Laborers argue that assigning the job classifications in dispute to Laborers results in greater efficiency of operations because Laborers-represented employees perform other work on the jobsite that requires similar skills; if Laborers-represented employees fill the positions in dispute, these employees can assist or fill in for other Laborers-represented employees when downtime is experienced. See *Operating Engineers Local 825 (Walters & Lambert)*, 309 NLRB 142, 145 (1992) (factor of economy and efficiency of operations favored union whose members possessed knowledge and skills necessary to perform additional craft work when not performing disputed work). The record supports this argument. For instance, the SPP's responsibilities include cleaning, hammering in dowels, and assisting in "leapfrogging" the rail forward. Other Laborers-represented employees working nearby perform similar or related tasks. The RB1 and RB2 employees also perform tasks that other Laborers-represented employees at the jobsite perform, such as cleaning, grouting, drilling, and general tunnel labor. See *Operating Engineers Local 150 (Beverly Environmental)*, 358 NLRB No. 143, slip op. at 3 (2012) [\*23] (finding factor of economy and efficiency favored union whose represented employees had already been trained and were working on the site performing job tasks in dispute).

There is no evidence in the record that Operating Engineers have experience performing these job tasks or that the jobs Operating Engineers currently perform include these tasks. In fact, the record shows that Operating Engineers currently perform jobs that are distinct from the other jobs and require them to be physically removed from tunnel lining construction. For instance, the TBM operator is more than 100 feet away from the other workers and does not perform any cleaning or lining installation tasks. Project Manager Szaraz testified that it is more efficient and economical for Laborers to perform the work in dispute because assigning Operating Engineers to these positions would require the

Employer to hire employees who could perform only one function on the project, which would increase project costs. There is no contrary evidence in the record. n7 Accordingly, the factor of efficiency and economy favors Laborers.

n7 Operating Engineers argues that assigning the work in dispute to Laborers would not be economical because doing so would trigger damages resulting from the breach of the Employer's contract with Operating Engineers. This argument is flawed because the maintenance of a pay-in-lieu grievance after the Board has awarded the work in dispute violates *Sec. 8(b)(4)(ii)(D). Iron Workers Local 433 (Otis Elevator), 309 NLRB 273, 274 (1992)*, enfd. *46 F.3d 1143 (9th Cir. 1995)*. Moreover, when analyzing economy and efficiency in a 10(k) dispute, the Board does not consider whether a successful grievance would subject an employer to financial liability for breach of contract. See *Beverly Environmental, above, slip op. at 3; AMS Construction, 356 NLRB No. 57, slip op. at 5-6*.

[\*24]

#### Conclusions

After considering all of the relevant factors supported by record evidence, we conclude that employees represented by Laborers are entitled to perform the work in dispute. We reach this conclusion relying on the factors of employer preference, past practice, area and industry practice, relative skills and training, and economy and efficiency of operations, all of which favor Laborers-represented employees. Consideration of these factors outweighs collective-bargaining agreements, the only factor that favors Operating Engineers. In making this determination, we are awarding the work to employees represented by Laborers, not to that union or its members. The determination is limited to the controversy that gave rise to this proceeding.

#### DETERMINATION OF DISPUTE

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

Employees of McNally/Kiewit ECT JV, represented by Laborers' International Union of North America (AFL-CIO), Laborers Local No. 860, are entitled to perform the jobs of ring builder 1, ring builder 2, and segment preparation person on McNally/Kiewit's Euclid Creek Tunnel project in Cleveland, Ohio.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law  
Collective Bargaining & Labor Relations  
Interpretation of Agreements  
Labor & Employment Law  
Collective Bargaining & Labor Relations  
Strikes & Work Stoppages  
Labor & Employment Law  
Employment Relationships  
Employment Contracts  
Conditions & Terms  
Compensation



**LABORERS INTERNATIONAL UNION OF NORTH AMERICA, LOCAL 210,  
Plaintiff-Appellant, v. MCKINNEY DRILLING COMPANY, Defendant-Appellee.**

No. 09-5158-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

*393 Fed. Appx. 736; 2010 U.S. App. LEXIS 16550; 189 L.R.R.M. 2074*

August 9, 2010, Decided

**NOTICE:** PLEASE REFER TO *FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1* GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

**PRIOR HISTORY:** [\*1]

Appeal from a judgment of the United States District Court for the Western District of New York. (Richard J. Arcara, Judge).

*Constr. Indus. Employers Ass'n v. Local Union No. 210, Laborers Int'l Union of N. Am.*, 580 F.3d 89, 2009 U.S. App. LEXIS 20253 (2d Cir. N.Y., 2009)

**COUNSEL:** APPEARING FOR PLAINTIFF-APPELLANT: JOHN M. LICHTENTHAL, Lipsitz Green Scime Cambria LLP, Buffalo, New York.

APPEARING FOR DEFENDANT-APPELLEE: MARK MOLDENHAUER (Robert A. Doren, on the brief), Bond, Schoeneck & King, PLLC, Buffalo, New York.

**JUDGES:** PRESENT: ROBERT D. SACK, REENA RAGGI, GERARD E. LYNCH, Circuit Judges.

**OPINION**

**SUMMARY ORDER**

UPON DUE CONSIDERATION IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the

November 13, 2009 judgment of the district court is **AFFIRMED** and defendant's motion for sanctions is **DENIED**.

Plaintiff Laborers International Union of North America, Local 210 ("Local 210") appeals from an award of summary judgment in favor of defendant McKinney Drilling Company ("McKinney") in this action under section 301 of the Taft-Hartley Act, 29 U.S.C. § 185, (1) to enforce a grievance against McKinney for failing to make certain payments to Local 210 for work allegedly covered by a collective bargaining agreement ("CBA") between the parties but performed by members of another union, or, alternatively, (2) for a court determination that McKinney's conduct breached [\*2] the CBA. In defending the award, McKinney moves for sanctions pursuant to *Fed. R. App. P. 38* and 28 U.S.C. § 1927. We review an award of summary judgment de novo, "resolving all ambiguities and drawing all permissible factual inferences in favor of the party against whom summary judgment is sought." *Burg v. Gosselin*, 591 F.3d 95, 97 (2d Cir. 2010) (internal quotation marks omitted). We will award sanctions for pursuit of an appeal only if the appellant acted in bad faith vexatiously to multiply proceedings, see *In re 60 E. 80th St. Equities, Inc.*, 218 F.3d 109, 115 (2d Cir. 2000) (discussing § 1927 standard), or pursued a patently frivolous appeal, see *In re Drexel Burnham Lambert Group Inc.*, 995 F.2d 1138, 1147 (2d Cir. 1993) (discussing Rule 38 standard). We assume the parties' familiarity with the facts and

procedural history of this and related cases between them, see, e.g., *Construction Indus. Emp'rs Ass'n v. Local Union No. 210, Laborers Int'l Union of N. Am.* ("McKinney I"), 580 F.3d 89 (2d Cir. 2009), which we reference only as necessary to explain our decision to affirm.

### 1. Claim for Enforcement

Local 210 submits that the district court erred in granting McKinney summary judgment [\*3] on its enforcement claim on the ground that the parties' dispute is jurisdictional and, therefore, not subject to the grievance procedures established by the CBA. Local 210 does not -- and cannot -- contend that the parties' CBA, in all its iterations, does not expressly exclude jurisdictional disputes from the grievance process. Rather, it contends that the parties' dispute is not jurisdictional because Local 210 does not seek to have work taken from another union; it seeks only "to enforce those provisions of its CBA with McKinney relating to the preservation of the Union's work and the enforcement of its representational rights vis-a-vis workers engaged in caisson work, whoever they may be." Appellant's Br. at 15. To state the claim is to defeat it. A union's action to enforce the terms of its CBA with respect to work performed by a non-union member is necessarily a claim for the work. See *Laborers Int'l Union of N. Am., Local 113 v. Super Excavators, Inc.*, 338 N.L.R.B. 472, 474-75 (2002); see also *Local 30, United Slate, Tile & Composition Roofers Ass'n, v. NLRB*, 1 F.3d 1419, 1427 (3d Cir. 1993) ("The distinction . . . between seeking the work and seeking payment for the work is [\*4] ephemeral."). And when the work at issue is performed by members of a different union, the enforcement claim presents a jurisdictional dispute. See *Laborers' Int'l Union of N. Am., Local 931 v. Carl Bolander & Sons Co.*, 305 N.L.R.B. 490, 491 (1991). Because we agree with the district court that the decision Local 210 seeks to enforce concerns a jurisdictional dispute expressly excluded from grievance by the parties' CBA, we conclude that there was no basis for enforcement, and that summary judgment on this claim was correctly entered in favor of McKinney.

### 2. Breach of Collective Bargaining Agreement

Local 210 asserts that, even if its grievance decision is not enforceable, the district court erred in dismissing its breach of contract claim because the court could have resolved the jurisdictional dispute underlying the claim. Assuming such authority, which neither party disputes,

we are not persuaded because the record fails to reveal a triable issue of fact on the jurisdictional point. McKinney presented evidence that the CBA did not encompass the relevant caisson work, and Local 210 failed to adduce any evidence that, even when viewed in the light most favorable to the union, "would [\*5] be sufficient to support a jury verdict in its favor." *Burt Rigid Box, Inc. v. Travelers Prop. Cas. Corp.*, 302 F.3d 83, 91 (2d Cir. 2002). The CBA language cited by Local 210 does not, by its terms, encompass caisson work, and McKinney presented evidence that such language generally is understood not to encompass that work. See generally 20 Williston on Contracts § 55:20 (4th ed. 2004) ("[A] court should seek to ascertain the meaning of a collective bargaining agreement not only by viewing the language used by the parties to the collective bargaining agreement, but also by considering the parties' past interpretations and practices."). Notably, Local 210 has entered other bargaining agreements whose terms explicitly reference such caisson work. Meanwhile, Local 210 has never performed caisson work under the CBA here at issue. To the extent Local 210 attempts to create an issue of fact by challenging this second point, it offers no persuasive reason why it should not be estopped from doing so by our prior decision in McKinney I, holding that Local 210 had never performed caisson work under that CBA. See *Bank of N.Y. v. First Millennium, Inc.*, 607 F.3d 905, 918 (2d Cir. 2010) (noting [\*6] that collateral estoppel "bars a plaintiff from relitigating an issue that has already been fully and fairly litigated in a prior proceeding" (emphasis omitted)). In any event, the evidence of past caisson work is insufficient to raise a triable question of fact because it is based on a nineteen-year-old observation by an individual who cannot state that the work was actually performed under a collective bargaining agreement. Accordingly, because Local 210 has failed to raise a triable issue of fact respecting its entitlement to caisson work, McKinney was entitled to summary judgment on the claim of breach.

### 3. Sanctions

Finally, we deny McKinney's motion for an award of appellate sanctions because Local 210's arguments, while unsuccessful, are not so frivolous or indicative of bad faith as to warrant sanctions. *In re Drexel Burnham Lambert Group Inc.*, 995 F.2d at 1147; see also *In re 60 E. 80th St. Equities, Inc.*, 218 F.3d at 115. We note, however, that the question of sanctions is a close one and that Local 210's continued persistence in litigating its

dispute with McKinney about the award of caisson work to another union could justify the imposition of future sanctions.

We have considered [\*7] the parties' other

arguments and find them to be without merit. Accordingly, the November 13, 2009 judgment of the district court is AFFIRMED, and plaintiff's motion for sanctions is DENIED.



**THE TRUSTEES OF THE B.A.C. LOCAL 32 INSURANCE FUND; MARBLE AND TERRAZZO INDUSTRY PENSION FUND; TILE, MARBLE AND TERRAZZO INDUSTRY JOINT INDUSTRY TRAINING FUND; GREAT LAKES CERAMIC TILE COUNCIL FUND; TILE, MARBLE AND TERRAZZO INDUSTRY SUPPLEMENTAL UNEMPLOYMENT BENEFIT PLAN; TILE, MARBLE AND TERRAZZO INDUSTRY VACATION AND HOLIDAY FUND; BRICKLAYERS INTERNATIONAL PENSION FUND; B.A.C. LOCAL 32, Plaintiffs-Appellants, v. OHIO CEILING AND PARTITION COMPANY, INCORPORATED, Defendant-Appellee.**

**No. 01-1396**

**UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

**48 Fed. Appx. 188; 2002 U.S. App. LEXIS 21095; 29 Employee Benefits Cas. (BNA) 1948**

**October 4, 2002, Filed**

**NOTICE:** [\*\*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 28(g) LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 28(g) BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

**PRIOR HISTORY:** On Appeal from the United States District Court for the Eastern District of Michigan. 00-70263. Friedman. 03-02-01.

**DISPOSITION:** Affirmed.

**COUNSEL:** For B.A.C. LOCAL 32 INSURANCE FUND, TILE, MARBLE AND TERRAZZO INDUSTRY PENSION FUND, TILE, MARBLE AND TERRAZZO INDUSTRY JOINT INDUSTRY TRAINING FUND, GREAT LAKES CERAMIC TILE COUNCIL FUND, TILE, MARBLE AND TERRAZZO

INDUSTRY SUPPLEMENTAL UNEMPLOYMENT BENEFIT PLAN, TILE, MARBLE AND TERRAZZO INDUSTRY VACATION AND HOLIDAY FUND, BRICKLAYERS INTERNATIONAL PENSION FUND, B.A.C. LOCAL 32, Plaintiffs - Appellants: Seymour M. Waldman, Vladeck, Waldman, Elias & Engelhard, New York, NY. Christopher M. Seikaly, Southfield, MI.

For OHIO CEILING AND PARTITION COMPANY, INCORPORATED, Defendant - Appellee: Robert A. Koenig, James H. O'Doherty, Shumaker, Loop & Kendrick, Toledo, OH.

**JUDGES:** Before: GUY and BATCHELDER, Circuit Judges; QUIST, District [\*\*2] Judge. \* Gordon J. Quist, District Judge, concurring.

\* The Honorable Gordon J. Quist, United States District Judge for the Western District of Michigan, sitting by designation.

**OPINION BY:** RALPH B. GUY, JR.

**OPINION**

[\*189] **Before: GUY and BATCHELDER, Circuit Judges; QUIST, District Judge. \***

\* The Honorable Gordon J. Quist, United States District Judge for the Western District of Michigan, sitting by designation.

**RALPH B. GUY, JR., Circuit Judge.** Plaintiffs appeal from the entry of judgment in favor of the defendant, Ohio Ceiling and Partition Company, Inc. (OCP), in this action seeking to collect employee benefit contributions under § 515 of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1145. Trustees of seven employee welfare benefit funds claim that contributions are due under a collective bargaining agreement between the Bricklayers and Allied Craftworkers (BAC), Local 32 of Michigan, and certain Independent Contractors (Michigan BAC Agreement). Although [\*\*3] OCP was not a signatory to the BAC Local 32 Agreement, [\*190] plaintiffs claim OCP was bound to that agreement by virtue of the Traveling Contractor clause in a collective bargaining agreement between BAC Local 46 of Northern Ohio and the Ohio Contractors Association (Ohio BAC Agreement)--an agreement to which OCP had admittedly assented.

After a bench trial, the district court found that the Traveling Contractor clause did not bind OCP to the Michigan BAC Agreement. The district court also concluded that since OCP had paid contributions to other plans on behalf of the carpenters union employees that performed the work in Michigan, OCP should not be required to pay benefits to the bricklayers funds over what was essentially a jurisdictional dispute between the unions over covered work. After review of the record and the arguments presented on appeal, we affirm the judgment.<sup>1</sup>

<sup>1</sup> The named plaintiffs included the union, BAC Local 32 of Michigan, and the Trustees of the BAC Local 32 Insurance Fund; Tile, Terrazzo and Marble Industry Pension Fund; Tile, Marble & Terrazzo Industry Joint Industrial Training Fund; Great Lakes Ceramic Tile Council Fund; Tile Terrazzo and Marble Industry Supplemental Unemployment Benefit Fund; Tile, Terrazzo and Marble Industry Vacation and Holiday Fund; and Bricklayers International Pension Fund.

## [\*\*4] I.

Defendant OCP is an interior systems contractor located in Holland, Ohio. Started as a lathe and plastering contractor in 1968, OCP gradually expanded its services and now can perform complete flooring projects; including carpet, sheet vinyl, and hard tile. OCP did not begin doing tile, marble and terrazzo work (T-M-T work) until the late 1990s. Plaintiffs seek contributions for hours worked by the carpenters union employees who performed T-M-T work on two projects that OCP completed in Michigan. Matthew Townsend, OCP's president, testified that he hired union carpenters from Ohio for the Michigan jobs because the carpenters had a variety of skills needed for interior contracting work and because using the same carpenters from job to job made it possible to know what quality of work to expect. Plaintiffs have conceded that OCP made benefit contributions for the work in question to the carpenters union funds in accordance with the collective bargaining agreements between OCP and the local and national carpenters unions.

The parties stipulated that OCP was bound by: (1) a national collective bargaining agreement with the United Brotherhood of Carpenters and Joiners of America [\*\*5] (National Carpenters CBA); (2) a local collective bargaining agreement with the Northwest Ohio Regional Council of Carpenters, Carpenters, Lathers and Floorlayers Local Union No. 248 (Ohio Floorlayers CBA); and (3) a local collective bargaining agreement with the Northwest Ohio Regional Council of Carpenters Local Union Nos. 248, 372, 1138, 1581 and 2239 (Ohio Carpenters CBA). The National Carpenters and Ohio Floorlayers CBAs expressly included T-M-T work as covered work and required that employers make fringe benefit contributions to the specified carpenters employee benefit funds.

As mentioned earlier, OCP was not a signatory to either the Michigan BAC Agreement, under which plaintiffs claim contributions are due, or the bricklayers national agreement. Instead, plaintiffs claim that OCP was bound to the Michigan BAC Agreement as a result of the Traveling Contractors clause found in the local Ohio BAC Agreement. In 1995, before OCP had begun to perform any T-M-T [\*191] work, OCP signed an Assent to the Ohio BAC Agreement in order to be able to do plaster work within the territorial area covered by that agreement; namely, the counties and townships in

northern Ohio that are specified in [\*\*6] paragraph 8 of that agreement. The critical clause, set forth in paragraph 44, provided as follows:

**TRAVELING CONTRACTORS -**

When the Employer has any work specified in this agreement to be performed outside of the area covered by this agreement and within the area covered by an agreement with another affiliate of the International Union of Bricklayers and Allied Craftsmen, the Employer agrees to abide by the full terms and conditions of the agreement in effect in the jobsite area. Employees covered by the agreement who are sent to projects outside of the area covered by this agreement shall be paid at least the established minimum wage scale specified in Appendix A of this agreement but in no case less than the established minimum wage scale of the local agreement covering the territory in which such work is being performed plus all contributions specified in the jobsite local agreement. The employer shall in all other matters be governed by the provisions established in the jobsite local agreement. If employees are sent to work on a project in an area where there is no agreement covering the work, the full terms and conditions of this agreement shall apply.

The district [\*\*7] court emphasized the explicit territorial jurisdiction of the Ohio BAC Agreement and concluded that the Traveling Contractors clause clearly and unambiguously applied only to BAC Local 46 employees, that is "employees covered by this agreement," who were "sent" to work on projects outside the area covered by the agreement. In addition, the district court concluded that BAC Local 32 was not intended as a third-party beneficiary of the Ohio BAC Agreement. Plaintiffs argue that this interpretation erroneously limits the extra-territorial effect of this provision by ignoring the scope of the first sentence.

Testimony from Robert Wilson, business manager for BAC Local 32 of Michigan, made clear that Local 32 believed it had a right to the T-M-T work performed by the carpenters from Ohio under the Jurisdictional

Agreement and Disclaimer executed on July 16, 1997, between the national bricklayers and carpenters unions. On the other hand, Robert Bernius, the top official of the Northwest Regional Council of Carpenters, testified that the carpenters had retained jurisdiction over T-M-T work as long as the employer did not perform T-M-T work exclusively. Bernius denied that his local was alone [\*\*8] in this interpretation and confirmed that there were procedures for resolving such jurisdictional disputes between the unions. Wilson conceded that although BAC Local 32 was aware that OCP was doing the work in question, Local 32 made no jurisdictional claim to the work.

In January 2000, after the work was completed, plaintiffs filed this action seeking unpaid contributions for the T-M-T work. The district court denied plaintiffs' motion for summary judgment in October 2000. At the conclusion of the bench trial, the district court rendered its decision in favor of defendant OCP. Judgment was entered in favor of OCP on March 1, 2001, with costs and attorney fees to be taxed according to law. This appeal followed.

**II.**

The district court's conclusions of law following a bench trial are reviewed *de novo*, while its findings of fact are reviewed for clear error. *Kline v. TVA*, 128 F.3d 337, 341 (6th Cir. [\*192] 1997). We begin with § 515 of ERISA, which provides that:

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent [\*\*9] not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

29 U.S.C. § 1145. This provision entitles multiemployer plans to rely on the literal terms of written commitments between the plan, the union, and the employer and, as a result, the actual intent or understanding of the contracting parties is immaterial when the meaning of that language is clear. See *Bakery & Confectionery Union and Indus. Int'l Health Benefits and Pension Funds v. New Bakery Co.*, 133 F.3d 955, 959 (6th Cir.

1998); *Bakery & Confectionery Union and Indus. Int'l Pension Fund v. Ralph's Grocery Co.*, 118 F.3d 1018, 1021 (4th Cir. 1997). The effect of this provision is to accord ERISA funds special status, akin to a holder in due course under commercial law, and entitle them to enforce the writing regardless of the defenses that might be available under the common law of contracts. *N.W. Ohio Adm'rs, Inc. v. Walcher & Fox, Inc.*, 270 F.3d 1018, 1025 (6th Cir. 2001), cert. denied, 535 U.S. 1017, 152 L. Ed. 2d 620, 122 S. Ct. 1605, 1606, (2002); *New Bakery Co.*, 133 F.3d at 959. [\*\*10] <sup>2</sup> Even so, ERISA funds are not entitled to enforce a nonexistent contractual obligation. *DeVito v. Hempstead China Shop, Inc.*, 38 F.3d 651, 654 (2d Cir. 1994). Whether a contractual provision is ambiguous is a question of law for the court to determine. *Walcher & Fox*, 270 F.3d at 1025.

2 Thus, employers may not assert traditional contract defenses "such as fraud in the inducement, oral promises to disregard the text, or the lack of majority support for the union and the consequent ineffectiveness of the pact under labor law" to avoid the clear terms of their agreements. *Cent. States, S.E. and S.W. Areas Pension Funds v. Gerber Truck Serv., Inc.*, 870 F.2d 1148, 1153 (7th Cir. 1989) (en banc).

#### A. Traveling Contractor Clause

The first hurdle to plaintiffs' recovery is the district court's determination that the Traveling Contractor clause clearly and unambiguously applied only to employees sent from BAC Local 46 in Ohio to perform work outside the [\*\*11] area covered by the Ohio BAC Agreement. Taking issue with this interpretation, plaintiffs argue that the first sentence of the clause broadly obligates a traveling employer doing covered work to abide by any agreement between another BAC affiliate and other employers that includes the jobsite within its territorial jurisdiction. Plaintiffs maintain that the district court ignored the first sentence and erroneously viewed the second sentence, which adds a qualification regarding the wage rates to be paid to "employees covered by [this] agreement" who are "sent" to work on a project, as establishing the scope of the entire Traveling Contractor clause.

Plaintiffs rely on several cases from other jurisdictions that enforced similar traveling contractor clauses. On close examination, however, these cases are of limited assistance in interpreting the Traveling

Contractor clause at issue in this case. The two principle cases, cited for the proposition that traveling contractor clauses are valid, involved somewhat different clauses and arose in the context of an action by the local union to enforce an arbitration award against a nonsignatory employer. See *McKinstry Co. v. Sheet Metal Workers' Int'l Local 16*, 859 F.2d 1382 (9th Cir. 1988); [\*\*12] *Local Union No. 36, Sheet Metal Workers' Int'l v. Atlas Air* [\*\*193] *Conditioning Co.*, 926 F.2d 770 (8th Cir. 1991).

In *McKinstry*, the employer had a CBA with Local 99 of the Sheet Metal Workers' International (SMWI) that contained traveling contractor provisions. McKinstry became the successful bidder on a job in an area within the jurisdiction of SMWI Local 16, with which McKinstry did not have a CBA. Local 16 brought a grievance claiming that McKinstry had violated the subcontracting clause in the CBA it had signed with Local 99, by hiring a nonunion subcontractor to do the sheet metal work. The grievance was arbitrated, McKinstry was found to have violated its agreement with Local 99, and damages were awarded to Local 16. McKinstry brought an action to vacate the arbitration award, and the issue on appeal was whether the agreement between Local 99 and McKinstry conferred enforceable benefits on Local 16, including the right to arbitration of grievances.

The court explained that when arbitration is sought by a nonsignatory to the agreement, that party must show that the signatories intended it to derive benefits from the agreement and that the nonsignatory party [\*\*13] has the right to enforce those benefits. 859 F.2d at 1384-85. While the court rejected the employer's contention that the clauses applied only to workers from the Local 99 area who were sent to a job site in another area, the court agreed that the "language is indeed ambiguous." *Id.* at 1386. Finding that the clauses were meant to benefit sheet metal workers from locals in other areas, the court concluded that McKinstry and Local 99 intended for nonsignatory SMWI locals to derive benefits from the agreement and, therefore, that Local 16 was entitled to arbitrate grievances against McKinstry.

In *Atlas Air Conditioning*, the Eighth Circuit relied on *McKinstry* to enforce an arbitration award that found the traveling contractor clauses required Atlas to comply with the CBA of an affiliated SMWI local covering the territory where Atlas was working. Although Atlas

argued that the local adjustment board for the job site area did not have jurisdiction to hear the grievance, the court found the jurisdictional objection was both untimely and without merit. In rejecting that claim on the merits, the court concluded that the following clause obviously meant [\*\*14] that Atlas was required to comply with the job site agreement.

Except as provided in Section 2 & 6 of this Article, the Employer agrees that journeymen sheet metal workers hired outside of the territorial jurisdiction of this Agreement shall receive the wage scale and working conditions of the Local Agreement covering the territory in which such work is performed or supervised.

*926 F.2d at 772.* This conclusion was reached without discussion, and the actual language differs enough from the clause at issue in this case that it is of limited assistance to our inquiry.

One case on which plaintiffs place heavy reliance involved both the same BAC traveling contractor clause and an action under ERISA to recover benefits. *See Trustees of the Colo. Tile, Marble & Terrazzo Workers Pension Fund v. Wilkinson & Co.*, 134 F.3d 383, 1998 WL 43172 (10th Cir. Feb. 3, 1998) (unpublished decision). In that case, however, the employer did not challenge the meaning of the traveling contractor clause.

Wilkinson had a CBA with BAC Local 77 in New Jersey that contained the traveling contractor clause. Wilkinson traveled to Colorado and hired a nonunion subcontractor [\*\*15] to perform certain interior marble work at the Denver International Airport. BAC Local 6 in Colorado, with [\*194] which Wilkinson did not have a CBA, claimed the work was covered by its CBA with other employers. Pension fund trustees sued under § 515 of ERISA to recover contributions for all hours of covered work performed within its territorial jurisdiction. Wilkinson argued that the CBA was ambiguous regarding the type of work covered, but conceded that the traveling contractor clause would bind it to the Colorado BAC Agreement. As an aside, the court noted that traveling contractor clauses were found to be valid in *McKinstry* and *Atlas*. The court explained:

In the ordinary § 515 case, the plans seeking the contributions are the ones

named in the collective bargaining agreement or otherwise have a more direct relationship with the employer. Here, the trustees' § 515 claim arises through operation of the traveling contractors clause. The type of work Wilkinson performed in Colorado triggered the clause, thus requiring Wilkinson to comply with the terms of the Colorado CBA, which in turn required the payment of contributions to the trustees. Had Wilkinson performed the same [\*\*16] work in Local 77's home territory, it could have been subject to a § 515 claim. Wilkinson does not challenge the enforceability of the traveling contractors clause per se, nor does it argue that the trustees here should be distinguished for any reason from the typical § 515 plaintiff. Under these circumstances, we see no reason why the clause should not be enforced to support the trustees' § 515 claim.

*134 F.3d 383, 1998 WL 43172*, at \*6 (footnotes omitted).  
3 Although the Tenth Circuit's decision supports the proposition that the clause can be understood to bind an employer to a job site agreement to which it was not a signatory, the court was not asked to determine whether that meaning is clear and unambiguous.

3 Plaintiffs also cite *Merritt-Meridian Construction Corp. v. Local 64, BAC International Union*, 1991 U.S. Dist. LEXIS 1396, No. 90-1228, 1991 WL 15527 (N.D. N.Y. Feb. 5, 1991) (unpublished decision), in which the court denied a motion to remand because an arbitration agreement existed by virtue of the BAC traveling contractor clause. The court cited *McKinstry* and found the employer was bound by the arbitration provision in the affiliate BAC local's CBA. There is no indication, however, that the employer disputed the meaning of the traveling contractor clause.

[\*\*17] Although not cited by the parties, this court has found one case in which the meaning of a nearly identical traveling contractor clause was directly addressed in an action to collect contributions under § 515. *See Trustees of the BAC, Local 5 New York*

*Retirement, Welfare Apprenticeship Training and Journeyman Upgrading and Labor-Management Coalition Funds v. Charles T. Driscoll Masonry Restoration Co., Inc.*, 165 F. Supp.2d 502 (S.D. N.Y. 2001). In that case, Driscoll Masonry, a nonunion employer, signed a collective bargaining agreement with BAC Local 5 in order to do work on one job within Local 5's territorial jurisdiction. Driscoll performed a number of jobs in areas covered by agreements between certain BAC affiliates and other employers, but continued to refuse to sign agreements with those other BAC locals. Local 5 and the trustees of its employee benefit funds demanded fringe benefit contributions for covered work performed by Driscoll's employees in New York but outside the territorial jurisdiction of the Local 5 agreement. When Driscoll refused, the funds sued under § 515 of ERISA.

The district court explained that to prevail, the funds must show that [\*\*18] the agreement created an unambiguous contractual obligation for the defendants to make contributions. 165 F. Supp.2d at 510. The [\*195] Local 5 funds relied on the first sentence of the clause, which stated that:

When the employer has any work specified in ARTICLE IV of this Agreement to be performed outside of the area covered by this Agreement and within the area covered by an Agreement with another affiliate of the International Union of Bricklayers and Allied Craftworkers, the employer agrees to abide by the full terms and conditions of the Agreement in effect in the jobsite area.

165 F. Supp. 2d at 506 (quotation marks and emphasis omitted). As is apparent, this language is nearly identical to the first sentence of the clause that plaintiffs rely on in this case. The court in *Driscoll* concluded that this sentence clearly and unambiguously applied only if the employer had entered into a collective bargaining agreement with the BAC affiliate that covered the area in which the work was to be performed. In other words, "if Driscoll (the employer) does work as specified in Article IV (masonry) in an area of the state outside of Local 5's jurisdiction [\*\*19] where Driscoll has an agreement with another BAC local (the other local), then Driscoll pays benefits in accordance with its agreement with the other local." 165 F. Supp. 2d at 511. <sup>4</sup>

4 The court also noted that this interpretation was supported by the deposition testimony of the president of BAC Local 5. Because the case was decided on cross motions for summary judgment, the court disregarded the contrary statements made in a subsequent affidavit by the president of Local 5.

Local 5 had also argued that the fourth sentence bound Driscoll to pay benefits for covered work performed anywhere in New York where Driscoll did not have a CBA with another BAC affiliate. As in this case, sentence four provided that: "If employees are sent to work in an area where there is no local Agreement covering the work specified in ARTICLE IV of this Agreement, the full terms and conditions of this Agreement shall apply." 165 F. Supp. 2d at 506 (emphasis omitted). Disagreeing with Local 5, the court found that it applied [\*\*20] only when employees performing masonry work within Local 5's territorial jurisdiction were subsequently sent to work on a project outside Local 5's territorial jurisdiction. *Id.* Summary judgment was granted to Driscoll.

We find that the first sentence of the BAC Traveling Contractor clause is susceptible to more than one interpretation. The phrase "within the area covered by an agreement with another affiliate of the International [BAC]" could refer to an agreement between OCP and the BAC affiliate, or it could refer to an agreement between any employer and the BAC affiliate. The *Driscoll* court found it unambiguously means the former, while plaintiffs argue that it unambiguously means the latter. Or, the reference in the first sentence to "any work specified in this agreement" could refer to work to be performed by employees covered by the Ohio BAC Agreement. Certainly, the second, third, and fourth sentences specifically refer to employees covered by the agreement who are sent to work in an area outside the territorial jurisdiction of the Ohio BAC Agreement. This is consistent with the district court's reading of the clause as a whole and in the context of the express territorial [\*\*21] limits of the Ohio BAC Agreement.

When a contractual provision is susceptible to more than one reasonable interpretation it is ambiguous and the intent of the parties to the contract may be considered. Although Wilson, the business manager for BAC Local 32 of Michigan, testified to his understanding of the clause, the only evidence of the parties' intent when

entering into the Ohio BAC Agreement was the testimony of OCP's president. Townsend testified that when he signed the agreement [\*196] he understood its territorial limits to be the specified counties and townships in northern Ohio. He also did not understand or intend that the Ohio BAC Agreement would bind OCP to what was essentially a national agreement with every BAC affiliate outside the northern Ohio area that had a CBA with any employer. This testimony is bolstered by the fact that although OCP was a union employer and had signed the National Carpenters CBA, it had not signed a national agreement with the International Bricklayers and Allied Craftworkers Union.

Accordingly, we affirm the district court's finding that the plaintiffs cannot rely on the Traveling Contractor clause in the Ohio BAC Agreement to bind OCP to the Michigan [\*\*22] BAC Agreement. Even if we were to conclude otherwise, we also find that plaintiffs cannot overcome the second hurdle necessary to recover contributions--that they were entitled to contributions under the Michigan BAC Agreement.

#### **B. Obligation to Pay Contributions**

After determining that the Traveling Contractor clause did not bind OCP to the Michigan BAC Agreement, the district court also concluded that

since the defendant paid all of the ERISA benefits for all of its employees in Michigan under contract terms that they had with the carpenters' union, it [] certainly would be a windfall should Local 32 receive any benefits because they would not be in a position, number one, to pay any kind of benefit later on because the carpenters' union is going to do it. And certainly neither the company should be -- the defendant company in this particular matter, should be put in a position where they have to pay twice, and the only benefit would be a windfall to the pension plan of Local 32 and their trustees. Also, there would be no benefit to the employees.

The whole scheme of ERISA and the reason for ERISA was to ensure that . . . employers will pay the benefits and that [\*\*23] the employees can take advantage

of it. In this case it would be a useless kind of exercise because they've already been paid. The carpenters who did the work . . . are going to get their benefit contribution added to it.

The Court has some major concerns in this particular case. The Court believes essentially [that] the fund and its trustees used this case as a jurisdictional dispute. And I think to some extent they have to reexamine their fiduciary duties. That the union and its obligations to its members is much different than the fund and its trustees to exercise discretion. These kinds of cases cannot be used for jurisdictional disputes or anything of that nature.

Plaintiffs maintain that OCP's payment of contributions to the carpenters union funds cannot excuse OCP's breach of the agreement to contribute to the bricklayers funds for all hours of covered work. While we agree that several of plaintiffs' criticisms of the court's comments have merit, we are persuaded that this situation presents a more difficult question than is suggested by plaintiffs' arguments. As we see it, it is not the possible double payment or the concern over a windfall that is the heart of the [\*\*24] issue, but rather that the work was performed under a CBA with another union claiming jurisdiction over the work and under which contributions were made to the associated employee benefit funds.

Plaintiffs rely principally on the general proposition that, as indicated earlier, ERISA funds seeking contributions under § 515 are not subject to traditional contract defenses. Consistent with this proposition, courts have held that the mere fact that an award of benefits could cause an employer to "pay double" would not be [\*197] sufficient to relieve the employer of its contractual obligation to make contributions to the ERISA funds. *See Brogan v. Swanson Painting Co.*, 682 F.2d 807, 809-10 (9th Cir. 1982) (cash payments to nonunion employees in an amount equal to the contributions did not itself excuse the obligation to contribute to the trust funds); *O'Hare v. Gen. Marine Transp. Corp.*, 740 F.2d 160, 170 (2d Cir. 1984) (purchase of equivalent health care insurance for employees did not excuse failure to contribute to funds). We are not convinced that this case is similar to either *Brogan* or *O'Hare*, or that the protection of § 515 should

be extended [\*\*25] to this situation, even though one unreported district court decision relied on by plaintiffs concluded otherwise. See *Trustees of the BAC, Local 5 New York Retirement, Welfare, Apprenticeship Training and Journeymen Upgrading and Labor-Management Coalition Funds and BAC Local 5 v. Plaster Master, Inc.*, No. 99-5194 (S.D. N.Y. filed Jan. 9, 2001) (unreported decision) (citing *Brogan* and rejecting defense that contributions were made to a competing union).

In further support of their position, plaintiffs rely on *Hutter Construction Co. v. International Union of Operating Engineers*, 862 F.2d 641 (7th Cir. 1988), as representing an analogous conflict between the competing jurisdictional claims of two unions. In *Hutter*, the court was asked to affirm an arbitrator's decision awarding damages to the operators union for breach of the subcontracting provisions in its CBA with Hutter despite the fact that the NLRB had awarded the work to the laborers union. The Seventh Circuit concluded that the arbitrator's award and the NLRB decision did not conflict because there was a distinction between seeking the work and seeking payment for the work. In a footnote, the court [\*\*26] stated: "We recognize that Hutter will now pay two unions for work that was performed by one. This unfortunate result, however, is solely attributable to Hutter's decision to enter into conflicting collective bargaining agreements." *Id.* at 645 n.16. Plaintiffs argue that OCP's predicament likewise results from its decision to enter into conflicting agreements. In *Hutter*, however, the conflict was between a determination on the merits that the employer breached the CBA with one union and a finding by the NLRB that the other union had a superior right to the work. Here, neither has actually been determined.

More importantly, to the extent that the rationale in *Hutter* may apply here, there is a split among the circuits that have addressed the dilemma presented in *Hutter*. While the Seventh and Ninth Circuits adhere to the distinction between seeking the work and seeking payment for the work, the First and Third Circuits have rejected such a distinction as "ephemeral" and held that an employer is not liable in damages to the disappointed union when it acts in accordance with an NLRB ruling resolving the jurisdictional dispute. See *T. Equip. Corp. v. Mass. Laborers' Dist. Council*, 166 F.3d 11 (1st Cir. 1999); [\*\*27] *Local 30, United Slate, Tile and Composition Roofers, Damp and Waterproof Workers Ass'n v. NLRB*, 1 F.3d 1419 (3d Cir. 1993). This court

has not specifically addressed the distinction drawn in *Hutter*, but has rejected a claim for damages for breach of contract by one union when the NLRB resolved the jurisdictional dispute in favor of another union. See *Int'l Union, United Auto., Aerospace and Agric. Implement Workers (UAW) and its Local 1519 v. Rockwell Int'l Corp.*, 619 F.2d 580, 584-85 (6th Cir. 1980) (interpreting *Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 11 L. Ed. 2d 320, 84 S. Ct. 401 (1964)). *Rockwell* suggests that this circuit would not adopt the distinction made by the court in *Hutter*.

Finally, we are sympathetic to the district court's concern about the use of [\*198] ERISA to press a jurisdictional dispute over the assignment of T-M-T work. It is undisputed that both the carpenters and bricklayers CBAs expressly include T-M-T work as covered work. Emphasizing their role as fiduciaries for the funds, plaintiffs distance themselves from any claim by Local 32 that it had a right to the work. Even so, the real question [\*\*28] is whether plaintiffs could demonstrate a contractual obligation to make contributions to the bricklayers funds when the carpenters union agreements purported to cover the same work, the work was assigned to employees covered by the carpenters union agreements and contributions were made in full to the carpenters union funds.

The Eighth Circuit's decision in a similar case supports the view that plaintiffs should not be able to establish an entitlement to contributions for work assigned to another union claiming jurisdiction over the work without invoking procedures for resolving the jurisdictional work assignment issue. See *Carpenters Fringe Benefit Funds v. McKenzie Eng'g*, 217 F.3d 578 (8th Cir. 2000). Reversing judgment in favor of the carpenters funds in that case, the court found that the audit failed to establish that the hours claimed were covered by the CBA. The court also refused to ignore the CBA McKenzie had with the Operating Engineers that covered the same work, explaining that:

On this record, McKenzie was contractually free to assign the Crescent Bridge work to either union, or part of the work to each union. Any union aggrieved by that assignment [\*\*29] could invoke the inter-union jurisdictional dispute procedure, which results in a final work assignment decision prospectively binding

on McKenzie. See generally *NLRB v. Radio & Television Broad. Eng'rs Union*, 364 U.S. 573, 5 L. Ed. 2d 302, 81 S. Ct. 330 . . . (1961). Because Local 166 did not invoke that procedure, the Funds are not entitled to contributions for work assigned to members of a competing union within the jurisdiction of that union.

*Id. at 585.* Looking at the basis for the protections afforded to ERISA plans under § 515, nothing suggests that it was intended to afford ERISA fiduciaries a weapon against employers in undeclared jurisdictional disputes with competing unions. We conclude that plaintiffs have

failed to demonstrate that OCP had a contractual obligation to pay contributions for the hours of T-M-T work performed by the carpenters union employees on the two Michigan jobs.

**AFFIRMED.**

**CONCUR BY:** Gordon J. Quist

**CONCUR**

**Gordon J. Quist, District Judge, Concurrence.** I concur in the result of this case for the reasons [\*\*30] set forth in Part II B of the Opinion.



Sheet Metal Workers' International Association, Local 27, AFL-CIO and E.P. Donnelly, Inc. and United Brotherhood of Carpenters and Joiners of America, Local Union No. 623

Case 4-CD-1188

NATIONAL LABOR RELATIONS BOARD

*2011 NLRB LEXIS 693; 192 L.R.R.M. 1071; 2010-11 NLRB Dec. (CCH) P15,505; 357 NLRB No. 131*

December 8, 2011

**NOTICE:**

[\*1]

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

**PRIOR HISTORY:**

*Sheet Metal Workers' Int'l Ass'n, Local 27, 2008 NLRB LEXIS 254 (N.L.R.B., Aug. 18, 2008)*

**COUNSEL:**

Henry Protas, Esq., for the General Counsel.

Robert O'Brien, Esq. (O'Brien, Belland & Bushinsky, LLC), for the Respondent.

Louis Rosner, Esq., for the Employer.

**JUDGES:** By Mark Gaston Pearce, Chairman; Craig Becker, Member; Brian E. Hayes, Member

**OPINION:**

DECISION AND ORDER

On August 18, 2008, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed exceptions and a supporting brief, and a brief in answer to the Respondent's exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order. n1

2011 NLRB LEXIS 693, \*1; 192 L.R.R.M. 1071;  
2010-11 NLRB Dec. (CCH) P15,505; 357 NLRB No. 131

n1 In accordance with our decision in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), we modify the judge's remedy by requiring that backpay and other monetary awards shall be paid with interest compounded on a daily basis. We shall modify the judge's recommended Order to conform to the violations found and to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

[\*2]

#### Facts

E.P. Donnelly, Inc. (Donnelly), a New Jersey contractor, installs prefabricated roofs. It had a collective-bargaining agreement with the United Brotherhood of Carpenters and Joiners of America, Local Union No. 623 (Local 623).

Sambe Construction Company, Inc. (Sambe) was the general contractor for the Egg Harbor Township Community Center in New Jersey, a public works project covered by a Project Labor Agreement (PLA) authorized by New Jersey State law. Sambe and the Sheet Metal Workers' International Association, Local 27, AFL-CIO (Respondent or Local 27) were signatories to the PLA. n2 In March 2007, Sambe subcontracted roofing installation work on the Egg Harbor Township Community Center project to Donnelly, and Donnelly signed a Letter of Assent agreeing to be bound by the PLA.

n2 The PLA included a "supremacy" provision stating that it "supersedes any . . . other collective bargaining agreement of any type which would otherwise apply to this Project."

In April 2007, Local 27 claimed the roofing work [\*3] under the PLA, but Donnelly assigned the work to its Carpenters-represented employees. Local 27 invoked the PLA's procedure for resolving jurisdictional disputes. Arbitrator Stanley Aiges found that Sambe and Donnelly violated the PLA "by assigning the disputed work to members of the Carpenters Union, Local 623" and directed that the work be reassigned to employees represented by Local 27. (Aiges Award). n3

n3 Local 27 also filed a grievance under its collective-bargaining agreement against Sambe and Donnelly with the Local Joint Adjustment Board (LJAB) over the work assignment. The LJAB found that Sambe and Donnelly had violated the agreement and the PLA, failed to comply with the Aiges Award, and were liable for lost wages and benefits.

#### *10(k) Proceedings and Determination*

In late April 2007, Local 623 threatened to picket if the roofing work on the Egg Harbor Township Community Center project was reassigned, and Donnelly filed 8(b)(4)(ii)(D) charges. In the subsequent 10(k) proceeding, Local 27 contended [\*4] that the Board could not award the disputed work because the PLA was authorized by New Jersey statute, which is not subject to preemption under the Supreme Court's decision in *Building & Construction Trades Council v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 113 S. Ct. 1190, 122 L. Ed. 2d 565 (1993) (*Boston Harbor*) (holding that the Act does not preempt a state authority acting as owner of a construction project from requiring that contractors abide by a PLA).

On December 31, 2007, the Board issued its 10(k) determination, 351 NLRB 1417, awarding the work to employees represented by Local 623 based on employer preference, current assignment and past practice, and economy and efficiency of operations. The Board disagreed that an award of the work to Local 623 "would effectively and

impermissibly preempt New Jersey law":

An award of the disputed work to Local 623 would not prevent Egg Harbor Township from exercising its authority under state law to negotiate and execute project labor agreements, nor would it invalidate the PLA. *The Employer would continue to be bound under the terms of the PLA, and the parties to the PLA would retain any rights [\*5] they may have under state law to bring a suit for damages against the Employer for any breach of the PLA. Id. at 1419. [Emphasis added.]*

#### *Local 27's Complaints in Federal Court and Donnelly's Unfair Labor Practice Charges*

In June 2007, Local 27 filed a complaint, and in August filed a first amended complaint, against Donnelly, Sambe, and Local 623 in Federal district court under *Section 301* of the Act. The first amended complaint sought enforcement of the Aiges Award and the LJAB award, reassignment of the work to Local 27-represented employees, and damages for breach of contract.

Donnelly filed new 8(b)(4)(ii)(D) charges with the Board in January 2008, claiming that Local 27's "refusal to comply with the Board's 10(k) award by continued maintenance of its district court action" violated *Section 8(b)(4)(ii)(D)*. The Region issued its complaint on April 16, 2008.

In June 2008, the Respondent filed a second amended complaint against Sambe and Donnelly. In it, the Respondent no longer sought reassignment of the Egg Harbor work. Count one of the second amended complaint requested a declaratory judgment that the Aiges Award is valid and binding on Sambe and Donnelly [\*6] ". . . to the extent that Arbitrator Aiges held that Donnelly and Sambe violated said PLA." Count two requested damages for breach of the PLA, and count three requested damages for violation of the New Jersey statutes.

#### *The Judge's Decision*

The administrative law judge found that by maintaining its Section 301 lawsuit against Donnelly and Sambe after the Board had issued its 10(k) determination, the Respondent violated *Section 8(b)(4)(ii)(D)* of the Act.

For the reasons discussed below, we agree with the judge that the Respondent unlawfully maintained its lawsuit against Donnelly. Contrary to the judge, however, we do not find that the Respondent unlawfully maintained its lawsuit against Sambe.

#### Discussion

The Respondent and the General Counsel except to the judge's finding that the Respondent unlawfully maintained the lawsuit against Sambe. They argue that the Respondent was denied due process because the complaint did not allege that the lawsuit against Sambe violated the Act. They further contend that, under Board precedent, because Sambe did not assign the disputed work directly to employees, an award against Sambe would not be inconsistent with the Board's 10(k) award. See, [\*7] e.g., *Carpenters Local 33 (AGC of Massachusetts)*, 289 NLRB 1482, 1484 (1988) (finding grievance seeking damages from general contractor for breaching subcontracting clause did not undermine 10(k) award of work to subcontractor's employees). We agree with these arguments, and reverse the judge's finding that the Respondent violated *Section 8(b)(4)(D)* by maintaining its suit against Sambe following the Board's 10(k) determination.

However, we affirm the judge's conclusion, based on longstanding Board and court precedent, that Local 27 violated *Section 8(b)(4)(ii)(D)* by maintaining its lawsuit against Donnelly after the Board's 10(k) award issued in December 2007. In doing so, we reject the Respondent's contention that the judge erred by failing to consider that it had a reasonable basis for filing and maintaining its lawsuit under *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983).

As a general rule under *Bill Johnson's*, an ongoing lawsuit can be enjoined as an unfair labor practice only if it is filed with a retaliatory motive and if it lacks a reasonable basis in fact or law. But the Court noted an exception to the general rule in *Bill [\*8] Johnson's*, finding the rule inapplicable to a lawsuit "that has an objective that is illegal under federal law." *Bill Johnson's*, 461 U.S. at 747 fn. 5. Thus, where "the Board has previously ruled on a given matter, and where the lawsuit is aimed at achieving a result that is incompatible with the Board's ruling, the lawsuit falls within the 'illegal objective' exception to *Bill Johnson's*." *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 (1991), enf. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959, 113 S. Ct. 1383, 122 L. Ed. 2d 758 (1993). n4

n4 In *BE&K Construction Co. v. NLRB*, 536 U.S. 516, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002), the Supreme Court held that the Board may not find that maintenance of a completed, unsuccessful lawsuit constituted an unfair labor practice where the suit was objectively reasonable and filed with the purpose of receiving the relief requested. On remand from the Supreme Court, the Board in *BE&K Construction Co.*, 351 NLRB 451, 456 (2007), held that "the filing and maintenance of a reasonably based lawsuit does not violate the Act, regardless of whether the lawsuit is ongoing or is completed, and regardless of the motive for initiating the lawsuit."

The Board had held that the Supreme Court's ruling in *BE&K* did not affect the footnote 5 exceptions in *Bill Johnson's*, *supra*, for lawsuits with an illegal objective. *Allied Trades Council (Duane Reade, Inc.)*, 342 NLRB 1010, 1013 fn. 4 (2004). See also *Small v. Plasterers Local 200*, 611 F.3d 483 (9th Cir. 2010).

[\*9]

It is well established that a union's lawsuit to obtain work awarded by the Board under *Section 10(k)* to a different group of employees, or monetary damages in lieu of the work, has an illegal objective for purposes of *Bill Johnson's* footnote 5 and violates *Section 8(b)(4)(ii)(D)*. n5 Accordingly, we affirm the judge's finding that, following the Board's 10(k) award, Local 27's maintenance of its 301 lawsuit was incompatible with the Board's award and, therefore, had an objective that was illegal under Federal law.

n5 *Small v. Plasterers Local 200*, *supra* at 493; *United Slate, Tile & Composition Roofers Local 30 v. NLRB*, 1 F.3d 1419, 1426 (3d Cir. 1993) ("[T]he pursuit of a . . . breach of contract suit [for pay-in-lieu] that directly conflicts with a section 10(k) determination has an illegal objective and is enjoined as an unfair labor practice under *section 8(b)(4)(ii)(D)*."), enf. *Roofers Local 30 (Gundle Construction)*, 307 NLRB 1429(1992). See also cases cited in *Roofers Local 30*, *supra* at 1430.

[\*10]

The Respondent attempts to distinguish the clear case precedent by asserting that the second amended complaint's count two seeks damages only for breach of the PLA, not pay-in-lieu of assignment of the work. But this is a distinction without a difference. The basis of the damages in count two is that the arbitrator "clearly and unequivocally determined that . . . Donnelly violated the PLA" and, as a result of that violation, Local 27 and its members were "damaged. . . as they lost wages and benefits otherwise due." The arbitrator's rationale for finding the violation was Donnelly's having assigned the work to employees represented by the Carpenters in accordance with the Board's 10(k) award. The judge correctly concluded that the effect of count two's request for damages for breach of the PLA is the same as the first amended complaint's request that Donnelly pay damages for assigning the work to employees represented by Local 623.

Similarly, count three, though couched in terms of a State-law violation, is founded on Donnelly's assignment of the disputed work in accordance with the Board's 10(k) award. The Respondent's claim that Donnelly violated State law and owed damages to [\*11] the Respondent directly conflicts with the Board's 10(k) award, and is therefore unlawful. n6

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n6 We note that the district court denied the Respondent summary judgment on this cause of action, finding that the New Jersey statute authorizing PLAs did not create a private right of action. *Sheet Metal Workers' Local 27 v. E.P. Donnelly, Inc. and Sambe Construction Co.*, 673 *F.Supp.2d* 313, 331 (D.N.J. 2009).

The judge saw "nothing improper" in the request in count one of the second amended complaint for declaratory relief validating the Aiges Award's finding that Donnelly violated the PLA. We disagree. If granted, a declaration validating the finding that Donnelly breached the PLA by assigning the work to the Carpenters-represented employees would also directly conflict with the 10(k) award. Accordingly, we will modify the remedy to require that the Respondent withdraw its lawsuit against Donnelly in its entirety.

The Respondent's other principal argument is that, despite longstanding 8(b)(4)(ii)(D) [\*12] precedent, the Board's 10(k) award expressly permitted Local 27 to continue its lawsuit seeking damages from Donnelly for breach of the PLA. The Respondent's argument focuses on a single sentence from the 10(k) award stating that Donnelly "would continue to be bound under the terms of the PLA, and the parties to the PLA would retain any rights they may have under state law to bring a suit for damages against the Employer for any breach of the PLA." 351 *NLRB at* 1420. The Respondent asserts that its interpretation was confirmed by the district court's decision denying the Region's request for an injunction pendente lite. *Moore-Duncan v. Sheet Metal Workers Local 27*, 624 *F.Supp. 2d* 367 (D.N.J. 2008). n7

n7 See also *Sheet Metal Workers Local 27 v. E.P. Donnelly, Inc. and Sambe Construction Co.*, 673 *F.Supp.2d at* 331 (reaffirming the findings in 624 *F.Supp. 2d* 367 and granting Local 27 summary judgment on breach of contract claim).

The court concluded that the Respondent's [\*13] second amended complaint did not conflict with the Board's 10(k) determination because it sought only damages for breach of the PLA. n8 It rejected as implausible the idea that the Board was addressing only future, unrelated suits that might arise under the PLA, and not Local 27's existing lawsuit, given the Board's "sweeping assurance that parties would retain 'any rights' under the PLA to sue for 'any breach.' If the Board intended to exclude the ongoing litigation from its broadly worded assurance, it would have done so clearly." 624 *F. Supp.2d at* 374. "In short, the Board's 10(k) decision specifically held the [the Respondent's] Action to be compatible with it." *Id. at* 374-75. n9 With all due respect to the court, we believe that it misconstrued (as did the Respondent) the meaning of the Board's language in the 10(k) determination.

n8 Significantly, the court ruled only on the question of whether to grant the Board's request for temporary injunctive relief and not on the merits of whether the Respondent violated *Sec. 8(b)(4)(D)*. Accordingly, its statements regarding the merits of the allegation are not binding on the Board. See *Roofers Local 30, supra at* 1431 *fn. 7*. Likewise, the court's reaffirmance of those statements in Local 27's breach of contract suit, *Sheet Metal Workers Local 27 v. E.P. Donnelly, Inc. and Sambe Construction Co., supra*, is not binding on the Board and is contrary to clear Third Circuit precedent. *United Slate, Tile & Composition Roofers Local 30 v. NLRB, supra, 1 F.3d at* 1429 (holding lawsuit to recover damages for work awarded to employees represented by another union in a 10(k) proceeding violates *Sec. 8(b)(4)(ii)(D)*).

[\*14]

n9 The Respondent and the court treat the PLA as authoritative because of its "supremacy" provision. But a PLA is a "'prehire' collective bargaining agreement." *Boston Harbor*, 507 *U.S. at* 230. In its 10(k) decision, the Board did not give the PLA special deference because of its "supremacy" provision, contrary to the Respondent's contention. Rather, the Board noted that "[e]very contract implies an expectation of the parties that its terms will be honored, notwithstanding the existence of any conflicting agreements entered into by any of the parties." 351

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*NLRB at 1420*. Accordingly, consistent with prior precedent, the Board considered the PLA on the same basis it considered the Donnelly-Carpenters' collective-bargaining agreement and concluded that "the factor of collective-bargaining agreements does not favor an award to employees represented by either union." *Id.* See *Operating Engineers Local 318 (Kenneth E. Foeste Masonry)*, 322 NLRB 709, 712 (1996) (neither project agreement nor other union's labor agreement favored award of work to employees represented by either union; work awarded based on other factors).

[\*15]

Initially, if the Board had intended to overrule decades of well-established precedent in its 10(k) decision and permit a union to pursue a contractual claim conflicting with the Board's award, it would have done so explicitly. Cf. *Longshoremen ILWU Local 7 (Georgia-Pacific)*, 291 NLRB 89, 92-93 (1988), review denied 892 F.2d 130, 282 U.S. App. D.C. 114 (D.C. Cir. 1989) (explicitly reversing earlier precedent and announcing it would no longer find union's grievances before issuance of 10(k) award to be coercive within meaning of *Section 8(b)(4)(ii)(D)*). n10

n10 Indeed, the courts have found that the Board "acts unreasonably if it departs from established policy without giving a reasoned explanation for the change." *Chelsea Industries v. NLRB*, 285 F.3d 1073, 1075-1076, 350 U.S. App. D.C. 440 (D.C. Cir. 2002); *Bro-Tech Corp. v. NLRB*, 105 F.3d 890, 897 (3d Cir. 1997) ("The Board may not, by *ipse dixit*, simply issue new rules (or "interpret" its old ones) without explaining the reason for their issuance (or reinterpretation).") (citation omitted).

[\*16]

Further, the Respondent's interpretation of the Board's language fails to consider it in the context of the Respondent's asserted defense in the 10(k) case. The Board's statement about the PLA was part of its response to Local 27's assertion that the Board "cannot make an affirmative award of the disputed work" . . . because the PLA is authorized by a New Jersey statute . . . which (according to Local 27) is not subject to NLRA preemption." 351 NLRB at 1419. The Board rejected the assertion that it lacked jurisdiction as "without merit," because the award of the disputed work would neither preclude Egg Harbor Township from negotiating and executing project labor agreements pursuant to the state statute nor invalidate the PLA involved here. *Id.* at 1419-1420.

The Board continued its response by stating, "the parties to the PLA would retain any rights they may have under state law to bring a suit for damages against the Employer for any breach of the PLA." *Id.* at 1420. In context, the Board merely pointed out that the exercise of its statutory authority to resolve this particular jurisdictional dispute over certain roofing work would neither [\*17] amount to a general preemption of the New Jersey statute nor generally nullify the parties' rights and obligations under the PLA.

The remainder of the Board's analysis confirms this interpretation. Immediately after the sentence relied on by the Respondent, the Board emphasized that even if its exercise of jurisdiction put it "at cross purposes with the New Jersey statute" authorizing the PLA, "it does not follow that the Board is precluded from exercising its statutory authority," or that "the Board has no jurisdiction over this dispute . . . Such a suggestion is contrary to the *Constitution's Supremacy Clause*." *Id.*

By invoking the *Constitution's Supremacy Clause*, the Board affirmed the primacy of its 10(k) determination in this case over any conflicting contractual claims or arbitral awards concerning the disputed work. Simply put, it is unreasonable to interpret the Board as having sanctioned the Respondent's continuing pursuit of a contractual claim that would "totally frustrate" "the very purpose of *Section 10(k)* -- to authorize the Board to resolve the jurisdictional dispute." *Longshoremen's & Warehousemen's Union v. NLRB*, 884 F.2d at 1414.

Moreover, the [\*18] legality of Local 27's lawsuit was not at issue in the 10(k) proceeding. As noted, Board

precedent is clear that, before the Board issued its 10(k) award, Local 27's lawsuit did not have an illegal objective. See *Longshoremen ILWU Local 7 (Georgia Pacific)*, 291 NLRB at 92-93 (union's grievances before issuance of 10(k) award not coercive under *Section 8(b)(4)(ii)(D)*). Once the Board issues a 10(k) award, a respondent has a reasonable period to refrain from pursuing its conflicting grievance or lawsuit. *Council of Laborers (W. B. Skinner, Inc.)*, 292 NLRB 1035, 1035 fn. 6 (1989). Local 27's violation of *Section 8(b)(4)(ii)(D)* began only when it continued its lawsuit after the Board awarded the work to the Carpenters-represented employees. Because a 10(k) award takes precedence over contrary claims and determinations, the Board would have had no reason to even consider Local 27's existing lawsuit in connection with its 10(k) determination.

In sum, we agree with the judge that by maintaining the suit against Donnelly after the Board made its 10(k) determination, the Respondent sought to undermine the Board's 10(k) award and to coerce the Employer into [\*19] reassigning to members of Local 27 the work that the Board found had been properly assigned to employees represented by Local 623. Accordingly, the Respondent's conduct in maintaining the suit against Donnelly after the 10(k) determination issued violated *Section 8(b)(4)(ii)(D)* of the Act.

#### ORDER

The Respondent, Sheet Metal Workers' International Association, Local 27, AFL-CIO, its officers, agents and representatives, shall

##### 1. Cease and desist from

(a) Threatening, coercing or restraining E.P. Donnelly, Inc., or any person engaged in commerce, or in an industry affecting commerce, where an object thereof is to force or require Donnelly to assign the work of installing prefabricated standing seam metal roofing, soffit, fascia and related trim on the Community Center Project in Egg Harbor Township, New Jersey, to employees who are members of, or are represented by, Local 27, rather than to employees who are members of, or are represented by, Local 623.

(b) Maintaining after December 31, 2007 a lawsuit entitled *Sheet Metal Workers Local 27 v. E.P. Donnelly, Inc. et al.* Civil No. 07-3023(RMB/JS) in the United States District Court for the District of New Jersey, or any lawsuit that [\*20] it maintains, that requests that the Employer comply with the terms of the LJAB or the arbitrator's award herein, or requests monetary damages for its failure to assign the disputed work to employees who are members of, or are represented by, the Respondent or the Sheet Metal Workers' International Association.

##### 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw the above-described lawsuit. Within 7 days, notify the Employer of its action.

(b) Reimburse payments, if any, that were made by E.P. Donnelly to the Respondent pursuant to the award of the LJAB or the arbitrator, following the Board's Section 10(k) Determination issued on December 31, 2007, with interest. Interest is to be computed in the manner described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

(c) Within 14 days after service by the Region, post at its union office and hiring hall in Farmingdale, New York, as well as any other offices it maintains, copies of the attached notice marked "Appendix." n11 Copies of the notice, on forms provided by the [\*21] Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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n11 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(d) Within 21 days after service by the Region, file [\*22] with the Regional Director for Region 4 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

**ALJ:**

JOEL P. BIBLOWITZ

**ALJ-DECISION:**

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on May 29, 2008, in Philadelphia, Pennsylvania. The complaint herein, which issued on April 16, 2008 and was based upon an unfair labor practice charge that was filed on January 11, 2008, by E. P. Donnelly (the Employer), alleges that Sheet Metal Workers' International Association, Local 27, AFL-CIO (Local 27 or the Respondent) violated *Section 8(b)(4)(ii)(D)* of the Act by filing and maintaining a lawsuit in order to obtain certain work, even though the Board had issued a 10(k) decision and determination of dispute awarding of the work in question to United Brotherhood of Carpenters and Joiners of America, Local Union No. 623 (Local 623), rather than to Local 27.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, that the Employer has been an employer engaged in commerce within the meaning of *Section 2(6)* and *(7)* of the Act.

II. LABOR ORGANIZATION STATUS [\*23]

Respondent admits, and I find, that it and Local 623 are each labor organizations within the meaning of *Section 2(5)* of the Act.

III. THE FACTS

The facts herein are straightforward and undenied. The Employer, a contractor in the construction industry, specializes in the installation of prefabricated standing seam metal roofs and related jobs mostly in south and central New Jersey. It has maintained a collective-bargaining relationship with Local 623 since about 1999, and it is a signatory to the Carpenters' international agreement, which binds it to the Local 623 agreements when working within its jurisdiction. Further, it employs a "core group" of seven or eight carpenter-represented employees and supplements this group by hiring additional carpenters, as needed, through the applicable local carpenter agreement.

On March 30, 2007, n1 the Employer obtained a subcontract from Sambe Construction Company, Inc. (Sambe), to install prefabricated standing seam metal roofing and related work at the Egg Harbor Township Community Center project (the Project), which is covered by a project labor agreement (PLA). The signatories to the PLA are the Egg Harbor Township, Sambe, the South Jersey [\*24] Building and Construction Trades Council, and certain local unions, including Local 27; Local 623 was not a signatory to the PLA. Upon entering into the subcontract with Sambe, the

Employer signed a letter of assent agreeing to be bound by the PLA. Pertinent portions of the PLA are:

This Agreement, together with the local Collective Bargaining Agreements appended hereto . . . represents the complete understanding of all signatories and supersedes any national agreement, local agreement or other collective bargaining agreement of any type which would otherwise apply to this Project. . . . [Art. 2, sec. 4.]

Where there is a conflict, the terms and conditions of this Project Agreement shall supersede and override terms and conditions of any and all other national, area, or local collective bargaining agreements. [Art. 3, sec. 1.]

The Contractors recognize the signatory Unions as the sole and exclusive bargaining representative of all craft employees who are performing on-site Project work within the scope of this Agreement. . . . [Art. 4, sec. 1.]

The PLA also provides for a procedure for resolving jurisdictional disputes, and appended to the PLA is a collective-bargaining [\*25] agreement between Local 27 and Sambe, effective June 1, 2006, through May 31, 2009, encompassing the disputed work in question.

n1 Unless indicated otherwise, all dates referred to herein relate to the year 2007.

On April 4, at a prejob meeting provided for in the PLA, Sambe assigned the disputed work to the Employer, and Local 27 claimed the disputed work. On April 13, the Employer stated that it was assigning the work to employees represented by Local 623. On April 16, Local 27 invoked the PLA's provisions for settlement of jurisdictional disputes, resulting in a hearing before Arbitrator Stanley Aiges on June 5; the Employer, Sambe and Local 27 participated in this hearing, Local 623 did not. On July 2, Aiges issued his decision awarding the disputed work to Local 27. The award states, inter alia: "For the reasons set forth above, I find that based on area practice within the jurisdiction of the South Jersey BCTC, Sambe/Donnelly violated the Egg Harbor Community Center PLA by assigning the disputed work to [\*26] members of the Carpenters Union, Local 623. They are directed to reassign that work to members of Sheet Metal Workers Local 27." On June 26, Local 27 filed a grievance against Sambe and the Employer with the Local Joint Adjustment Board (LJAB) concerning the assignment of work at the Project. The LJAB met on July 16 to consider the grievance; although Sambe and the Employer were invited to attend, neither one did. On July 23, the LJAB issued its decision finding that Sambe and the Employer, by assigning the disputed work at the Project to Local 623 members rather than to Local 27 members, were in violation of the collective-bargaining agreement, as well as the PLA and, additionally found that they failed to comply with the award issued by Arbitrator Aiges on July 2. The LJAB award concludes:

Assuming the aforementioned work is not reassigned to Sheet Metal Workers from Local # 27, the LJAB finds Sambe Construction Company, Inc. and E. P. Donnelly, Inc. jointly, severally and in the alternative responsible to pay fair and justifiable compensation to Sheet Metal Workers Local Union # 27 for lost wages and benefits in the amount of \$ 428,319.26, as determined by averaging the [\*27] shop and field hours required to complete the project, as estimated by Local 27 contractors, and multiplying those hours by SMW Local Union # 27's hourly rate of \$ 67.42.

On April 30, Local 623 informed the Employer that the assignment of this work to another trade would be considered a breach of its contract and would result in a grievance, picketing or any other means available to preserve the work for its members. On May 2, the Employer filed 8(b)(4)(D) charges against both Local 623 and Local 27. The Board dismissed the charges against Local 27 and a 10(k) proceeding ensued on July 2, 3, and 5. On December 31, the Board issued its decision and determination of dispute at *351 NLRB 1417 (2007)*. Based upon employer preference,

current assignment and past practice, and economy and efficiency of operations, the Board awarded the work to employees represented by Local 623.

On June 27 and August 3, Local 27 filed a complaint and a first amended complaint under *Section 301* of the Act against the Employer, Local 623, Sambe and the New Jersey Regional Council of Carpenters. In the first amended complaint, Local 27 states, inter alia, that the Employer and Sambe have refused [\*28] to abide by the award issued by Arbitrator Aiges, which award is legal and binding upon them as parties to the PLA of the Project, and that this refusal has caused damage to Local 27 and its membership, and that the Employer and Sambe have also refused to abide by the award issued by the LJAB, which also continues to damage Local 27 and its members. As a remedy, Local 27 requested the reassignment of the work to employees that it represents, monetary relief for the damages caused by the Employer and Sambe's breach of contract in accordance with the LJAB award of July 23, permanent injunctive relief compelling them to comply with the PLA and Aiges' arbitration award, and permanent injunctive relief enjoining them from contracting work at the Project to any entity not a signatory to the PLA.

On March 27, 2008, Renee Marie Bumb, United States District Judge of the District Court for the District of New Jersey, issued an opinion wherein she denied the Plaintiff's motion for summary judgment, without prejudice, and granted the Respondents' motion to vacate the LJAB award that issued on July 23. On June 25, 2008, the Respondent filed its second amended complaint, amending its remedy request. [\*29] In count one of this complaint, the Respondent requests that declaratory judgment be entered finding that the PLA is valid, legal, and binding on the Employer and Sambe for the Project, and that Aiges' arbitration award is also valid, legal, and binding on them ". . . to the extent that Arbitrator Aiges held that Donnelly and Sambe violated said PLA." Count two requests "monetary relief" and costs and attorney's fees for the damage caused by the Employer and Sambe's breach of the PLA, and count three requests damages for their breach of the New Jersey statutes. The important difference between this second amended complaint and the earlier complaints is that this latter complaint does not request compliance with, and damages pursuant to, the arbitration award and the LJAB award. Rather, this second amended complaint seeks "generic" monetary relief for the breach of the PLA and enforcement of the arbitration decision to the extent that the arbitrator found that the Employer and Sambe violated the PLA.

#### IV. ANALYSIS

The complaint before me alleges that Local 27 violated *Section 8(b)(4)(D)* of the Act by continuing to maintain this lawsuit in the United States District Court after the [\*30] Board issued its 10(k) ruling on December 31, ordering that the work in question be assigned to employees who were represented by, or were members of, Local 623. As a defense, Local 27 points to certain Board language in its 10(k) determination in response to Local 27's contention that the Board "cannot make an affirmative award of the disputed work" because the PLA was authorized by New Jersey statute, which is not subject to preemption. In that regard, the Board stated:

Local 27 thus appears to suggest that a Board award of the work in dispute to employees represented by Local 623 would effectively and impermissibly preempt New Jersey law authorizing public entities such as Egg Harbor Township to negotiate project labor agreements. An award of the disputed work to Local 623 would not prevent Egg Harbor Township from exercising its authority under state law to negotiate and execute project labor agreements, nor would it invalidate the PLA. *The Employer would continue to be bound under the terms of the PLA, and the parties to the PLA would retain any rights they may have under state law to bring a suit for damages against the Employer for any breach of the PLA.* [Emphasis [\*31] added.]

In addition to arguing that this language in the 10(k) determination permitted (in fact, encouraged) the Respondent to act as it did, the Respondent has two additional defenses herein. That even without this language, its second amended complaint does not go over the line in seeking to abrogate or undermine the effect of the 10(k) determination, and that under *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983), and *BE&K Construction Co.*, 351 NLRB 451 (2007), the Board cannot find a violation enjoining its second amended complaint

because its lawsuit was "reasonably based."

The law is clear (at least it was prior to December 31, when Board issued the 10(k) determination herein) that any post-award conduct (usually picketing, grievances, or a lawsuit) by the losing party in a 10(k) proceeding that undermines that determination is unlawful. In *Local 30 United Slate (Gundle Lining Construction Corp.)*, 307 NLRB 1429, 1430 (1992), the Board stated: "Such post-award conduct is properly prohibited under *Section 8(b)(4)(D)* because it directly undermines the 10(k) award, which under the congressional scheme, is supposed [\*32] to provide a final resolution to the dispute over which group of employees are entitled to the work at issue." The court, at *1 F.3d 1419, 1426 (3d Cir. 1993)*, in enforcing, stated: "The pursuit of a section 301 breach of contract suit that directly conflicts with a section 10(k) determination has an illegal objective and is enjoined as an unfair labor practice under *Section 8(b)(4)(ii)(D)*." And in *Iron Workers Local 433 (Otis Elevator Co.)*, 309 NLRB 273, 274 (1992), the Board said, ". . . allowing the losing party in a 10(k) dispute to pursue payments for work that the Board awarded to employees other than those involved in the grievance necessarily subverts the Board's 10(k) award."

I find that all of the complaints filed in its Section 301 suit, including the second amended complaint, tend to undermine the Board's 10(k) determination herein. The original complaint and the first amended complaint clearly undermined the 10(k) determination by requesting the reassignment of the work that the Board awarded to Local 623, ordering that the parties comply with the arbitration award and requesting monetary relief in accordance with the LJOB award. While [\*33] the second amended complaint is an improvement over the earlier complaint it still tends to undermine the Board's earlier determination. There is nothing improper in count one, which requests a finding that the PLA is valid and binding upon the Employer and Sambe and that the arbitration award, to the extent that it found that the Employer and Sambe violated the PLA, is also valid and binding on them. However, count two requests monetary relief for damages caused by the Employer and Sambe's breach of the PLA. Although, on its face, this appears to be less objectionable than the demands in the earlier complaints, the end result is the same as if the Respondent had requested that the Employer and Sambe pay damages in accordance with the LJOB award--that they would have to pay damages for assigning the work to Local 623 members, as the Board determined in its 10(k) determination, thereby undermining that ruling. I therefore find that *under normal circumstances*, by filing and maintaining its second amended complaint, the Respondent violated *Section 8(b)(4)(D)* of the Act. This is where the Respondent's principal defense comes in, i.e., the language contained on page 4 of the Board's [\*34] determination.

Prior to deciding the merits of the dispute, the Board stated that awarding the work to Local 623 would not prevent the township from exercising its authority under state law to negotiate or execute agreements, nor would it invalidate the PLA. More relevant, and confusing, is the language that follows: "The employer would continue to be bound under the terms of the PLA, and the parties to the PLA would retain any rights they may have under state law to bring a suit for damages against the Employer for any breach of the PLA." The Respondent (correctly) points out that is all that it did herein, and therefore the complaint should be dismissed. I, reluctantly, disagree for two reasons. As stated by counsel for the General Counsel, in his brief, if the Board wanted to overrule such longstanding precedent, as the Respondent argues it meant to do, it would have specifically stated that it was doing so, but it did not do so. In addition, if the Board really meant to say what the Respondent alleges, it should be for the Board to so state rather than for me to make that determination and overrule longstanding precedent.

Finally, the Respondent defends that under *BE&K, supra*, [\*35] there can be no finding of a violation herein, which would enjoin its lawsuit; I disagree. Initially, I find that because the second amended complaint, if successful, would undermine the Board's 10(k) determination, it was not "reasonably based," i.e., the Respondent must have been aware that it conflicted with that determination and would therefore be subject to challenge. In *Northern California District Council of Laborers (W. B. Skinner, Inc.)*, 292 NLRB 1035 (1989), the Board stated:

The Board issued a decision under *Section 10(k)* of the Act awarding certain disputed work to employees of W. B. Skinner who were represented by IBEW Local 202, rather than to employees who were represented by Respondents. That decision put the Respondents, who fully participated in the 10(k) hearing, on notice that there was no longer any reasonable basis for continuing to prosecute the lawsuit

that they filed prior to the 10(k) award to confirm a contrary arbitral award.

See also *Longshoremen's ILWU Local 32 (Weyerhaeuser)*, 271 NLRB 759 (1984), and *ILWU Local 13 (Sea-Land)*, 290 NLRB 616, 617 (1988). In addition, as counsel for the General [\*36] Counsel states in his brief, *BE&K, supra*, did not affect footnote 5 in the Supreme Court's decision in *Bill Johnson's, supra*, which states: "We are not dealing with . . . a suit that has an objective that is illegal under [F]ederal law. Petitioner concedes that the Board may enjoin these latter types of suits." As I have found that the Respondent's suits herein violate the Act because they undermine the Board's 10(k) determination, they can be enjoined.

Based upon all of the above, I find that by bringing and maintaining its Section 301 lawsuit, including the second amended complaint on June 25, 2008, the Respondent violated *Section 8(b)(4)(ii)(D)* of the Act.

#### CONCLUSIONS OF LAW

1. E. P. Donnelly, Inc. has been an employer engaged in commerce within the meaning of *Section 2(6)* and *(7)* of the Act.

2. Sheet Metal Workers' International Association, Local 27, AFL-CIO and United Brotherhood of Carpenters and Joiners of America, Local Union No. 623 have each been labor organizations within the meaning of *Section 2(5)* of the Act.

3. By maintaining its Section 301 lawsuit against the Employer and Sambe after the Board issued its 10(k) determination, [\*37] the Respondent violated *Section 8(b)(4)(ii)(D)* of the Act.

#### THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action necessary to effectuate the policies of the Act. As stated above, the difficulty that I had with the Respondent's lawsuit was its request for damages. Whether it was stated as damages for breach of the PLA and a violation of the New Jersey statutes (as set forth in the second amended complaint), or as a request that the Employer and Sambe be ordered to comply with the LJOB and the arbitrator's award and pay damages pursuant to those awards, the result is the same. The Employer and Sambe would be penalized for complying with the Board's 10(k) determination, thereby undermining that determination. I recommend that the Respondent be ordered to delete from its second amended complaint paragraphs B and C in its remedy request for count one, as well as its entire remedy request for counts two and three or, in the alternative, to withdraw the lawsuit in its entirety.

Upon the foregoing findings of fact, conclusions of law and the entire record, [\*38] I hereby issue the following recommended n2

n2 If no exceptions are filed as provided by *Sec. 102.46* of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in *Sec. 102.48* of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

#### ORDER

The Respondent, Sheet Metal Workers' International Association, Local 27, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from

2011 NLRB LEXIS 693, \*38; 192 L.R.R.M. 1071;  
2010-11 NLRB Dec. (CCH) P15,505; 357 NLRB No. 131

(a) Threatening, coercing, or restraining E. P. Donnelly, Inc., or any person engaged in commerce, or in an industry affecting commerce, where an object thereof is to force or require Donnelly to assign the work of installing prefabricated standing seam metal roofing, soffit, fascia, and related trim on the Community Center Project in Egg Harbor Township, New Jersey, to employees who are members of, or are represented by, Local 27, rather than to employees who are members of, or represented by, Local 623.

(b) Maintaining a [\*39] lawsuit entitled *Sheet Metal Workers Local 27 v. E. P. Donnelly, Inc.*, in the United States District Court for the District of New Jersey, insofar as this, or any lawsuit that it maintains, requests that the Employer and/or Sambe comply with the terms of the LJAB or the arbitrator's award herein, or requests monetary damages for their failure to assign the disputed work to employees who are members of, or are represented by, the Respondent or the Sheet Metal Workers' International Association.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw the remedy requests located in paragraphs B and C contained in count one and the entire remedy request contained in counts two and three of its second amended complaint or, in the alternative, withdraw the lawsuit. Either way, within 7 days, notify the Employer of its action.

(b) Reimburse, with interest, payments, if any, that were made by E. P. Donnelly and/or Sambe to the Respondent pursuant to the award of the LJAB or the arbitrator, following the Board's 10(k) determination issued on December 31, 2007. Interest to be computed in the manner described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). [\*40]

(c) Within 14 days after service by the Region, post at its union office and hiring hall in Farmingdale, New York, as well as any other offices it maintains, copies of the attached notice marked "Appendix." n3 Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

n3 If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. August 18, 2008

#### APPENDIX:

APPENDIX  
NOTICE [\*41] TO EMPLOYEES AND MEMBERS  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

2011 NLRB LEXIS 693, \*41; 192 L.R.R.M. 1071;  
2010-11 NLRB Dec. (CCH) P15,505; 357 NLRB No. 131

Choose representatives to bargain on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a lawsuit seeking to require E.P. Donnelly, Inc. to pay monetary damages to us, with an object of forcing it to assign certain work to individuals who are members of, or are represented by us, contrary to a ruling by the National Labor Relations Board at *351 NLRB 1417 (2007)*, in which the Board awarded the work to employees who were represented by United Brotherhood of Carpenters and Joiners of America, Local Union No. 623.

WE WILL withdraw our lawsuit against Donnelly.

WE WILL reimburse Donnelly for any payments, with interest as prescribed in the Board's Order, it may have made to us for the above described work following the issuance of [\*42] the Board's 10(k) Determination.

SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 27, AFL-CIO

**Legal Topics:**

For related research and practice materials, see the following legal topics:

Labor & Employment Law Collective Bargaining & Labor Relations Arbitration Authority Labor & Employment Law Collective Bargaining & Labor Relations Arbitration Awards Labor & Employment Law Collective Bargaining & Labor Relations Unfair Labor Practices General Overview

**EXHIBIT "B"**

**ORDER & OPINION RE: 1954 MEMORANDUM**

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

Raymond Orrand, Administrator,  
et al.,

Plaintiffs,

v.

Case No. 2:13-cv-481

Hunt Construction Group, Inc.,

Defendant.

OPINION AND ORDER

This is an action brought pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001, et seq. by Raymond Orrand, Administrator of the Ohio Operating Engineers Health and Welfare Plan, Pension Fund, Apprenticeship Fund, and Education and Safety Fund, and the trustees of those funds against defendant Hunt Construction Group. Plaintiffs allege that the defendant, an employer, and the Ohio Operating Engineers, a labor union, are parties to a collective bargaining agreement which requires defendant to make contributions to the funds on behalf of certain employees, and that defendant has failed to make those contributions. Plaintiffs seek the payment of contributions allegedly owed the funds under ERISA §515, 29 U.S.C. §1145, access to defendant's records for the purpose of conducting an audit, statutory interest, costs and attorney's fees, and injunctive relief.

This matter is before the court on defendant's motion to dismiss without prejudice. Defendant contends that the instant case is related to a dispute between Local 18 of the International Union of Operating Engineers ("Operating Engineers") and the

Laborers' International Union of North America ("Laborers' Union") over which union's members should be assigned work operating forklifts and skids. Defendant and other employers in the Cleveland, Ohio, area filed unfair labor practice charges with the National Labor Relations Board ("the Board"). Defendant states that the NLRB has now held two hearings under §10(k) of the National Labor Relations Act, 29 U.S.C. §160(k), to determine whether the work in question should be awarded to the members of the Operating Engineers or to members of the Laborers' Union. Defendant indicates that a decision from the Board could come at any time.

Defendant argues that plaintiffs are using the instant ERISA action, with its associated costs and risks, as a means of applying additional pressure against defendant in its efforts to expand the types of work within the jurisdiction of the Operating Engineers. Defendant correctly notes that it is the Board's responsibility and duty to decide in the §10(k) proceeding which of the two employee groups claiming the right to perform certain work tasks is correct and then specifically to award such tasks in accordance with its decision. See National Labor Relations Board v. Radio and Television Broadcast Engineers Union, Local 1212, 364 U.S. 573, 586 (1961). Defendant urges this court to apply the primary jurisdiction doctrine<sup>1</sup> and to dismiss this action without prejudice while the Board resolves the §10(k) matters. In the alternative,

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<sup>1</sup> The doctrine of primary jurisdiction arises when a claim is properly cognizable in court but contains some issue within the special competence of an administrative agency. United States v. Haun, 124 F.3d 745, 749 (6th Cir. 1997). When the doctrine is applicable, court proceedings are stayed so as to give the parties reasonable opportunity to refer the matter to an agency by seeking an administrative ruling. Id.

defendant asks this court to stay further proceedings in this case until the Board renders its decision. See Ryan v. Gonzales, 133 S.Ct. 696, 708 (2013) (district courts ordinarily have authority to issue stays where such a stay would be a proper exercise of discretion); Enelow v. New York Life Ins. Co., 293 U.S. 379, 382 (1935) (explaining that a district court may stay a case "ending before it by virtue of its inherent power to control the progress of a cause so as to maintain the orderly processes of justice").

The court concludes that the dismissal of the instant case without prejudice would not be appropriate. Defendant indicates that a decision could come from the Board at any time. However, the court will issue the stay requested by defendant. The court recognizes that the §10(k) proceedings before the Board are between the unions and the employers under the National Labor Relations Act, whereas plaintiffs' ERISA claims can only be advanced in this court by the administrator and trustees of the funds. See 29 U.S.C. §1132(e)(1). Nonetheless, the outcome of the proceedings before the Board may be relevant to this court's analysis of defendant's contractual liability under the relevant collective bargaining agreement.

The court finds the Sixth Circuit's decision in Trustees of the B.A.C. Local 32 Ins. Fund v. Ohio Ceiling & Partition Co., 48 Fed.Appx. 188 (6th Cir. 2002), to be instructive. In that case, the Sixth Circuit considered claims for contributions under §1145 brought by the trustees of various union funds, where the unions were engaged in a similar dispute about work jurisdiction. The court stated that "the heart of the issue" was "that the work was performed under a CBA with another union claiming jurisdiction over the work and under which contributions were made to the associated employee benefit funds." Id. at 196. The court reiterated that

the real question is whether plaintiffs could demonstrate a contractual obligation to make contributions to the bricklayers funds when the carpenters union agreements purported to cover the same work, the work was assigned to employees covered by the carpenters union agreements and contributions were made in full to the carpenters union funds.

Id. at 197-198. The court noted that the Sixth Circuit had previously rejected a claim for damages for breach of contract by one union when the Board resolved the jurisdictional dispute in favor of another union. Id. at 197 (citing Int'l Union, United Auto., Aerospace and Agric. Implement Workers (UAW) and its Local 1519 v. Rockwell Int'l Corp., 619 F.2d 580, 584-85 (6th Cir. 1980)).

The Sixth Circuit also stated that it was "sympathetic to the district court's concern about the use of ERISA to press a jurisdictional dispute of the assignment of" work. Id. at 197-98. The court observed, "Looking at the basis for the protections afforded to ERISA plans under [§1145], nothing suggests that it was intended to afford ERISA fiduciaries a weapon against employers in undeclared jurisdictional disputes with competing unions." Id. at 198. The court also noted that the issue of which union had a superior right to the work had not been determined in that case, id. at 197, and that "plaintiffs should not be able to establish an entitlement to contributions for work assigned to another union claiming jurisdiction over the work without invoking procedures for resolving the jurisdictional work assignment issue." Id. at 198 (citing Carpenters Fringe Benefit Funds v. McKenzie Eng'g., 217 F.3d 578 (8th Cir. 2000)). The court held that plaintiffs failed to demonstrate that the defendant had a contractual obligation to pay contributions for the hours of work performed by the carpenters union employees. Id. This holding suggests that the Board's

decision in the jurisdictional dispute in this case not only relevant to, but also a necessary predicate to recovery on plaintiffs' ERISA claims.

In any event, it makes sense from the standpoint of fairness and judicial economy to stay this action pending the Board's decision. The Board's determination may impact the parties' position in this case and their decision whether to proceed further with this litigation. Adhering to a typical schedule would result in an expenditure of time, money and judicial resources which may prove to be unnecessary if the parties later resolve the matter based on the Board's decision. Although a stay may delay any possible eventual recovery of contributions by the Operating Engineers' funds, the defendant has already made contributions to the Laborers' Union funds for the work performed by Laborers' Union members, to the benefit of the workers who actually performed the work.

Accordingly, the defendant's motion (Doc. 14) is granted in part and denied in part, in that the motion to dismiss is denied, and the motion to stay all further proceedings in this case pending a decision by the Board is granted. Counsel shall immediately notify the court when the Board renders its decision.

Date: September 26, 2013

s/James L. Graham  
James L. Graham  
United States District Judge

**EXHIBIT "C"**

**ORDER & OPINION RE: LOCAL 18 v. HUNT CONSTRUCTION GROUP, INC.**

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

**INTERNATIONAL UNION OF )  
OPERATING ENGINEERS, LOCAL 18, )  
Plaintiff, )  
)  
vs. )  
)  
**LABORERS' INTERNATIONAL )  
UNION OF NORTH AMERICA, et al., )  
Defendants. )****

**CASE NO. 1:12CV2797  
JUDGE CHRISTOPHER A. BOYKO  
OPINION AND ORDER**

**CHRISTOPHER A. BOYKO, J.:**

This matter comes before the Court upon the Motion (ECF DKT #9) of Defendants, Laborers' District Council of Ohio, Laborers' Local 265, Laborers' Local 310, Laborers' Local 423, Laborers' Local 500, Laborers' Local 530, Laborers' Local 639, Laborers' Local 860, Laborers' Local 894 and Laborers' Local 1015 ("Ohio Laborers"), to Dismiss for Lack of Subject Matter Jurisdiction Pursuant to Fed.R.Civ.P. 12(b)(1) and for Failure to State a Claim Pursuant to Fed.R.Civ.P. 12(b)(6) and alternatively Motion to Stay; and upon the Motion (ECF DKT #20) of Defendant, Laborers' International Union of North America ("LIUNA"), to Dismiss for Failure to State a Claim Pursuant to Fed.R.Civ.P. 12(b)(6), for Lack of Subject Matter Jurisdiction Pursuant to Fed.R.Civ.P. 12(b)(1) and alternatively

Motion to Stay. For the following reasons, the Court grants both Motions, in part, pursuant to Fed.R.Civ.P. 12(b)(6), for failure to state a claim upon which relief may be granted; and, further, declines to enter a stay of proceedings.

### **I. BACKGROUND**

Plaintiff, International Union of Operating Engineers, Local 18 ("Local 18"), filed this Complaint on November 8, 2012, pursuant to Section 301 of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185, claiming breach of an agreement between labor organizations. Local 18 represents the interests of equipment operators, referred to as "operating engineers," working in the State of Ohio. Defendants are the Ohio Laborers' International, District Council, and nine locals. Local 18 alleges that Defendants breached a February 3, 1954 Memorandum of Understanding, executed by the International Hod Carriers' Building and Common Laborers' Union of America and the International Union of Operating Engineers; and describes, in its Complaint, at least seventeen 2012 projects throughout Ohio, at which laborers allegedly performed work that is designated in the Memorandum as operating engineers' work. In its opening, the Memorandum of Understanding recites:

The International Union of Operating Engineers and the International Hod Carriers' Building and Common Laborers' Union of America, being desirous of arriving at a clarification regarding disputes that have arisen in the construction industry between the members of both Organizations and cognizant of the fact of the development of machinery and equipment in connection with work in which both Organizations are involved, hereby make the following clarifications ...

The Memorandum then sets out three numbered provisions, clarifying work to be performed by operating engineers and work to be performed by laborers, involving forklifts, drilling

operations, and conveyors.

Local 18 claims it is intended to benefit from, and be bound by, the 1954 Agreement, which clarifies division of work between the crafts. Local 18 also alleges that the 1954 Memorandum has not been repudiated and remains in full force and effect. Defendants, International, District Council, and local affiliates, allegedly condoned, assigned, and permitted work to be performed by laborers in disregard of the terms of the Agreement, directly and proximately causing injury to Local 18. Local 18 seeks compensatory damages and punitive damages. The punitive damages claim is based upon the allegation that, “given the nature and purposes of labor organization (sic), one union willfully and purposely agreeing with employers to perform work of another union in flagrant violation of written agreements between the international unions not to engage in such activity, constitutes extreme and outrageous conduct contravening the remedial purposes of national labor policy.” (Complaint - Prayer for Relief, ECF DKT #1).

Defendants, Ohio Laborers and LIUNA, have moved for dismissal under Fed.R.Civ.P. 12(b)(1) and Fed.R.Civ.P. 12(b)(6), or alternatively, for a stay pending resolution of all current National Labor Relations Board (“NLRB”) proceedings concerning Ohio Laborers and Local 18. All briefing has been completed and the issues are properly joined.

## **II. LAW AND ANALYSIS**

### **Standard of Review**

### **Subject Matter Jurisdiction**

Fed. R. Civ. P. 12(b)(1) states in pertinent part:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive

pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter....

When challenged on a motion to dismiss, it is plaintiff's burden to prove the existence of subject matter jurisdiction. *Rogers v. Stratton Indus.*, 798 F.2d 913, 915 (6th Cir.1986). Such challenges are brought by two different methods: (1) facial attacks and (2) factual attacks. *See, e.g., United States v. Ritchie*, 15 F.3d 592, 598 (6th Cir.1994).

“A *facial* attack is a challenge to the sufficiency of the pleading itself. On such a motion, the court must take the material allegations of the petition as true and construed in the light most favorable to the nonmoving party.” *Walters v. Leavitt*, 376 F.Supp.2d 746, 752 (E.D. Mich. 2005), *citing Scheuer v. Rhodes*, 416 U.S. 232, 235-37 (1974). “A *factual* attack, on the other hand, is not a challenge to the sufficiency of the pleading's allegations, but a challenge to the factual existence of subject matter jurisdiction. On such a motion, no presumptive truthfulness applies to the factual allegations, .... and the court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.” *Walters* at 752.

In the within matter, Defendants argue that this Court lacks subject matter jurisdiction to hear and decide this dispute, because Local 18's claims are preempted by *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959) and its progeny. The *Garmon* preemption “protects the primary jurisdiction of the NLRB to determine in the first instance what kind of conduct is either prohibited or protected by the NLRA.” *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 748 (1985). Thus, “federal courts must defer to the *exclusive* competence of the National Labor Relations Board if the danger of state interference with

national policy is to be averted.” *Alongi v. Ford Motor Co.*, 386 F.3d 716, 723 (6th Cir. 2004) (citing *Garmon*, 359 U.S. at 245) (emphasis added).

In some instances, federal courts and the NLRB possess concurrent jurisdiction, that is, where the courts’ jurisdiction is invoked under Section 301 of the LMRA. *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261 (1964).

Since the *Carey* decision, the Sixth Circuit has required an analysis of disputes, to determine if they implicate the exclusive initial jurisdiction of the NLRB pursuant to *Garmon*, or if they implicate the concurrent jurisdiction contemplated under Section 301.

Thus, upon an analysis of Local 18’s Complaint, this Court finds that the alleged breach of the 1954 Memorandum does not require the Court to defer, under *Garmon*, to the “exclusive competence” of the NLRB. Rather, the dispute between Local 18 and Defendants, Ohio Laborers and LIUNA, is principally a matter of contract interpretation; which, though it may potentially implicate representational issues, rightfully rests within the Court’s Section 301 authority. *International Brotherhood of Electrical Workers, Local 71 v. Trafftech, Inc.*, 461 F.3d 690, 695 (6th Cir. 2006).

Defendants also contend that subject matter jurisdiction is lacking, despite Local 18’s assertion that a Section 301 contract exists. Labor Management Relations Act § 301(a), 29 U.S.C. 185(a) provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

The Sixth Circuit has concluded that the existence of a union contract is an *element* of a Section 301 plaintiff's claim, and *not a restriction* on federal subject matter jurisdiction. *Daft v. Advest, Inc.*, 658 F.3d 583, 591 (6th Cir. 2011); *Winnett v. Caterpillar, Inc.*, 553 F.3d 1000 (6th Cir. 2009).

Nothing in Section 301(a) indicates that Congress meant to attach subject-matter jurisdiction consequences to the failure to state a cognizable Section 301 claim, and still less does anything in the statute do so "clearly." *Winnett*, 553 F.3d at 1006.

Therefore, Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction, pursuant to Fed.R.Civ.P. 12(b)(1) and the doctrine of preemption, is denied.

#### **Failure to State a Claim**

Fed. R. Civ. P. 12(b)(6) states:

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (6) failure to state a claim upon which relief can be granted...

In deciding a motion to dismiss under Fed.R.Civ.P. 12(b)(6), the court must accept as true all of the factual allegations contained in the complaint. *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007). The court need not, however, accept conclusions of law as true:

Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Court held in [*Bell Atlantic v.*] *Twombly*, 550 U.S. 544, 127 S.Ct. 1955 [(2007)], the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-Defendant-unlawfully-harmed-me accusation. *Id.* at 555. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.* at 557.

To survive a motion to dismiss, a complaint must contain sufficient factual matter,

Plaintiff Local 18, as an intended third-party beneficiary of the 1954 Agreement.” *Id.* at ¶ 46.

At the outset, the Court must highlight the introduction of the 1954 Memorandum of Understanding, which recites that the two signatory organizations, “being desirous of arriving at a clarification regarding disputes that have arisen in the construction industry ... hereby make the following clarifications.” This language suggests the absence of clarity, despite a previous accord between these organizations; so, if there is a contract, it must, logically, have been executed at a time prior to the 1954 Memorandum at issue.

The 1954 Memorandum is executed by two international labor organizations, and nowhere in its mere two pages of text does it indicate it is binding upon local unions, district councils, employers, or project owners.

The 1954 Memorandum is lacking a choice of law provision, a venue clause, a merger provision, a modification clause and a dispute resolution mechanism — all traditional contract terms.

There is no stated contract period. The Court can discern no plausible meeting of the minds regarding work assignments, such as would bind the signatories for any set time frame.

The critical element of mutual consideration is also absent. Local 18 asks the Court to read mutual promises into the 1954 Memorandum; that is, the signatories bound themselves to perform certain work, but to forego other types of work. Although allegations must be read generously, and inferences reasonably made under Fed.R.Civ.P. 12(b)(6), the Court is not permitted to add language or wording to a document attached and incorporated into the Complaint as an exhibit.

In sum, Local 18 has not shown the essential elements of a valid, enforceable contract.

Likewise, Local 18 has failed to demonstrate a meeting of the minds as to essential contract terms. The 1954 Memorandum is far from definite, particularly as to the contract time frame and the parties to be bound by it. Local 18's Complaint for Breach of Contract does not state a plausible claim for relief, and is, therefore, dismissed pursuant to Fed.R.Civ.P. 12(b)(6).

### **III. CONCLUSION**

For these reasons, the Motion (ECF DKT #9) of Defendants, Laborers' District Council of Ohio, Laborers' Local 265, Laborers' Local 310, Laborers' Local 423, Laborers' Local 500, Laborers' Local 530, Laborers' Local 639, Laborers' Local 860, Laborers' Local 894 and Laborers' Local 1015 ("Ohio Laborers"), to Dismiss for Lack of Subject Matter Jurisdiction Pursuant to Fed.R.Civ.P. 12(b)(1) and for Failure to State a Claim Pursuant to Fed.R.Civ.P. 12(b)(6) and alternatively Motion to Stay, and the Motion (ECF DKT #20) of Defendant, Laborers' International Union of North America ("LIUNA"), to Dismiss for Failure to State a Claim Pursuant to Fed.R.Civ.P. 12(b)(6), for Lack of Subject Matter Jurisdiction Pursuant to Fed.R.Civ.P. 12(b)(1) and alternatively Motion to Stay, are granted, in part, pursuant to Fed.R.Civ.P. 12(b)(6), for failure to state a claim upon which relief may be granted; and the Court further declines to enter a stay of proceedings.

**IT IS SO ORDERED.**

**s/ Christopher A. Boyko**  
**CHRISTOPHER A. BOYKO**  
**United States District Judge**

**Dated: September 26, 2013**

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ORDER SECTION