

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 4
(JDC Demolition Company, Inc.)

and

MASSACHUSETTS BUILDING-WRECKERS
AND ENVIRONMENTAL REMEDIATION
ASSOCIATION & JDC DEMOLITION
COMPANY, INC.

LABORERS INTERNATIONAL UNION OF NORTH
AMERICA, LOCAL 1421
(JDC Demolition Company, Inc.)

and

MASSACHUSETTS BUILDING-WRECKERS
AND ENVIRONMENTAL REMEDIATION
ASSOCIATION & JDC DEMOLITION
COMPANY, INC.

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**POST-HEARING BRIEF OF THE INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 4**

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Introduction

This case involves a dispute over the operation of Skidsteers (Bobcats) and forklifts/Lulls¹ on all wrecking sites for the Salem Power Plant Project located at 57 Fort Avenue, Salem, Massachusetts. The Charging Parties, Massachusetts Building-Wreckers and Environmental Remediation Association (“Association”) and JDC Demolition Company, Inc. (“JDC”) filed charges against International Union of Operating Engineers, Local 4 (“Local 4”) and Laborers International Union of North America, Local 1421 (“Local 1421”) alleging violations of Section 8(b)(4)(D) of the National Labor Relations Act (“Act”).

On October 16, 2014, the Regional Director for Region One issued an order consolidating the cases and scheduling a 10 (k) hearing. The hearing was held on October 20, 21, 22 and 24, 2014. Local 4 now submits this post-hearing brief.

Statement of the Facts

I. The Disputed Work

For many years, members of Local 4 have operated the Bobcats and Lulls on various types of jobs, including demolition jobs. The only exception has been the operation of a Bobcat used for interior demolition. Tr.175-176, 219-222, 232, 234, 248, 315-321, 350, OEX-2, OEX-10, OEX-11, OEX-12.²

In February, 2013, Local 4 entered into a Standard Short Form Agreement with JDC.³ Tr. 44-45. Paragraph 3 of the Short Form Agreement provides as follows:

The Employer hereby adopts and agrees to abide by all of the terms and conditions of the Collective Bargaining Agreements now prevailing or as they shall

¹ Bobcat is the brand name of a skid steer loader and Lull is the brand name of a forklift. Tr. 360. For purposes of this brief, the terms Bobcat and skid steer are used interchangeably, as are the terms Lull and forklift.

² Local 4’s Exhibits are referred to as “OEX-“ followed by the exhibit number. The Charging Parties’ exhibits are referred to as “CPX-“ followed by the exhibit number. Local 1421’s exhibits are referred to as “LX-“ followed by the exhibit number.

³ JDC had only been in business since approximately November, 2012. Tr. 16.

prevail by and between Local 4 and the four Employer Associations herein after named. The Associations are:

Labor Relations Division of Construction Industries of Massachusetts
Foundation and Marine Contractors Association of New England, Inc.
Building Trades Employers Association of Boston and Eastern Massachusetts, Inc.
Labor Relations Division of the Associated General Contractors of Massachusetts, Inc.

OEX-1 at Exhibit 3⁴. These agreements are contained in a Master Document. Tr. 45. Copies of the Master Documents that were in effect at the time JDC executed the Short Form Agreement, OEX-9, and at the time of the events giving rise to this dispute, OEX-1 at Exhibit 4, are in the record.

The Agreement with the Labor Relations Division of Construction Industries of Massachusetts, Part A of the Master Document, applies primarily to highway construction. The Agreement with the Foundation and Marine Contractors Association of New England, Inc., Part B of the Master Document, applies to matters such as marine construction and bridges. The Agreements with the Building Trades Employers Association of Boston and Eastern Massachusetts, Inc. and the Labor Relations Division of the Associated General Contractors of Massachusetts, Inc., Part C of the Master Document, apply to building construction and demolition jobs. Tr. 309-312.

Part C – Article II sets forth the craft jurisdiction of Local 4. This article states that “Local 4 has jurisdiction over hoisting and portable engines, boilers and machinery operated by steam or mechanical power, including . . . fork lifts . . . all power shovels, cranes, scrapers, tractors, bulldozers, gradalls, shovel dozers, front end loaders . . . or any machine used irrespective of its motive power.” OEX-9 at p. 41-42, OEX-1, Exhibit 4 at p. 41-42. The operation of “Bobcats when used as Front End Loaders”, “Bobcats when used as Bulldozers” and

⁴ OEX -1 consists of a motion to quash, supporting memorandum, affidavit and Exhibits 1-6.

“Fork Lifts” are specifically referenced in the Wage Schedules that appear in the Master Documents. OEX-9 at p. 78, 80, OEX-1, Exhibit 4 at p. 78, 80.

When JDC entered into the Short Form Agreement with Local 4, it also agreed to following language:

The Employer shall not make any agreement in conflict with the provisions of this Agreement. *In the event that the craft and/or geographic jurisdiction of this Agreement shall overlap with the craft and/or geographic jurisdiction of any other agreement between the Employer and any other Building Trades Local, the terms of this Agreement shall supercede all others.* The Employer waives any claim or right that it may repudiate or void this Agreement based upon varying the size of the workforce, including a reduction in the workforce below two employees.

OEX-1, Exhibit 3 at par. 3 (emphasis added). Notwithstanding its agreement with Local 4 that, in the event of overlapping craft jurisdiction, the Local 4 agreement would supercede all others, JDC, prior to the start of the Salem Power Plant job, issued a letter to Local 1421 in which it “assign(ed) all work with the Skidsteer(s), forklift/Lull operations” to Local 1421. CPX-1.

Paul DiMinico is the Local 4 Business Agent for the Salem Power Plant job. In early August, 2014, he learned that a member of Local 1421 was operating a Bobcat at the site. The Bobcat was not performing the sort of inside demolition work ordinarily performed by Local 1421, but was performing the outside site work ordinarily performed by Local 4. Mr. DiMinico called Chris Berardi.⁵ Mr. DiMinico testified that Chris Berardi told him that he agreed that the work belonged to Local 4, but Local 1421 was giving him a hard time about it. Chris Berardi told Mr. DiMinico he would get back to him. Shortly thereafter, Chris Berardi told Mr. DiMinico that he was just going to park the Bobcat to avoid problems. Tr. 122-128.

Approximately two weeks later, Mr. DiMinico learned that a Local 1421 member was back on the Bobcat and also learned that a Local 1421 member was now operating a Lull. On August 22, 2014, Mr. DiMinico went to the job site. Tr. 128-129, CPX-11. While there, he observed the Local

⁵ Chris Berardi is the President of JDC. Tr. 16.

1421 member operating the outside Bobcat. He also saw the Lull on the job site, but it was broken down at the time. Mr. DiMinico spoke to Chris Berardi by telephone. Chris Berardi told Mr. DiMinico that he put the Local 1421 member back on the Bobcat because Local 1421 was putting so much pressure on him. Tr. 135-136.

As Mr. DiMinico was getting ready to leave the job site, he encountered Mark Berardi, Chris Berardi's son. Mark Berardi, who runs the outside field operations for JDC, introduced himself to Mr. DiMinico and told him he had just learned of the dispute over the work. He told Mr. DiMinico that if he had been aware of the dispute earlier, it would have been resolved. Mark Berardi told Mr. DiMinico that he would take care of the problem and call him later. Tr. 136-138.⁶

In fact, Mark Berardi contacted Mr. DiMinico later that day to tell him the issue was resolved: the outside Bobcat would be assigned to a Local 4 member starting on Monday and the Lull would be assigned to Local 4 as well. Tr. 159. The work assignments were confirmed through text messages to Mr. DiMinico from Mark Berardi. Tr. 159-171, OEX-5. On Monday, August 25, 2014, Roger Peretti, a member of Local 4, began operating the Bobcat. Tr. 220, 446, CPX-13. Since that date, either Mr. Peretti or another Local 4 member has operated that Bobcat. Tr. 446-447.

Louis Rasetta is the Business Manager for Local 4. Tr. 43, 305, OEX-1, Rasetta Affidavit. Mr. Rasetta testified that JDC had previously filed a charge against Local 4 regarding this matter. Tr. 329. He spoke to representatives of Local 1421 and JDC. Consistent with past agreements on demolition sites, Mr. Rasetta agreed with Local 1421 Business Agent Thomas Troy that each union would run one Bobcat: Local 1421 would operate the inside Bobcat and Local 4 would operate the outside Bobcat. Tr. 345-349. Mr. Rasetta also discussed this with Chris Berardi, who did not object to the arrangement. The charge was withdrawn. Tr. 325-329.

⁶ Chris Berardi testified that Mark Berardi is JDC's Field Manager. Tr. 61.

Local 1421 later reneged on the agreement. CX-3.⁷ Dave Howe, the owner of JDC, and Chris Berardi informed Mr. Rasetta and Local 4 President William McLaughlin that JDC would be refiling the charge because they were getting pressure from Local 1421. Tr. 329-330.

II. The Alleged Use of Proscribed Means

Chris Berardi testified that Mr. DiMinico threatened a job action on or about August 21, 2014 and also asked him “about unified trust money.” Tr. 25. Mr. DiMinico denied threatening any job actions or any changes in “trust money.” Tr. 136, 177. As far as the “trust money” is concerned, JDC has never applied for or received credit from the Local 4 Labor Management Cooperation Trust (“Trust”), a jointly administered trust fund. Tr. 25, 66-67, 332, 335. J. Derenzo Co., a related corporation, has received credits from the Trust. The Trust continued to award substantial credits to J. Derenzo Co. during the pendency of these charges. Tr. 335-340, OEX-13 –OEX-15.

Mr. Rasetta, who is the Union Co-Chairman of the Trust⁸, testified that he spoke to Dave Howe, the owner of JDC and J. Derenzo Corp., when he thought Mr. Howe was talking about assigning Bobcat and Lull operations to Laborers who worked for *J. Derenzo Co.* as well as for JDC. Such a change in work assignments would affect the credits calculated by the Trust since they are based on the number of Local 4 members working on a particular job. See OEX-13, OEX-14. Mr. Rasetta testified that this issue was resolved once Mr. Howe clarified the situation by stating that Local 4 would still operate the Bobcats on J. Derenzo jobs. Tr. 331-332, 350-352.

JDC also alleges that the actions of certain Local 4 members on October 22, 2014 constitute a job action. On that date, four of the five Local 4 members working on the job site left due to illness. Michael Wogan, one of the operators who left that day, testified that, during his time on the job, there

⁷ Mr. Rasetta testified that Mr. Troy told him he could no longer abide by the agreement because he was getting pressure from the Laborers District Counsel. Tr. 346-349.

⁸ The other Co-Chairman is Attorney John O’Reilly, an Employer Representative. Any actions taken by the Trust require the approval of both Union and Employer representatives. Tr. 332-340.

were fumes, fiberglass, rust and other contaminants in the air. Tr. 233-240. Mr. DiMinico testified that he smelled fumes on the day in question. Tr. 143. Roger Peretti testified that when he started at the job site on August 25, 2014, there was still so much fiberglass in the air that his skin was itchy and he had to cover his face with his shirt. Tr. 222.

On August 22, 2014, while he was working near the chimney and also in the area where the tanks were, Mr. Wogan felt ill.⁹ He left work and contacted his doctor, but he was unable to get through. He began to feel better, got something to eat and went back to work. He testified that he was gone about an hour. Tr. 240-242.¹⁰

Mr. Wogan testified that he complained about safety conditions and requested a respirator. Tr. 238. Mr. Peretti also complained about safety conditions and requested safety equipment, including a respirator. Tr. 222-224. JDC's safety supervisor initially denied receiving any safety complaints or requests for special equipment. Tr. 265. On cross-examination, however, he admitted that Mr. Peretti had complained about safety concerns and requested a protective suit and a respirator. Tr. 266-267. As of the time of the hearing, Mr. Peretti was still waiting to be fitted for his respirator. Tr. 223-224.

It is clear from the testimony of Mr. DiMinico, Mr. Peretti and Mr. Wogan that there were health and safety issues at the Salem Power Plant job site. There is not reasonable cause to believe that the actions of four employees on August 22, 2014 were anything more than absences due to illness.

Finally, JDC alleges another job action on October 29, 2014 when Mr. DiMinico met with his members in the parking lot. Mr. DiMinico testified that he went to the job site to meet with his members that day. He testified that he used his security badge to enter the job site that morning, but

⁹ JDC's Daily Report for this date shows that the chimney was being demolished and a contractor was extracting oil from pipes in Tank B4 until 1:30 that afternoon. CPX-10.

¹⁰ The visitor log shows that Mr. Wogan left at 10:13 am and returned at 12:12 pm.. CPX-11.

that Wayne Sheridan,¹¹ revoked his security clearance. Because of this, Mr. DiMinico had to leave the job site. He called the five or six Local 4 members out to the parking lot located next to the guard shack to meet with him there. There was no discussion about the Bobcats or Lulls because Mr. DiMinico had resolved that issue the week before. Tr. 145-150, OEX-5. JDC contacted Mr. Rasetta about the meeting in the parking lot. Mr. Rasetta contacted Mr. DiMinico and the Local 4 members went back to work. Tr. 326-328.

To the extent the events of October 29, 2014 may constitute a job action, there is no basis for finding that the activity had an object of forcing JDC to assign work to Local 4. The work had been assigned to Local 4 on August 22, 2014 and a Local 4 member was in the outside Bobcat that day. OEX-5, CPX-13. There is not reasonable cause to believe that Local 4 violated Section 8(b)(4)(D) of the Act.

III. The Pending Complaint Filed Pursuant to the Plan for Settlement of Jurisdictional Disputes

On October 17, 2014, the day after the notice of hearing issued, the International Union of Operating Engineers (“IUOE”) filed a notice of violation of the Plan for Settlement of Jurisdictional Disputes in the Construction Industry (“Plan”). This notice alleges, *inter alia*, that JDC is in violation of the Plan and is actively participating in an impediment to job progress. The IUOE asked the Plan Administrator to direct JDC to withdraw its unfair labor practice charges, to not participate in the 10 (k) hearing, and to resolve any jurisdictional dispute that might exist in accordance with the Plan. OEX-1, Exhibit 5. By way of a letter dated October 17, 2014, the Plan Administrator instructed the parties to cease the alleged violation and process any jurisdictional disputes through the Plan. OEX-1, Exhibit 6¹². On October 20, 2014, Terence M. O’Sullivan, General

¹¹ Mr. Sheridan is a consultant to JDC and the project executive for the Salem Power Plant job. Tr. 375-376.

¹² The Plan Administrator appears to have taken the names and titles of the Employer representatives from the information set forth in the charge filed in 1-CD-137069. Id. at p. 4.

President of the Laborers International Union of North America (“LIUNA”) faxed a letter to Local 1421 Business Manager Thomas Troy directing him to cease and desist any violations of the Plan and to process any jurisdictional dispute under the Plan. OEX-3. JDC has not responded to the Plan Administrator. See OEX-8,

The IUOE is a member of the Building and Construction Trades Department of the AFL-CIO (BCTD) and has been a member of the BCTD at all times relevant to this matter. LIUNA is also a member of the BCTD and has also been a member of the BCTD at all times relevant to this matter. Tr. 43, OEX-1, Rasetta Affidavit at pars. 2-3.

Article X of the BCTD’s Constitution states:

All jurisdictional disputes between or among affiliated National and International Unions and their affiliated Local Unions and employers shall be settled and adjusted according to the present plan established by the Building and Construction Trades Department, or any other plan or method of procedure adopted in the future by the Department for the settlement of jurisdictional disputes. Said present plan or any other plan adopted in the future shall be recognized as final and binding upon the Department and upon all affiliated National or International Unions and their affiliated Local Unions.

OEX-1, Rasetta Affidavit at pars. 4-5, Exhibit 1 at p. 28.

Both the IUOE and the LIUNA have admitted they are bound to the Plan by taking affirmative steps to process this matter through the Plan. OEX-1, Exhibit 5, OEX-3. It is beyond question that Local 4 and Local 1421, as “affiliated Local Unions” of the IUOE and the LIUNA, are also bound to the Plan. OEX-1, Exhibit 1 at p. 28.

As discussed above, by becoming a party to the Short Form Agreement, JDC bound itself to the terms and conditions set forth in the Master Document. One of the provisions of the Master Document states:

The parties recognize that there is a voluntary Plan for the Settlement of Jurisdictional Disputes in the Construction Industry. The parties hereto agree to abide by and conform to all rules and decisions of the Plan.

OEX-1, Exhibit 4 at p. 64.

By way of a letter dated October 22, 2014, Samuel Brooks, President of the Association, objected to resolving the matter pursuant to the Plan and stated that his agreement with Local 1421 does not provide for the arbitration of jurisdictional disputes “leaving . . . no recourse but to file with the National Labor Relations Board when jurisdictional job actions occur.” CPX-16.

On October 20, 2014, prior to the commencement of the hearing, Local 4 filed a motion asking the Regional Director to quash the notice of hearing because the parties had agreed upon a method for the voluntary adjustment of the dispute. OEX-1. The Regional Director appears to have taken no action with respect to this motion.

Argument

I. THE BOARD SHOULD QUASH THE NOTICE OF HEARING AS THE INSTANT MATTER INVOLVES A WORK PRESERVATION DISPUTE.

As discussed above, when JDC entered into the Short Form Agreement with Local 4, it agreed to the following language:

The Employer shall not make any agreement in conflict with the provisions of this Agreement. *In the event that the craft and/or geographic jurisdiction of this Agreement shall overlap with the craft and/or geographic jurisdiction of any other agreement between the Employer and any other Building Trades Local, the terms of this Agreement shall supercede all others.*

OEX-1, Exhibit 3 at par. 3 (emphasis added).

The operation of “Skidsteers (Bobcats) and forklifts/Lulls” is unquestionably within the craft jurisdiction of Local 4. Operators are trained to operate these machines in the Local 4 Apprenticeship and Training Program. Tr.173-175, 315, OEX-6, OEX-7. These machines are referenced in the Jurisdiction article and the Wage Schedules that are contained in the Master Documents. OEX-9 at pp. 41-42, 78, 80, OEX-1, Exhibit 4 at pp. 41-42, 78, 80. Over the years, Local 4 members have operated these machines on various types of jobs, including demolition jobs. Tr.175-176, 315-321,350. Various demolition companies have confirmed that they assign

this work to Local 4 operators. OEX-2, OEX-10, OEX-11, OEX-12. Mr. Peretti and Mr. Wogan have operated these machines themselves, including at the Salem Power Plant site. Tr. 219-222, 232, 234, 248.

The Charging Parties and Local 1421 have presented evidence that Local 1421 members have also performed this work. Although Local 4 disputes the extent to which Local 1421 members have performed the work in question¹³, the evidence establishes, at most, an “overlap” in craft jurisdiction for purposes of Paragraph 3 of the Short Form Agreement. Further, as discussed in Section III of the Statement of the Facts, *supra*, and Section II of this Argument, *infra*, Local 1421 is certainly a “Building Trades Local.” Therefore, given that this dispute involves an overlap in the craft jurisdiction of Local 4 and the craft jurisdiction of another Building Trades Local, namely Local 1421, the Local 4 agreement supercedes the Local 1421 agreement. OEX-1, Exhibit 3 at par. 3.

Business Manager Rasetta testified that the work in dispute is important to him because it is within Local 4’s jurisdiction and “with people out of work . . . those jobs are invaluable to us.” Tr. 349. Paragraph 3 of the Short Form Agreement is a work preservation article, designed to preclude infringement on Local 4’s jurisdiction by other Building Trades Locals. It automatically resolves competing claims for work in favor of Local 4. By issuing the assignment of work to Local 1421 on June 4, 2014, CPX-1, and then initially assigning such work to Local 1421, JDC violated its agreement with Local 4. JDC, “by its own unilateral actions . . . has created a work preservation dispute. As such, it is not appropriate for resolution under Section 10(k).” *Machinists District 190, Local 1414 (SSA Terminal LLC)*, 344 NLRB 1018, 1021 (2005), *aff’d* 253 Fed. Appx 625 (9th Cir. 2007) (citing *Safeway Stores*, 134 NLRB 1320, 1322 (1961)). The notice of hearing should be quashed.

¹³ Local 4 maintains that the Laborers have been limited to operating a Bobcat during inside demolition.

II. THE BOARD SHOULD QUASH THE NOTICE OF HEARING AS THE PARTIES HAVE AGREED UPON A METHOD FOR THE VOLUNTARY ADJUSTMENT OF THIS DISPUTE.

In the event the Board declines to quash the notice of hearing on the grounds that the instant matter involves a work preservation dispute, it should quash the notice of hearing because the parties have agreed upon a method for the voluntary adjustment of this dispute through the Plan. The Board has recognized the Plan as a method for the voluntary adjustment of jurisdictional disputes as long as the party unions and the employer are bound to submit jurisdictional disputes to the Plan. *Operating Engineers Local 139 (Allied Construction)*, 293 NLRB 604, 605-606 (1989), *Heavy Construction Laborers Local 60, LIUNA (General Contractors)*, 305 NLRB 762, 763 (1991). Here, as discussed in Section III of the Statement of the Facts, *supra*, both of the party unions “are local constituent bodies of member unions of the (BCTD). Thus, the Unions are required to abide by the Plan’s procedures for the settlement of jurisdictional disputes.” *Allied Construction, supra, General Contractors, supra*.

Additionally, JDC, by signing the Short Form Agreement, has recognized the Plan and agreed “to abide by and conform to all rules and decisions of the Plan.” OEX-1, Exhibit 4 at p. 64. The Plan provides that “(a)n Employer may become stipulated to the Plan by virtue of its membership in a stipulated association of employers . . . , a signed stipulation . . . or a provision in a collective bargaining agreement.” OEX-1, Exhibit 2 at p. 17 (emphasis added). Thus, JDC is stipulated to the Plan.

The rules of the Plan preclude JDC from filing or proceeding with the instant charges and require JDC to process any jurisdictional disputes through the Plan. OEX-1, Exhibit 2 at pp. 3-5, 21-27 and 32. The Plan Administrator, acting on the IUOE’s impediment to job progress

complaint, OEX-1, Exhibit 5, has instructed JDC and LIUNA to cease their violations of the Plan and process any jurisdictional dispute through the Plan. OEX-1, Exhibit 6.

In this case, as in *Allied Construction, supra*, the employer (JDC) is signatory to a contract with *one* of the party unions (Local 4) which binds the employer to recognize the Plan as a means of resolving jurisdictional disputes. Indeed, JDC has “agree(d) to abide by and conform to *all* rules and decisions of the Plan.” OEX-1, Exhibit 4 at p. 64. The Plan is ready to resolve the instant dispute in the manner agreed upon by the parties. Id. Exhibit 6.

“Accordingly, because all parties are bound to submit jurisdictional disputes to the Plan, (the Board should) quash the notice of hearing.” *Allied Construction, supra*.

The Association, which is one of the Charging Parties, has taken the position that, unlike JDC, it is not bound by the Plan, cannot be compelled to submit this matter to the Plan, and must therefore proceed with the charges. CPX-16. The Association relies on the contractual Procedure for Adjustment of Disputes and Arbitration set forth in Article XXIII of its agreement with Local 1421 for the proposition that it cannot participate in the Plan. CPX-16. The Association argues that, because jurisdictional disputes are excluded from the contractual grievance and arbitration procedure, CPX-2 at pp. 28-29, the Association is precluded from participating in arbitration under the Plan. CPX-16. Local 4 submits that the Association is reading too much into Article XXIII. This article is a typical grievance and arbitration article. The fact that jurisdictional disputes are excluded from arbitration *under this article* does not mean they cannot be resolved through arbitration elsewhere, such as through the Plan.

More importantly, the Association has not played any role in this dispute. It seems to exist solely for the purpose of negotiating contracts on behalf of signatory employers. Tr. 73-75, CPX-2. While the Association may “act() as an agent of an employer” and may be considered

an employer for purposes of Section 2 (2) of the Act, the Association is not *the* employer at the Salem Power Plant Project. The employer is JDC. JDC signed the Short Form Agreement with Local 4. JDC issued the June 4, 2014 work assignment letter that is at the heart of this dispute. CPX-1. JDC reassigned the work to Local 4 on August 22, 2014. OEX-5. Accordingly, JDC is the contractor who made the work assignments and is the “responsible contractor” that is bound to resolve this dispute through the Plan. OEX-1, Exhibit 2 at pp. 1-5. JDC has agreed to abide by all rules and decisions of the Plan. The fact that the Association did not so agree is irrelevant.

At the hearing, Counsel for Local 1421 cited *IUOE Local 150 (Diamond Coring, Co.)*, 331 NLRB 1349 (2000), and *Laborers Local 242 (Johnson Gunite)*, 310 NLRB 1335 (1993) in support of his argument that the Plan does not apply in this case. Tr. 12-13. These cases are distinguishable from the instant case. Neither case involved the Plan or any mutually agreed-upon procedure for resolving jurisdictional disputes. Instead, one party in each of these cases argued that the Board should defer because the agreements had similar provisions for resolving jurisdictional disputes, i.e., the agreements all provided that jurisdictional disputes should be resolved in some manner by the International Unions. In both cases, the Board refused to defer because, although the collective bargaining agreements at issue had similar procedures, there was no single agreed-upon method for resolving jurisdictional disputes that was binding on all of the parties. *Diamond Coring*, 331 NLRB at 1350; *Laborers Local 242 (Johnson Gunite)*, 310 NLRB at 1337. In the instant case, all relevant parties are bound to the Plan.

Nor is this a case where JDC may be subject to conflicting awards because it has agreed to use both the Plan and another method for resolving jurisdictional disputes. See *Operating Engineers Local 318 (Kenneth E. Foeste Masonry)*, 322 NLRB 709, 712 (1996) (“no *determinative* agreed-upon method exists for resolving the dispute, because the Employer is at

risk of being subject to conflicting awards.”). As discussed above, the Association agreement *excludes* jurisdictional disputes from its contractual grievance arbitration article, but it contains no mechanism for *resolving* jurisdictional disputes. The Association has taken the position that it has “no recourse but to file with the National Labor Relations Board when jurisdictional job actions occur.” CPX-16. Thus, if the Board quashes the notice of hearing and this matter is resolved through the Plan, there is no likelihood of a conflicting award.

Finally, based on questions posed by counsel during the examination of witnesses in this matter, Local 4 anticipates that the Charging Parties may argue that the IUOE should have filed its impediment of job progress complaint sooner than it did. As Mr. Rasetta testified, it could have been that the IUOE thought the matter would be resolved. Tr. 357. In any event, the notice of hearing in this matter did not issue until October 16, 2014. The IUOE filed its notice with the Plan Administrator the next day. OEX-1, Exhibit 5. Later that day, the Plan Administrator notified the parties that he had received the complaint and was prepared to appoint an arbitrator to hold a hearing. OEX-1, Exhibit 6. Local 4, for its part, filed a motion to quash the notice of hearing with the Regional Director on October 20, 2014, prior to the commencement of this hearing. OEX-1. Tr. 12, 39-40, 471-472.

In *Allied Construction, supra*, a “hearing was scheduled for March 9, 1988, but was postponed until May 9, 1988 to permit other parties potentially affected by the outcome of the hearing to appear.” *Allied Construction*, 293 NLRB at 605. On May 5, 1988, the Operating Engineers filed a motion to quash based on the applicability of the Plan. Id. The Board quashed the notice of hearing, “find(ing) that the Operating Engineers’ initial failure to invoke the Plan as a means of settling the instant dispute does not preclude it from now seeking a resolution of the

dispute under the Plan's procedures." *Id.* at 606 n. 7. For all of the foregoing reasons, the notice of hearing should be quashed.

III. IN THE EVENT THE BOARD DOES NOT QUASH THE NOTICE OF HEARING, IT SHOULD AWARD THE WORK TO EMPLOYEES REPRESENTED BY LOCAL 4.

For the reasons set forth in Section II of the Statement of the Facts, *supra*, Local 4 denies that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. To the extent Local 1421 is alleged to have participated in a job action, it was a sham resulting from collusion between Local 1421 and JDC, as evidenced by the Local 1421 Business Manager's letter to JDC calling JDC to task for not getting "an injunction against Local 4" as promised. CPX-3.¹⁴ Additionally, for the reasons set forth in Sections I and II of this Argument, *supra*, the notice of hearing should be quashed. If the Board rejects these arguments and determines that it should proceed with a determination of a dispute under Section 10(k) of the Act, the work in question should be awarded to employees represented by Local 4, based on the factors typically considered.

A. Certifications and collective bargaining agreements

The work in dispute is not covered by any Board orders or certifications.¹⁵ Both collective bargaining agreements cover the work in question. Compare OEX-1, Exhibit 4 at pp. 41-42 and 78, 80 to CPX-2 at pp. 22-23. As discussed in Section I of this Argument, however, the Short Form Agreement that JDC entered with Local 4, and which incorporates the language of the Master Document, specifically provides that:

¹⁴ JDC spent significant time and effort at the hearing trying to prove 8(b)(4)(D) violations by Local 4. Tr. 375-443, CPX-8-CPX-14. JDC presented only one exhibit pertaining to the alleged Local 1421 job action. CPX-15. JDC's witness offered no explanation for the dearth of evidence pertaining to the Local 1421 job action. Tr. 445-446. For his part, Business Manager Troy described the event as an "informational meeting." Tr. 114.

¹⁵ To the extent any party argues that the work is covered by the order in *LIUNA, Local 310 (KMU Trucking)*, 361 NLRB No. 37 (2014), that case arose in a different part of the country and was decided on different facts.

In the event that the craft and/or geographic jurisdiction of this Agreement shall overlap with the craft and/or geographic jurisdiction of any other agreement between the Employer and any other Building Trades Local, the terms of this Agreement shall supercede all others.

Thus, JDC's agreement with Local 4 not only *favors* Local 4, it is dispositive of the dispute.

Therefore, the work should be awarded to employees represented by Local 4. In the event the Board determines that it must consider other factors, it should nonetheless award the work to employees represented by Local 4 for the reasons set forth below.

B. Employer preference and past practice

By executing the Short Form Agreement, JDC expressed its preference that Local 4 would perform the work in the event of an overlap in craft jurisdiction with another Building Trades Local, such as Local 1421. When JDC assigned the work in question to Local 1421, it violated its agreement with Local 4. On August 22, 2014, JDC again expressed its preference that employees represented by Local 4 should perform this work. OEEX-5.¹⁶

While the Charging Parties may argue that it has been JDC's past practice to assign the disputed work to Local 1421, this argument should be rejected for two reasons. In the first place, JDC is a new company with a limited time in which to establish a past practice.¹⁷ Secondly, with respect to the operation of Bobcats, Local 4 does not seek the operation of Bobcats used inside of structures for demolition work, nor does it challenge the use of these Bobcats to remove materials from within the structures and bring these materials outside to dump them. Rather Local 4 seeks only those Bobcats used outside for site work. Tr. 125-128.

It appears that this was the first job on which JDC was using a Bobcat "full time outside on the site." Tr. 128, 194. The "outside" Bobcat was initially used to move materials on and off

¹⁶ The Charging Parties may challenge the authority of Mark Berardi to assign the work to Local 4. However, Mark Berardi is a manager of JDC. Tr. 61. Moreover, the Bobcat was, in fact, assigned to a Local 4 operator on August 25, 2014, just as Mark Berardi had promised. Tr. 446-447, CPX-13.

¹⁷ JDC has only been in business since approximately November, 2012. Tr. 16.

the job site. It was used to move crushed stone, in order to make ramps and roadways, and to move pipes that were being used in connection with the tanks. Tr. 125-126. Mr. Peretti has used the Bobcat for debris cleanup, moving materials around, and other odd jobs. Tr. 220. Unlike the Local 1421 employees doing demolition inside the tanks, Mr. Peretti worked outside. Tr. 228. He used the Bobcat to grab materials from inside the exhaust tubes and would then spend most of his time separating the materials for disposal. The materials were separated outside, not inside of the tanks. Tr. 228-231. He worked with Mr. Wogan, another Local 4 operator. Tr. 223. Mr. Peretti used the Bobcat to fill the excavator bucket with debris or steel that Mr. Wogan would then haul away. Tr. 223. The operation of the “outside” Bobcat is integrated with the site work being performed by employees represented by Local 4, not the inside demolition work being performed by employees represented by Local 1421. See OEX-2, OEX-11, OEX-12. As noted above, JDC has, in fact, assigned this work to Local 4 since August 25, 2014. The factor of employer preference and past practice favors an award of the work to employees represented by Local 4.

C. Area and Industry Practice

There is conflicting evidence regarding area and industry practice. Aside from conflicting testimony, there are also letters from various demolition contractors that, at first glance at least, appear to be in conflict. Compare CPX-4 and LX-1 to OEX-2, OEX-10, OEX-11, OEX-12. The Charging Parties and Local 1421 submitted letters from twelve contractors other than JDC. CPX-4.¹⁸ Presumably, they will argue that these letters establish an area and industry practice supporting the assignment of the work in dispute to Local 1421. Only four of these twelve contractors, however, are also signatory to collective bargaining agreements with

¹⁸ CPX-4 contains fourteen letters. Two are from NASDI and one is from JDC. LX-1 is a copy of the NASDI letter dated September 4, 2014.

Local 4. Tr. 322-323. Local 4 submits that the assignment of this work to Local 1421 is irrelevant if Local 4 is not on the job. See Tr. 94-101, 303-304.

Local 4 submitted letters from four different demolition contractors stating that they have assigned the work in question to Local 4. Tr. 316-321, OEX-2, OEX-10, OEX-11, OEX-12.

One of these companies, NASDI, also submitted a letter to Local 1421. LX-1. The letter submitted to Local 4 is dated October 1, 2014 and was signed by Thomas Higgins, Executive Vice President. It reads, in pertinent part, as follows:

This is to notify you that NASDI has always assigned all motorized equipment to the Operating Engineers, Local 4. The only exception has been the operation of the skid steer inside the building being demolished or abated.

OEX-2.

The letter submitted to Local 1421 is dated September 4, 2014 and is signed by Art Dore Jr. It reads, in pertinent part, as follows:

Please be advised, NASDI will assign the operation of the following equipment to #1421.

Skid steer

Bobcat

Telescopic forklift

LX-1.

Both Mr. Higgins and Mr. Dore are listed as “managers” of NASDI, LLC in the corporation’s corporate filings. OEX-4. While it may appear that the two letters are irreconcilable, they are not. The letter from Mr. Higgins recites NASDI’s past practice of having *always assigned* the work to Local 4. The letter from Mr. Dore seems to express, at most, a future intention that it *will assign* the work to Local 1421, presumably at the request of Business

Manager Troy.¹⁹ The factor of area and industry practice favors an award of the work to employees represented by Local 4.

D. Relative skills and training

Local 4 has a four year apprenticeship and training program that includes training in the operation of forklifts and skid steer loaders. Tr. 173-175. The program utilizes detailed training curricula for forklifts, OEX-6, and skid steer loaders. OEX-7. Employees who complete the program receive the necessary licenses and also receive safety training. Tr. 175. The program has a Bobcat with a variety of different attachments for use by the apprentices. Tr. 315. While Local 1421 contends that it has similar training programs, their training materials are not in evidence. This factor favors an award of the work to employees represented by Local 4.

E. Economy and efficiency of operations

The Charging Parties contend that employees represented by Local 1421 are more versatile and efficient than employees represented by Local 4 because they can be used on a Bobcat or Lull for only part of the day and do something else the rest of the day. However, the Local 4 Master Document contains provisions designed to enhance flexibility and efficiency. For example, the applicable agreement allows for broken time. OEX-1, Exhibit 4 at pp. 42-44. Additionally, the Master Document includes a section known as “Memorandum of Agreement” that allows the parties, by mutual agreement, to modify or deviate from the existing agreement. Id. at p. 70. Mr. Rasetta testified that Local 4 has not insisted on strict compliance with the time lines set forth in the Memorandum of Agreement. Tr. 371-373.

In fact, the record evidence demonstrates that JDC has had flexibility in the work assignments it has given to Local 4 operators on this job. Mr. Peretti has operated three different

¹⁹ The other letter from NASDI dated September 26, 2012 assigned the Lull to Local 1421 on a particular job. As Mr. Troy testified, Local 4 was not on that job. Tr.100-101.

machines: a Bobcat, a sweeper, and a water truck. He is presently alternating between the sweeper and the water truck. Tr. 220-221. During the approximately two and one-half months he was on the job, Mr. Wogan operated at least six different machines, a Bobcat, an excavator with a sheer on it, a 450 Komatsu loader, an end dump, a water truck, and a sweeper. He was “bounce(d) around a lot” and regularly operated more than one piece of equipment in the same day. Tr. 234. The employees represented by Local 4 are as versatile as the employees represented by Local 1421. The factor of economy and efficiency of operations does not favor an award of the work to either group of employees.

Conclusion

For all of the foregoing reasons, the Board should quash the notice of hearing because the instant matter involves a work preservation dispute. Alternatively, if the Board determines that this matter does not involve a work preservation dispute, the Board should quash the notice of hearing because the parties have agreed upon a method for the voluntary adjustment of this dispute, specifically through the Plan. Finally, in the event the Board declines to quash the notice of hearing, the Board should award the work to employees represented by Local 4 based on an analysis of the factors typically considered, particularly the language in the Short Form Agreement which resolves issues of overlapping jurisdiction in favor of Local 4.

Respectfully submitted,

INTERNATIONAL UNION OF
OPERATING ENGINEERS,
LOCAL 4
By its attorney,

November 14, 2014
Dated

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CERTIFICATE OF SERVICE

I, Randall E. Nash, counsel for International Union of Operating Engineers, Local 4 in Case Nos. 01-CD-137069 and 01-CD-138333, certify that I have served a copy of the Post-Hearing Brief of the International Union of Operating Engineers, Local 4 upon the following persons, by electronic mail, on the fourteenth day of November, 2014 at the addresses below:

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