

**UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION ONE**

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

And

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

Consolidated with

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

And

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

CASE 01-CD-137069

CASE 01-CD-138333

**POST HEARING BRIEF OF LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL UNION 1421**

BACKGROUND AND TRAVEL:

This is a consolidated jurisdictional dispute between Laborers' Local Union 1421 and Operating Engineers' Local Union 4 over the operation of the Skidsteer (Bobcat) and the Forklift (Lull) on all wrecking sites for the Salem Power Plant Project located at 57 Fort Avenue, Salem, Massachusetts. The work was originally assigned, in writing on June 4, 2014, to Laborers' Local Union 1421 by JDC Demolition Company. The assignment was made pursuant to a collective bargaining agreement negotiated between Laborers' Local Union 1421 and the Massachusetts Building-Wreckers and Environmental Remediation Specialists Association, Inc. The assignment was initially performed by employees represented by the Laborers.

During August of 2014, representatives of Operating Engineers Local Union 4 contacted JDC Demolition Company requesting that the Company assign the operation of the Skidsteer (Bobcat) and Forklift (Lull) to employees represented by Local 4. This resulted in temporary, unilateral accommodations being attempted by the Company. However, these accommodations resulted in alleged job actions on August 22, 2014 and August 29, 2014 by the Operating Engineers, and an alleged job action by the Laborers on September 25, 2014.

The employees represented by the Laborers and the employees represented by the Operating Engineers in Massachusetts typically work together in harmony on jobsites throughout the Commonwealth. If problems arise, they are usually worked out to the satisfaction of all parties. Accordingly, the Business Managers of Laborers' Local 1421 and Operating Engineers' Local 4 both testified that they had never previously participated in a 10(k) hearing or an arbitration directed under the AFL-CIO Plan For Settlement Of Jurisdictional Disputes.

Separate 8(b)(4)(D) charges were filed against Laborers' Local 1421 and Operating Engineers' Local 4 as a result of alleged threats and job actions. These cases were consolidated

by the Region One Regional Director on October 16, 2014 and a Notice of 10(k) Hearing was also issued. A Motion to Quash was filed on October 17, 2014 by Operating Engineers' Local 4. However, the Regional Director allowed the case to proceed on October 20, 2014. The Motion was renewed before the Hearing Officer on October 20, 2014. This second Motion was not granted and parties participated in four (4) days of hearing (October 20, 21, 22 and 24, 2014).

During the above hearings, the Charging Parties secured the issuance of NLRB Subpoenas to Laborers' Local 1421 Business Manager Tom Troy and his Steward, on the Salem Power Plant Project, Glenn Troy. (Subpoena Numbers: A-976764 and A-976763 respectively). The Charging Parties then called the Local 1421 Business Manager and Steward, along with the Operating Engineer Local 4 Business Agent, Paul Diminico, as adverse witnesses. This resulted in Laborers' Local 1421 not bringing any witnesses forward in this case and also limited Operating Engineers Local 4's presentation.

The hearings concluded on October 24, 2014 with a directive that the briefs be filed by October 31, 2014. At the request of the Charging Party, the deadline for filing briefs was extended to November 14, 2014.

JURISDICTION:

During the first day of hearings on this matter, October 20, 2014, the parties stipulated that the two Charged Parties, Laborers' International Union of North America, Local 1421 and International Union of Operating Engineers, Local 4, are labor organizations within the meaning of Section 2(5) of the National Labor Relations Act. (TR 8-11).

The parties also stipulated that the primary Charging Party/Employer, Massachusetts Building-Wreckers and Environmental Remediation Specialists Association, Inc., is a non-profit 501(c)(6) association engaged in commerce within the meaning of Sections 2(6) and (7) of the Act and is further subject to the jurisdiction of the Board. The parties further stipulated that the Massachusetts Building-Wreckers and Environmental Remediation Specialists Association, Inc. is a Massachusetts non-profit 501(c)(6) organization which represents employers, including JDC Demolition Company, who are themselves engaged in commerce within the meaning of Sections 2(6) and (7) of the Act. It was also stipulated that the Association derives gross revenues in excess of one hundred thousand (\$100,000) dollars annually from its operations. (TR 9-11).

The parties further stipulated that the secondary Charging Party/Employer, JDC Demolition Company, is an employer engaged in commerce within the meaning of Sections 2(6) and (7) of the Act and is also subject to the jurisdiction of the Board. The parties also stipulated that JDC Demolition Company, Inc. is a Massachusetts corporation with an office and place of business located at 60 Gerard Street, Boston, Massachusetts. It was further stipulated that JDC Demolition Company is engaged in the construction industry as a general contractor who receives annual gross revenues in excess of five hundred thousand (\$500,000) dollars. It was also stipulated that JDC Demolition Company annually purchases and receives, at its Boston, Massachusetts facility and jobsites, goods and material valued in excess of fifty thousand (\$50,000) dollars directly from points located outside the Commonwealth of Massachusetts. (TR 9-11).

WORK IN DISPUTE:

On October 20, 2014, it was stipulated that the disputed work is the operation of skidsteers (Bobcats) and forklifts/Lulls on all wrecking sites for the Salem Power Plant project located at 57 Fort Avenue, Salem, Massachusetts. It was further stipulated that the International Union of Operating Engineers Local 4 and Laborers' International Union of North America Local 1421 both claim the work in dispute. (TR 10).

DISCUSSION:

Applicability of the Statute:

Ironically, while this dispute was underway in Massachusetts, the Board issued a 10k Decision, covering the same disputed work claims by the Laborers and the Operators, in Ohio. Specifically, on September 3, 2014, the Board awarded the operation of the Forklift (Lull) and the Skid Steer (Bobcat) to employees represented by Laborers' Local Union 310 in Ohio, thereby denying the operation of the above equipment to employees represented by the charged union in that case - Operating Engineers Local 18.

This recent award further applied to all worksites where the Jurisdiction of the two (2) local unions overlapped. In this Decision, the Board also provided the guidelines it follows to determine whether to proceed under Section 10(k) of the Act. Laborers' International Union of North America, Local 310 and KMU Trucking & Excavating, Schirmer Construction Co., Platform Cement, Inc., 21st Construction, Inc., Independence Excavating, Inc., Donley's Inc., and International Union of Operating Engineers, Local 18, AFL-CIO. 361 NLRB No. 37 (2014).

In the above Laborers' Local 310 case, the Board advised that it may only proceed with a determination of dispute under Section 10(k) if there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. (Citing: Operating Engineers' Local 150 (R&D Thiel) 345 NLRB 1137, 1139 (2005). The Board further advised, "This standard requires finding that 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 that work. Additionally, there must be a finding that the parties have not agreed upon a method of voluntary adjustment of the dispute." Laborers Local 310 and KMU Trucking, et al., Id at Pg 3. Accordingly, Laborers' Local Union 1421 shall address the above issues as follows:

THE 8(b)(4)(D) VIOLATION:

Competing Claims for the Disputed Work.

On the first hearing day, it was stipulated by all parties that the disputed work is the operation of skidsteers (Bobcats) and forklifts/Lulls on all wrecking sites for the Salem Power Plant project located at 57 Fort Avenue, Salem, Massachusetts. (TR – 10). It was further stipulated that International Operating Engineers Local 4 and Laborers' International Union of North America Local 1421 both claim the disputed work. (TR – 10). These stipulations were further supported by the testimony of the parties.

As the Charging Party's first witness, Mr. Chris Berardi, the President of JDC Demolition, confirmed that he had made a June 4, 2014 written assignment of all work with the Skidsteer(s) and forklift/Lull operations on all Wrecking sites to Building Wreckers Local 1421. (TR – 18), (CP Ex 1). Accordingly, Charging Party Exhibit 1 was entered without objection. (TR – 19). When asked why he made this written work assignment, Mr. Berardi responded, "Because Tom Troy had come to me back sometime in May stating that Local 4 had been trying to get this

work from the Wrecker Union and that he wanted to reinforce for this job that this work was theirs. And I had no problem with that obviously, because we have been doing it for 20 plus years.” (TR – 21).

Mr. Berardi further advised that, in August of 2014, he had received a telephone call from the Operating Engineers Local 4 Business Agent, Paul Diminico claiming the disputed work. (TR- 24 and 25). Mr. Berardi also testified that he had a follow-up telephone conversation with Operating Engineer Local 4 Business Manager Lou Rasetta who “basically said the same thing, that Local 4 had owned those machines...” (TR – 29).

Laborers’ Local Union 1421 Business Manager confirmed his claim of the disputed work when he was subpoenaed and called as an adverse witness by the Charging Party. (TR – 89). Citing and quoting from his collective bargaining agreement with the Wreckers’ Association, he stated, “Yes, this is our contract and this is our language. It states, “the operation of all small bulldozers, loaders, skidsteers, backhoes, sweepers, forklifts, telescopic boom forklifts of mask type, hydraulic breakers, whether operated manually or remote controlled similar to Brokks and floor covering removal equipment is the work of Local 1421 in demolition projects.” (TR – 89, quoting from CP EX. 2).

Operators Local 4 Business Agent Paul Diminico was also called by the Charging Party as an adverse witness. He also confirmed the Operators’ claim to the disputed work when there was one Bobcat on the jobsite. He stated, “At that point there was one. And that’s when I had called Chris Berardi and spoke to him on the phone about it first. And explained to him that it was doing what’s considered our work, outside work.” (TR – 127). Finally, Operators’ Local 4 Business Manager Lou Rasetta also confirmed his telephone conversation with JDC President Chris Berardi and the Operator’s claim of the disputed work. (TR-324-326).

In light of the above, Laborers' Local Union 1421 respectfully submits that it has been clearly established that there are competing claims for the disputed work of the operation of skidsteers (Bobcats) and forklifts/Lulls.

Use of proscribed claims to enforce its claim to that work

The Charging Party has alleged three (3) separate job actions by the Charged Parties in this case. There were two job actions alleged to have been taken by the Operating Engineers and one alleged to have been taken by the Laborers.

August 22, 2014 Operators' Job Action to Secure Work Assigned the Laborer

The first alleged job action occurred on August 22, 2014 – the day after Operating Engineer Business Agent Diminico's telephone conversation with JDC President Chris Berardi wherein Mr. Diminico claimed the disputed work. (TR 25). In reviewing the events of that day, JDC Project Executive, Wayne Sheridan, identified CPX-10 as the Company's weekly log covering August 18, 2014 through August 22, 2014. (TR-395). He stated, " And then – then we get to Friday the – August 22nd , and its – noted on this document that there is a labor dispute effectively at 10:15. It says the Operators left the site and returned at 12:30." (TR 398-399).

Mr. Sheridan testified that August 22nd was the first time that he had seen Operators' Business Agent Paul Diminico on the jobsite. (TR 399). He further testified that he escorted Mr. Diminico through a secure area where the Operator's Business Agent had a short conversation with two (2) Operators. (TR 401). While Mr. Sheridan did not hear the conversation, he noted that, "... he got out of my car and moments later I started to see Local 4 Operators coming out to the guardhouse, literally moments. And within a matter of less than 15 minutes all four of the Local 4 Operators that were in the employ of JDC were not in their equipment but they were out in the parking lot." (TR 402).

Upon review of the staggered returns of the Operators, as outlined in his records, he concluded that the Operators were absent from two to almost three (3) hours. (TR 405). While the Operators allegedly left the jobsite due to “sickness” related to “fumes”, Mr. Sheridan testified that, “There were no fumes”. (TR 406). This was confirmed by the Laborers’ Steward, Glen Troy, who worked in the same areas as the Operators that morning. (TR 279).

August 29, 2014 Operators’ Job Action to Secure Work Assigned the Laborer

Steward Glen Troy had also been subpoenaed by the Charging Party as an adverse witness. When asked about the second alleged job action by the Operators, on August 29, 2014, he testified, “Paul Diminico showed up again on site and I know – maybe like 7:30ish or so, it was early in the morning, again I noticed all the machines had stopped. And again I heard it through other people on site that there was an issue because the Bobcat was still being run by us, and that the guys were stopping work, and they – I went out and saw all the men gathered at the gate, I asked Paul if he needed to speak to me for anything, he said “No”, and we just gave each other a wave and they never returned to work.” (TR 292). He further testified that, as a result of the Operators not returning to work that day, “I believe that we ran out of work to do with assisting so we ended up leaving early.” (TR 292). Glen Troy also confirmed that his men did not leave early due to a holiday weekend and that, “That’s never been the case in the history I’ve been with the Union.” (TR 293).

September 25, 2014 Laborers’ Job Action to Preserve Their Assigned Work:

As a direct result of the above activity of the Operating Engineers, and the Company’s unilateral reassignment of the Bobcats on a one-to-one basis, Laborers’ Local 1421 Business Manager, Tom Troy, advised the Company that he wanted to preserve the original work

assignment of all work with Skidsteers (Bob Cats) and Forklift /Lull operations. In a September 12, 2014 letter to the Company, he stated:

Gentlemen:

As you are aware, on June 4, 2014, JDC Demolition Inc. gave Laborers' Local 1421 a written work assignment for the Salem Power Plant Project of all work with Skidsteers (Bob Cats), and Forklift/Lull operations on all wrecking sites. This assignment is fully consistent with our past practice with the Company and the Industry.

It has been reported to me that Operators Local 4 has conducted two separate job actions in order to force your Company to give them the above assignments. As a result of the first job action, I was told that the Company offered a one-to-one assignment in order to have Local 4 members return to the job. I told Chris Berardi that this was unacceptable and that he could not make such a deal with Local 4. I tried to get Local 4 to back off but apparently was not successful. It was then reported to me that Local 4 conducted a "sick out" to further pressure the Company.

I had been told that the Company was going to get an injunction against Local 4. However, this has not occurred. Accordingly, I am now requesting that you immediately remove any and all Local 4 Operators from all Skidsteers (Bob Cats) and Forklift/Lulls on our jobsite consistent with the original June 4, 2014 assignment. Your failure to do so will leave me no alternative but to conduct my own job actions on this project.

Sincerely,

Thomas Troy
Business Manager, Local 1421

During his testimony, Laborers' Local 1421 Business Manager Tom Troy confirmed that, in an effort to preserve the work that he had originally been assigned, he stated that he did the same thing that Local 4 had done. He pulled his men out to the parking lot and had an informational talk with them. This occurred on a subsequent Friday around 1:30 in the afternoon and involved approximately between fifty (50) and sixty (60) laborers. (TR 102).

Business Manager Troy was uniquely positioned to conduct a major job action if he had chosen to do so in this case. Laborers' Local Union 1421 owns a twenty-five (25) foot high inflatable Rat that rides on a registered trailer that is equipped with sirens and flashing lights. However, the Rat never made a guest appearance on the Salem Power jobsite. (TR 106-107). Business Manager Troy wanted to make a point but did not wish to jeopardize this thirty-six million dollar (\$36,000,000) job with the potential of eventually employing up to one hundred (100) Laborers. (TR 113).

Local Union 1421 respectfully submits that the August 22nd and 29th job actions conducted by Operators' Local 4 were conducted with the goal of securing work previously assigned to, and worked by, members of Laborers' Local Union 1421. This is clearly distinguishable from the September 25, 2014 job action conducted by Laborers in an effort to preserve the work that had been previously assigned to, and worked by, them.

At the end of this hearing, Counsel for Operators' Local 4 advised that he would argue that the Notice of Hearing be quashed on the basis of a work preservation claim. (TR 472). While Laborers' Local 1421 never made such a claim, assuming for the sake of argument that it did, it is respectfully submitted that, given the above facts, the Laborers' claim would be a far more credible work preservation claim than that of the Operators.

NO AGREED-UPON METHOD OF VOLUNTARY ADJUSTMENT OF THE DISPUTE.

In its October 20, 2014, "Motion To Quash Notice of Hearing" Operators' Local 4 requested that the Regional Director of Region One quash the notice of the hearing. (OX-1). As grounds for this motion, "Local 4 states that the parties are bound to resolve jurisdictional disputes through the Plan for the Settlement of Jurisdictional Disputes in the Construction

Industry (“Plan”).” The Regional Director did not grant the above motion and the hearing proceeded as scheduled. This Motion was again pressed before the Hearing Officer who also proceeded with the hearing.

As evidence and testimony were taken, it became clear that the Massachusetts State-Wide Wrecking and Environmental Remediation Agreement, between the Wrecker’s Association and Laborers’ Local 1421, contained no language that could bind the Wreckers’ Association, and/or its members, to the Plan. It was also clear that Wreckers’ Association President Brooks would not participate in an arbitration directed under the Plan and would not honor any resulting award. (CPX-16). President Brooks specifically advised the Administrator and Counsel to the Plan that, “Work shall continue to be assigned under our contract with Wreckers’ Local 1421 unless the National Labor Relations Board directs otherwise in the actions that I have brought. (CPX-16).

As outlined in Regional Director Kreisberg’s October 16, 2014 “Order Consolidating Cases and Notice of Hearing”, the Charging Party in both actions was the Massachusetts Building Wreckers and Environmental Remediation Association & JDC Demolition Company, Inc. Both Charges were signed by Samuel Brooks in his capacity as President and CEO of the Massachusetts Building Wreckers Association. There is nothing in the record that would suggest that the Massachusetts Building Wreckers and Environmental Remediation Association is not the Charging Party in this action. (BX 1(a) through (g)).

The parties further stipulated that the Charging Party/Employer, Massachusetts Building-Wreckers and Environmental Remediation Specialists Association, Inc., is a non-profit 501(c)(6) association engaged in commerce within the meaning of Sections 2(6) and (7) of the Act and is further subject to the jurisdiction of the Board. The parties further stipulated that the Massachusetts Building-Wreckers and Environmental Remediation Specialists Association, Inc.

is a Massachusetts non-profit 501(c)(6) organization which represents employers, including JDC Demolition Company, who are themselves engaged in commerce within the meaning of Sections 2(6) and (7) of the Act. It was also stipulated that the Association derives gross revenues in excess of one hundred thousand (\$100,000) dollars annually from its operations. (TR 9-11).

Massachusetts Wreckers' Association President Brooks and Laborers' Local Union 1421 Business Manager Troy also confirmed that they had negotiated the current Massachusetts State-Wide Wrecking and Environmental Remediation Agreement with effective dates of July 1, 2012 through July 1, 2016. (CPX-2, TR-73 and TR-85). This multi-employer agreement covers between sixty (60) to seventy (70) individual employers engaged in the wrecking and remediation industry who are contractually obligated to employ members of Laborers' Local Union 1421. (TR-85). There is absolutely nothing in the Massachusetts State-Wide Wrecking and Environmental Remediation Agreement requiring the Massachusetts Building-Wreckers and Environmental Remediation Specialists Association, Inc., or any of its members, to participate in the "Plan for the Settlement of Jurisdictional Disputes in the Construction Industry." (CPX-2, TR-427-428). In fact, Article XXIII of the Massachusetts State-Wide Wrecking and Environmental Remediation Agreement, entitled Procedure for Adjustment of Disputes and Arbitration, specifically exempts jurisdictional disputes from its coverage. (CPX-2, Pg 29).

In his October 22, 2014 letter to Richard M. Resnick, Esq., Administrator and Counsel to the Plan, entered as CPX-16, Massachusetts Building-Wreckers and Environmental Remediation Specialists Association, Inc. President Samuel Brooks stated:

Dear Mr. Resnick:

I am the President of the Massachusetts Building and Wreckers' and Environmental Remediation Specialists Association and I have been copied on your October 21, 2014 letter to General President Callahan. I am hereby entering my objection to your proposed arbitration.

The Wreckers' Association has no contractual relationship with the Operating Engineers. And, our collective bargaining agreement with Building Wreckers' Local 1421 of the Laborers contains no provision which would bind us to your "voluntary plan". In fact, my arbitration clause specifically excludes all jurisdictional disputes leaving me no recourse but to file with the National Labor Relations Board when jurisdictional job actions occur.

I have filed 8(b)(4)(D) charges against both Laborers' Local Union 1421 and Operator's Local Union 4 and the Regional Director scheduled a 10K hearing. We are now in our third day of hearings in these consolidated cases. When the parties suggested that I terminate the NLRB proceedings, I subpoenaed them as hostile witnesses. My Association has never given up its federal rights to file charges and proceed at the NLRB and we have no plans of doing so in the future.

To be clear, the Massachusetts Wreckers' Association will not participate in an arbitration directed under the Plan and will not honor any resulting award. Work shall continue to be assigned under our contract with Wreckers' Local 1421 unless the National Labor Relations Board directs otherwise in the actions that I have brought.

Sincerely,

Samuel Brooks

Mr. Brooks is the President of the Massachusetts Building-Wreckers and Environmental Remediation Specialists Association, Inc., whose sixty (60) to seventy (70) employer members have chosen to bargain through the Massachusetts Wreckers Association because their employees constitute a multiemployer unit represented by LIUNA Local Union 1421. Specifically, the wages, hours, working conditions and benefits of all of the Local 1421 member-employees covered under the terms and conditions of the Massachusetts State-Wide Wrecking and Environmental Remediation Agreement have been negotiated by the Massachusetts Wrecker's Association on behalf of its Employer members. (CPX-2). Stack Electric, Inc. and

International Brotherhood of Electrical Workers, Local No. 110, AFL-CIO and International Brotherhood of Electrical Workers, Local No. 292, AFL-CIO, 290 NLRB 575 (No. 73) (1988).

In its “Memorandum in Support of Motion to Quash Notice of Hearing”, Operator’s Local 4 cites two (2) Board Decisions for the proposition that the Regional Director should quash the notice of hearing. (OX-1, Memorandum Pg. 3). Operating Engineers Local 139 (Allied Construction) 293 NLRB 604 (1989) and Heavy Construction Laborers Local 60, LIUNA (General Contractors) 305 NLRB 762 (1991).

These two (2) cases stand for the proposition that **all parties** before the Board must be specifically bound to submit jurisdictional disputes to the Plan before a Motion to Quash is granted. Accordingly, in light of the fact that Charging Party, Massachusetts Building-Wreckers and Environmental Remediation Specialists Association, Inc., is clearly not bound by the Plan, these cases should now be relied upon by the Board to deny the Operators Local 4 Motion to Quash.

In the Allied Construction case, as in this case, the Board found that the Allied Construction Employer’s Association (ACEA) had filed the underlying 8(b)(4)(D) charges on behalf of certain member employers. The Board further found that:

“[T]he ACEA is signatory to the 1987-1990 collective-bargaining agreement with the Iron Workers which provides, inter alia, that “all jurisdictional disputes which may develop shall be settled in accordance with [the Plan].” We thus find that the ACEA is bound to recognize the Plan as a means of resolving the instant dispute. Accordingly, because all parties are bound to submit jurisdictional disputes to the Plan, we shall quash the notice of hearing. (Allied Construction, Supra at 606, (Emphasis added)).

In the second case cited by the Operators, General Contractors, the principle is the same – all parties must be bound by the Plan for the motion to be granted. In the General Contractors case, the Board stated:

“[T]he Employer notes that it is signatory to a collective-bargaining agreement with Local 60 which provides that jurisdictional disputes in the construction industry will be resolved in accordance with the National Joint Board pursuant to the AFL-CIO constitution. The Employer interprets this provision of the collective bargaining agreement as binding it to the plan and no party contends otherwise. *Accordingly, because all parties have conceded they are bound to submit jurisdictional disputes to the plan, we shall quash the notice of hearing.*”(General Contractors, Supra at 763), (Emphasis Added).

The above cases also involved Employer Associations, who like the Massachusetts Building-Wreckers and Environmental Remediation Specialists Association, Inc., had filed 8(b)(4)(D) charges resulting in the issuance of a Notice of 10k Hearing. In both cases, the Board found that all parties were contractually bound to submit jurisdictional disputes to the Plan. However, no such finding can be made in this case.

As Massachusetts Wreckers’ Association President Samuel Brooks advised in his October 22, 2014 letter to the Administrator and Counsel to the Plan, his Association was under no such contractual obligation and he would therefore neither participate in an arbitration directed by the Plan nor honor any resulting award. (CPX-16). In light of the above case authority cited by Operators Local 4, and the testimony and exhibits presented in this case, Laborers’ Local Union 1421 respectfully submits that the notice of hearing in this case should

not be quashed because the parties have not all agreed to Plan or any other method of voluntary adjustment of the dispute.

Laborers' Local Union 1421 further submits that the Board should therefore now proceed with the Merits as it has in those cases where it finds that there exists no single method of voluntary adjustment binding on all the parties. International Union of Operating Engineers Local 150, AFL-CIO and Diamond Coring Company, Inc. and Laborers' International Union of North America, State of Indiana District Council and its Local 81, AFL-CIO 331 NLRB 1349 (No. 179) (2000); and Hod Carriers and General Laborers Union, Local 242, affiliated with Laborers' International Union of North America, AFL-CIO and Johnson Western Gunit Company and Cement Masons, Local 528, affiliated with the Operative Plasters' and Cement Masons' International Association, AFL-CIO 310 NLRB 1335 (No. 223) (1993).

MERITS OF THE DISPUTE:

As the Board has advised in its recent KMU Trucking Decision, "Section 10(k) requires the Board to make an affirmative award of the disputed work after considering various factors. NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting), 364 U.S. 573, 577-579 (1961). The Board has held that its determination in a jurisdictional dispute is "an act of judgment based on commonsense 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)." Laborers' International Union of North America, Local 310 and KMU Trucking & Excavating, Schirmer Construction Co., Platform Cement, Inc., 21st Construction, Inc., Independence Excavating, Inc., Donley's Inc., and International Union of Operating Engineers, Local 18, AFL-CIO. 361 NLRB No. 37 (Page 3) (2014). In its KMU Trucking Decision, it determined that the following factors would be relevant in making the determination of this dispute:

Certifications and collective-bargaining agreements

While the operations of the forklift and skid steers were very recently awarded, by the Board, to the employees represented by the Laborers, as opposed to the employees represented by the Operating Engineers, this award occurred in the State of Ohio and not in the Commonwealth of Massachusetts. KMU Trucking, Id. However, Laborers' Local Union 1421 respectfully suggests that many of the factors considered by the Board in KMU Trucking are equally applicable in this case.

Local Union 1421 further notes that its collective bargaining agreement with the Massachusetts Wreckers' Association more clearly identifies its jurisdiction over the operation of skidsteers (Bobcats) and forklifts/Lulls than the collective bargaining agreement submitted by Operating Engineers Local 4.

Article XVIII, Section 1, of Laborers' Local 1421's collective bargaining agreement with the Massachusetts Wreckers Association provides in pertinent part:

Section 1. It is agreed that the Wrecking and Environmental Remediation Laborers' Specialist work shall include but not be limited to:....The operation of all small bulldozers, loaders, skid steers, backhoes, sweepers, forklifts, telescopic boom forklifts or mast type, hydraulic breakers whether operated manually or remote controlled similar to Brokks and all floor covering removal equipment and machines and lulls as needed to breakup, load, move or stockpile material, debris and salvage. ***** (CPX-2, Pages 22-23) (Emphasis Added).

During the third day of hearings on this matter, Local 4 Business Manager Lou Rasetta reviewed his 2011-2014 collective bargaining agreement that had been entered as Operators

Exhibit 9. He advised that this was a Master Agreement consolidating the three (3) original Operators' collective bargaining agreements. (TR 310). These original agreements were the "red book" which covered the road builders or CIM; the "green book" which covered marine foundation; and the "blue book" which covers building and construction. (TR-310). Mr. Rasetta further advised that usually demolition would fall under (building and construction). (TR-310).

Business Manager Rasetta was then asked by his counsel to refer to page 41 of Exhibit 9, part C, Article 2, where the term "jurisdiction" appears. (TR 312-313). That section provides:

It is agreed the Local has jurisdiction over hoisting and portable engines, boilers, and machinery operated by steam or mechanical power, including pumps, compressors, siphons, pulsometers, fork lifts, concrete mixers, stone crushers, elevators used for hoisting material, power driven conveyors, street rollers, cold planers, grinders, edgers, reclaimers, all power shovels, cranes, scrapers, tractors, bulldozers, gradalls, shovel dozers, front end loaders, Jackson type tampers, self-propelled or tractor drawn tampers, pumpcrete machines, concrete pumps, concrete pavers, screed machines and concrete finishing machines, wellpoint systems operating and installing, waste water plants, valves controlling permanent plant air or steam pressure, cableways, orange peel and clam shell buckets, pile drivers, dinky locomotives, work and personnel boats, straddle buggies, cal tracks, ballast regulators, switch tampers, and rail anchor machines; or any other machine used irrespective of its motive power. (OX-9, Pages 41-42).

When asked whether the term "Bobcat" or "Skid steer" appeared in the above article, Mr. Rasetta responded, "No". (TR-313). Mr. Rasetta subsequently advised that the term could be covered under "forklifts" or "front end loader". (TR-313).

Laborers' Local 1421 further notes that the term "Lull" also does not appear anywhere in the above jurisdictional listing of the jurisdiction of the Operating Engineer. Accordingly, Laborers' Local 1421 respectfully submits that the National Certifications, and the specific identification of "skid steers" and "lulls" in its collective bargaining agreement should support an award to the employees represented by the Laborers.

Employer preference and past practice.

During the hearing on this matter, it became readily apparent that the Massachusetts Wreckers' Association and its affiliated JDC Demolition Company both preferred an Award to Laborers' Local 1421.

Massachusetts Building Wrecker's President and CEO Samuel Brooks advised that he never had a contractual relationship with Operators' Local Union 4 and, during the thirty-five (35) to thirty-seven (37) year period that he had his own demolition company (Edifice Wrecks), the skidsteers and forklifts were always operated by Laborers. (TR-75).

Likewise, JDC President Chris Berardi testified and confirmed that he had made an original written work assignment of the Skidsteers, Bobcats, Forklifts and Lulls to Laborers Local 1421. (TR 18-19) (CPX-1). When asked why he signed a work assignment agreement with Local 1421, when the work was already covered by his collective bargaining agreement with Local 1421, Mr. Berardi testified, "Because Tom Troy had come to me back in sometime in May stating that the Local 4 had been trying to get this work from the Wreckers Union and that he wanted to reinforce for this job that this work was theirs. And I had no problem with that obviously, because we have been doing it for 20 plus years." (TR 20-21).

Mr. Berardi previously testified that, prior to the creation of JDC, he had been an owner and President of North American Site Developers, Inc. (NASDI). (TR-17). During his twenty (20) plus years in the industry, he had agreements with both Operators Local 4 and Laborers Local 1412. However, the skid steers (Bobcats), forklifts and Lulls were always operated by Laborers Local 1421. (TR 16-18). In light of the above, Laborers' Local 1421 respectfully submits that the employer preference and past practice should support an award to the employees represented by the Laborers.

Area and Industry Practice.

Only two (2) Contractors, testified in this case as to the Area and Industry Practice. These were the Charging Parties, Massachusetts Wreckers' Association President Samuel Brooks, who currently represents between sixty (60) and seventy (70) contractors, and who owns his own wrecking company with over thirty-five (35) years experience in the industry, and JDC President Chris Berardi who had well over twenty (20) years of experience in the industry. Both of these Contractors testified that the skid steers (Bobcats), forklifts and Lulls were always operated by employees represented by Laborers Local 1421. (TR 16-18, 75). Not a single Contractor appeared to support the position of Operating Engineers Local 4.

The Local 4 Business Manager did solicit four (4) letters of assignment from its Contractors after the initial charges were filed against the Operators. (TR-354) (OX 2, 10, 11 and 12). However, when the Business Manager of Laborers' Local 1421 was notified of this activity, he quickly solicited approximately ten (10) letters of assignment confirmation in addition to the original letter of assignment from JDC on the Salem Power Plant project and three (3) 2012 assignment confirmation letters he still had in his files. (CPX-4, Package of 14 Letters).

The first letter of assignment introduced by Local 4 was from NASDI. (OX-2). This October 1, 2014 letter was immediately called into question because the author, Vice President Thomas Higgins, had only been working for a couple of years. (OX-2). This letter was also specifically contradicted by the September 4, 2014 letter from the current Owner of NASDI, Art Dore, Jr., in which he states, "Please be advised, NASDI will assign the operation of the following equipment to #1421: Skid steer, Bobcat, Telescopic forklift." (LX-1, CPX-4, Page 10). It was also contradicted by the testimony of the former Owner and twenty (20) year President of NASDI, Mr. Chris Berardi. (TR 16-18).

The second letter submitted by the Operators, dated September 19, 2014, is from F & D Truck Company, Inc. (OX-10). This Company does not appear on the list of signatory contractors appended to the Laborers' Local 1421's collective bargaining agreement with the Massachusetts Wreckers Association. (CPX-2, Pages 35-37). Additionally, on cross examination, the Local 4 Business Manager did not believe that F & D was signatory to the Laborers. (Tr-361). It was also not clear whether this trucking company was even involved in the wrecking and environmental remediation industry.

The third letter submitted is dated September 19, 2014 and is from the J. R. Vinagro Corporation. (OX-11). The Local 4 Business Manager testified that, "Vinagro is signatory ... to the Laborers," (TR-361). However, it appears that a Company known as "C L Vinagro", as opposed to "J.R. Vinagro", is actually the signatory contractor to the Local 1421 collective bargaining agreement. (Comparing OX-11 to CPX-2, Page 36).

The last letter submitted is dated October 7, 2014 and is from RSG Contracting Corporation. (OX-12). This Company is the only company clearly identified in the Local 1421 list of signatory contractors. However, both this letter, and the J.R. Vinagro letter make absolutely no reference to either forklifts or Lulls. In addition, they specifically exempt the Bobcat (Skid steer), from being under the jurisdiction of the Operating Engineer, when this equipment is utilized on interior demolition. (OX 11&12). It is Laborers' Local Union 1421's position that there is no distinction between interior and exterior demolition when it comes to assigning the Skidsteer (Bobcat) or the Forklift (Lull). However, since almost all of the work performed by employees represented by Laborers' Local 1421 involves certain levels of interior demolition, Local 1421 respectfully submits that the Vinagro and RSG Contracting Corporation letters actually support its overall claim to the Skid steer (Bobcat) and Lull. (OX-11 & 12).

Unlike the letters submitted on behalf of the Operators, the assignment confirmation letters collected by Laborers' Local Union 1421 Business Manager Troy clearly confirmed that these Companies had assigned the Skidsteer (Bobcat) and the Forklift (Lull) to the employees represented by Laborers Local 1421. (CPX-4).

These letters include the October 17, 2014 assignment confirmation letters from RM Technologies, American Environmental, Inc., Atlantic Coast Dismantling, McConnell Enterprises, Inc., and the WK Mac Namara Corporation. Also included are the October 16, 2014 assignment confirmation letters from Air Quality Expert Inc., and Absolute Environmental. This package further includes the October 15, 2014 assignment confirmation letter from Isaac Blair Shoring and Rigging, the October 1, 2014 assignment confirmation letter from the Aulson Company, LLC., and the September 4, 2014 assignment confirmation letter from the current owner of NASDI. (CPX-4).

The original June 4, 2014 JDC Demolition Company assignment of “all work with the Skidsteer(s), forklift/ Lull operations on all Wrecking sites to Building Wreckers Local 1421” is also included in Charging Party Exhibit 4.(CPX-1 & 4). In addition, the September 26, 2012 historical assignments of this work by Yankee Environmental Services, LLC and NASDI are also included, along with the January 30, 2012 assignment confirmation letter from Aaxion Concrete Sawing to Local 1421. (CPX-4)

In light of the above, Laborers' Local Union 1421 respectfully submits that the Area and Wrecking Industry practice of assigning the Skidsteer (Bobcat) and the Forklift (Lull) is to assign this equipment to employees represented by Laborers' Local Union 1421.

Relative Skills and Training:

During the October 21, 2014 hearing, Operators' Local 4 Business Agent Paul Diminico confirmed that the Engineer's Training Center provided a Forklift Operators Training Course and a Skid Steer Loader Operator's Training course. He further confirmed that he had taken these courses and was licensed. (TR 173-175) (OX 6 & 7). The following day, October 22, 2014, after reviewing the submitted training materials, Laborers' Local 1421 Steward, Glenn Troy, confirmed that the same courses were offered at the Laborers' Training Center in Hopkinton, that he had also taken these courses, and that he was currently licensed to drive both the Bobcat and the Lull. (TR 278). In light of the above, while the training and licensure may be considered by some as equal, Laborers' Local Union 1421 respectfully submits that, because the employees represented by the Laborers are typically assigned these duties on a regular basis, as outlined above, these Laborers are more likely to have significant and more comprehensive experience with the Skidsteer (Bobcat) and Forklift (Lull) than the employees represented by the Operating Engineer.

Economy and Efficiency of Operations:

During the October 20, 2014 hearing, JDC President Chris Berardi confirmed in his testimony that he used Laborers on Lulls and Bobcats both inside and outside buildings. (TR 22). When asked why he assigned Local 1421 to the Bobcats and Lulls instead of Local 4, he testified, "Numerous reasons. One is that a Local 4 Operator, if he's running a skidsteer, a Lull, there might be only two hours worth of work for that machine. Basically a Local 4 Operator will sit in the machine the rest of the day and not do anything, whereas a Laborer will get out of the machine, if there is not work for it, and do other work. The other reason is there's a \$20 (per hour) differential between the two pays." (TR 22-23).

When Laborers' Local 1421 Steward Glenn Troy was subpoenaed and called as an adverse witness by the Charging parties, he was asked if there were occasions (while he was on the Salem Power Plant jobsite) where Bobcat or Lull work by the Operating Engineers did not take an entire day. He responded, "Well, I've seen them not working, and I would assume that's because there isn't something for them to do. (TR 283). When asked what did you see them doing when they were not working, Steward Troy responded, "One gentleman was sleeping in the Lull and when he wasn't he opened the doors to the chimney and there's only so much time to get the material out. Once that material is out and the sorting was done there was nothing else left to do." (TR 283). Steward Troy also advised that Roger Peretti, who had testified the day before, spent a substantial amount of time talking to the other Operator when he was not working. (TR 284). Steward Troy would witness this when he passed by in his own Lull or his truck. (TR 284).

When asked what he did when his Lull was not needed, Steward Glenn Troy testified, "...[W]hen we aren't using it, I park it and I use my truck to deliver supplies back and forth between the various containments that we have running. (TR 287). When asked what the Laborers running the Bobcats did when they were not busy, Steward Glenn Troy testified, "Get out and help the guys in the area wherever they're doing. Shoveling, cleaning up." (TR 287).

In light of the testimony of JDC President Chris Berardi, as confirmed by Steward Glen Troy, Laborers' Local Union 1421 respectfully submits that the economy and efficiency of the ongoing operations, at the Salem Power Plant jobsite, is best served by maintaining the original, June 4, 2014, JDC Demolition assignment of the Skidsteers (Bobcats) and Forklifts (Lulls) to the employees represented by Laborers' Local Union 1421.

CONCLUSION

In light of the fact that Charging Party Massachusetts Building-Wreckers and Environmental Remediation Association has no contractual obligation to participate in the Voluntary Plan For Settlement of Jurisdictional Disputes, Laborers' Local Union 1421 respectfully submits that the prior Decisions of the Regional Director and the Hearing Officer, not to quash the Notice of 10(k) Hearing, should be upheld by the Board.

Laborers' Local Union 1421 also respectfully submits that the Merits of this Dispute, as outlined in great detail above, clearly favor an Award of the work involving the Skidsteer (Bobcat) and the Forklift (Lull) to the employees represented by Laborers Local Union 1421 pursuant to their collective bargaining agreement with the Massachusetts Building-Wreckers and Environmental Remediation Association and its affiliated member JDC Demolition Company, Inc.

Respectfully Submitted on Behalf of
Laborers Local Union 1421

By: S/ Thomas B. Coffey, Esq.
Thomas B. Coffey, Esq.
BBO No. 087980
District Council Attorney
7 Laborers' Way
Hopkinton, MA. 01748
(508) 435-4164
legal@masslaborers.org

CERTIFICATION OF SERVICE

I, Thomas B. Coffey, Esq., counsel for LIUNA Local Union 1421 in Case Nos. 01-CD-137069 and 01-CD-138333, certify that I have served a copy of the Post-Hearing Brief of Laborers' Local Union 1421 upon the following persons, by electronic mail, on the 14th Day of November, 2014 at the addresses listed below:

Jonathan B. Kreisberg, Regional Director
National Labor Relations Board, Region 1
10 Causeway Street (6th Floor)
Boston, MA 02222-1072
Via e-mail to Jonathan.Kreisberg@nlrb.gov

Carol Chandler, Esq. (Counsel for the Charging Parties)
Stoneman, Chandler & Miller, LLP
99 High Street
Boston, MA 02110
Via e-mail to cchandler@scmlp.com

Randall E. Nash, Esq. (Counsel for Operators' Local Union 4)
111 Devonshire Street (Fifth Floor)
Boston, MA 02109
Via e-mail to rnash@attorneyrandallnash.com