

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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International Union of Operating Engineers, Local 4 )	
(JDC Demolition Company, Inc.) )	
And )	
Massachusetts Building Wreckers and Environmental )	1- CD- 137069
Remediation Association )	
(JDC Demolition Company, Inc.) )	
) )	
Laborers International Union of North America, )	
Local 1421 )	
(JDC Demolition Company, Inc.) )	
) )	
And )	
) )	1-CD- 138333
Massachusetts Building Wreckers and Environmental )	
Remediation Association )	
(JDC Demolition Company, Inc.) )	

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**POST-HEARING BRIEF OF THE  
MASSACHUSETTS BUILDING WRECKERS AND  
ENVIRONMENTAL REMEDIATION SPECIALISTS ASSOCIATION**

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POST-HEARING BRIEF OF THE MASSACHUSETTS BUILDING  
WRECKERS AND ENVIRONMENTAL REMEDIATION SPECIALISTS ASSOCIATION

Factual Background

The Massachusetts Building Wreckers and Environmental Remediation Specialists Association (“the Wreckers’ Association”) filed an 8 (b)(4)(D) charge against IUOE, Local 4 (“Operators or Local 4”) on September 19, 2014.<sup>1</sup> The second charge referenced in the caption to this matter was filed by the Wreckers’ Association against LIUNA, Local 1421 (“the Wrecking Laborers or Local 1421”) on September 24, 2014. The Wreckers’ Association filed these charges because the issue is of great moment, not just to JDC, but to all its members. A

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<sup>1</sup> The Wreckers’ Association filed an initial 8(b)(4)(D) charge against Local 4 on August 29, 2014. NLRB Charge No. 1-CD-135687 was withdrawn when witnesses were unavailable to provide Affidavits to the NLRB in a timely manner.

hearing on this matter was held in front of Hearing Officer Claire Powers on October 20, 21, 22 and 24, 2014.

The parties involved and their representatives who gave testimony in this matter are:

- Samuel S. Brooks CEO and President of the Massachusetts Building Wreckers and Environmental Remediation Specialists Association (“the Wreckers’ Association”), an association of employers engaged in the business of wrecking and remediation of buildings in Massachusetts, New Hampshire, Maine and Vermont.
- International Union of Operating Engineers Local 4 (“Operators or Local 4”), its Business Manager Louis Rasetta and Business Agent Paul Diminico, and two members of the union, Roger Peretti and Michael Wogan.
- Laborers International Union of North America, Wreckers Local 1421 (“Wrecking Laborers” or “Local 1421”), its Business Manager Thomas Troy and Salem Power Plant Laborers’ Steward and lull operator Glenn Troy,
- JDC Demolition Company, Inc. (“JDC”), its President Chris Berardi, Wayne Sheridan, President of WMS the Project Executive for JDC on the Salem Power Plant demolition project and Peter Noyes, JDC Safety Coordinator at the power plant site for over 30 years.

The Wreckers’ Association represents approximately seventy employers engaged in demolition and remediation of regulated materials. (Tr. 74) It has negotiated a master collective bargaining agreement with Local 1421 on behalf of those members who wish to be signatory. (Tr. 74) Wrecking Laborers Local 1421 does demolition and environmental remediation work, using wrecking tools to demolish and take apart buildings, bridges, structures and regulated materials. They then remove the materials taking them to stockpiles outside the structures being demolished. (Tr. 86 – 87) The Wreckers’ Association is not a member of the AFL-CIO or of the Building Trades Department and does not have a contract with Local 4. (Tr. 74) The Wreckers’ Association has never agreed to submit jurisdictional disputes to the Plan for Settlement of Jurisdictional Disputes in the Construction Industry. (Tr. 74, CP Exh. 2)

Many of the Wreckers’ Association’s employer members are signatory to the Wrecking Laborers Local 1421 collective bargaining agreement. (Tr. 74, CP EXH. 2) Some of its members are also signatory to agreements with Operating Engineers’ Local 4. (Tr. SB 75, R.

350) Members of the Wreckers' Association, other than JDC, are involved in this dispute as a result of the two unions' demands that various members sign Work Assignment Agreements committing to use one or the other union on the disputed work, the operation of skidsteers (Bobcats) and forklifts (Lulls) on wrecking sites. (CP Exh.1,4, OE Exh.4,10-12) All parties to the charges stipulated that the Operating Engineers and Wrecking Laborers both claim the work in dispute. (Tr. 10)

While the Wrecking Laborers' collective bargaining agreement specifically lists skidsteers ("bobcats") and lulls in its work jurisdiction article, the Operating Engineers' collective bargaining agreement only mentions forklifts in its work jurisdiction article. (CP 2 Article XVIII, OE 1 Article II) Bobcats are, however, mentioned later in the Local 4 agreement. (OE Exh. 1)

On demolition job sites, Wrecking Laborers utilize bobcats with claw bucket attachments to do interior and exterior demolition. (Tr. 58) In addition, they remove materials being demolished from both inside and outside structures to areas from which it is carted off site. Companies signatory to Wrecking Laborers Local 1421 are also licensed by various states to perform asbestos abatement. (Tr. 97-98) When such abatement is necessary, the Wrecking Laborers wears hazmat gear including respirators in order to safely remove the asbestos, place it in bags and then in Gaylord boxes which are removed through windows or doors to lulls or otherwise handled by bobcats in a manner that safeguards against the bags being broken. (Tr. 97- 98) Local 1421 Business Manager Tom Troy stated that he has no knowledge of Local 4 ever performing this work. (Tr. 98)

JDC is a contractor engaged only in demolition and asbestos remediation. (Tr. 18 – 21) It is a member of the Wreckers' Association and is bound to the Local 1421 collective bargaining

agreement negotiated by Wreckers' Association's CEO, Samuel S. Brooks. (CP Exh 2, Tr. 73 ) JDC is also signatory to one other agreement, a collective bargaining agreement with Local 4. (Tr. 17, OE Exh. 1) The Operating Engineers' agreement is not negotiated or signed by the Wreckers' Association. (Tr. 49, OE Exh. 1) JDC is owned by J. Derenzo, a site development company which is signatory with Operating Engineers Local 4 and with the Massachusetts District Council of Laborers, but not with Local 1421.<sup>2/</sup> ( Tr.35, CP Exh. 2) The "regular Laborers," not Local 1421 wrecking laborers, do site development. (Tr. 87)

JDC is the prime contractor to Footprint Power ("Footprint") for the two phases of the abatement of regulated material and demolition of the Salem Power Plant. (Tr. 377-378) The power plant occupies a 57 acre site on Salem harbor and contains stacks, tank farms, pipelines and numerous buildings of varying size and composition. (Tr.374, CP Exh. 5) Entrance to the site is gained through a Guard House where all employees and visitors working on site are required to obtain a badge and to check in and check out. (Tr. 129-130) Entrance to that part of the site, called the TWIC area, which abuts the harbor has additional security requirements, visitors and non-craft labor may enter the TWIC area only if accompanied by a TWIC credentialed JDC or Footprint Manager. (Tr.130)

JDC began work on Phase I demolition in July of 2014 and continues to work on the demolition of stacks, tanks and pipes under the Phase I contract. (Tr. 17) Work on Phase I is scheduled for completion by the end of December of 2014. (Tr. 378-9)

Operators and Wrecking Laborers on a demolition job have a symbiotic relationship, the Operators in cranes with various attachments, excavators and loaders pull down the heavy parts of the structures. The Wrecking Laborers in bobcats and lulls as well as with shovels, brooms

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<sup>2/</sup> Local 4 presented some evidence concerning Mark Berardi (the son of JDC President Chris Berardi). Mark Berardi was not the manager of the Salem job and certainly decisions of President of JDC, Chris Berardi, are those that control. (Tr. 61)

and other implements detach the materials from the structures, remove the demolished material to dedicated areas and also establish containment enclosures for safe removal of asbestos. The Wrecking Laborers deposit demolished materials at strategic locations for subsequent removal from the site. Wrecking Laborers also water the area where work is performed as well as the project roadways to tamp down any toxic particles that may be in the air. (Tr. 32) Generally, if the Wrecking Laborers are not working, the Operators cannot continue their work. If the Operators are not working, the Wrecking Laborers have no materials to remove or dust to keep down. (Tr. 31, 32, 418-419)

### The Jurisdictional Dispute

JDC became aware of contention over work assignments at this site when Tom Troy, Business Manager for the approximately fifty Wrecking Laborers currently working at the Salem Power Plant requested that JDC's President, Chris Berardi, sign a Work Assignment letter with regard to the Footprint project giving Local 1421 the work of operating bobcats and lulls on the site.<sup>3/</sup> (Tr. 21, Exh. 1) Because there was a dispute over which trade operates these small vehicles, Mr. Troy had JDC and numerous other area companies sign such Work Assignment letters, including RM Technologies, American Environmental, Inc., Atlantic Coast Dismantling, McConnell Enterprises, Inc., W.K. Macnamara Corporation, Air Quality Experts Inc., Absolute Environmental, Inc., Isaac Blair Shoring & Rigging, Aulson Company, LLC, NASDI LLC, Yankee Environmental Services, LLC, and Aaxiom Concrete Sawing. (Tr. 90 -92, CP Exh. 3) Some of the companies signing these letters are also signatory to contracts with the Operating Engineers. (Tr. 369) After the initial charges were filed against Local 4, in August of 2014, Mr. Rasetta also assembled Work Assignment letters. (OE Exh. 2, 10, 11, 14)

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<sup>3/</sup> Mr. Berardi had also signed a Local 1421 Work Assignment letter on an earlier Salem project on Canal Street.

Mr. Berardi had no problem in signing the work assignment letter for Wrecking Laborers Local 1421 because Mr. Berardi, both at JDC and in his 20 years as Manager and Owner-President of another wrecking company, NASDI, had historically assigned the work in dispute only to Local 1421. (Tr. 21) This fact was not disputed by Local 4. In addition, such assignment was in compliance with the wording of JDC's agreement with Local 1421 at Article XVIII. (CP 2):

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 . . .

On or about August 21, contention turned to proscribed conduct when Operating Engineers' Business Agent Paul Diminico called Mr. Berardi and notified him that the employees utilizing a bobcat were performing work within the jurisdiction of Local 4, and if the work were not assigned to Operating Engineers, there would be a job action. (Tr. 25, 136) Diminico also threatened to take Cooperative Trust funds away from JDC. (Tr. 25) When Mr. Berardi informed Diminico he did not have Trust funding, Diminico responded that JDC's failure to place operators on the machines would impact JDC's ability to receive such funding going forward. (Tr. 25)

Mr. Wayne Sheridan, Project Executive for JDC at the Power Plant acts manages the project and is the interface between JDC and Footprint as well as between JDC and all subcontractors on the job site. During the weeks of August 8 and August 11, job site Operating Engineer Dan Fenton told him of Local 4's concern about Wrecking Laborers Local 1421 members operating the bobcat and lull. (Tr. 46)

On August 22, 2014, Mr. Sheridan became acutely aware that this was an issue of concern to Local 4 Business Agent, Paul Diminico. That day, Mr. Diminico asked Operating

Engineer Michael Wogan, who was working near stack 5 in a loader, to drive him around the site. (Tr. 236 -237) Instead of taking Mr. Wogan away from his work, Mr. Sheridan offered to drive the B.A. around the site to speak with the Operating Engineers. (Tr. 399 -400 ) He then drove Mr. Diminico to the locations where the four Operating Engineers were working for JDC. (Tr. 122) He stopped at Tank D6 which had been breached days before where Operators Dallesandro and Pineau were operating excvators tearing up the containment wall and material on the ground. (Tr. 400-401) Dan Fenton was working a distance away at Tank B-1.(Tr. 400) Mr. Sheridan explained how far away the tanks were from each other stating, “You couldn’t hit a golf ball from B-1 to D-6. (Tr. 402 , CP Exh. 21) Mr. Sheridan did not hear what Mr. Diminico said to the Operating Engineers. But, as he drove Mr. Diminico off site, he asked whether there were any issues other than who was to operate the bobcat and lull. Mr. Diminico responded, “No.” (Tr. 437).

Within fifteen minutes of Mr. Diminico checking out at Security, the four JDC Operating Engineers with whom Mr. Diminico had spoken, left the site and joined their Business Agent. (Tr. 402) Mr. Sheridan was at the gate and asked why they had left their jobs. Diminico claimed that the fumes from the tank they were working on made them sick and dizzy. (Tr. 140,143 402) The four men were absent for from 2 to almost 3 hours.

Security Shack Check In/Check Out Times (August 22, 2014)

Paul Diminico, BA	9:28 – 9:57
Dan Fenton	10.02 – 12:45
Nick Alessandro	10:09 – 12:45
Mike Pineau	10:11 – 12:57
Mike Wogan	10:13 – 12:12

(CP Exh. 11)

The Operators returned to the site in the afternoon stating they felt better and were able to continue their work, even though no changes had been made to the site to remediate the alleged

fumes. (Tr. 407, CP Exh. 11) Mr. Sheridan noted, however, that on their returning to the site, they did not take up active work but he observed them talking to each other and sitting in their machines. (Tr. 437-438) Mr. Sheridan also testified that after this event the operators did not work with the same dedication and speed that he had seen before the dispute arose. (Tr. 437-438)

Two Operating Engineers working for JDC testified at the hearings. In sworn testimony, Operating Engineer Michael Wogan reported that on August 22 when Mr. Diminco asked him to drive him onto the site, Mr. Wogan was working at the chimney that was being demolished, “taking metal and insulation and stuff away.” (Tr. 236) A minute later he testified that fumes escaping from a tank being breached caused himself and three operators to leave the site as the result of nausea. (Tr. 240) He recalled that this occurred on the first day that tank B5 was cut open. (Tr. 239 - 241) He also recalled that it took two weeks to take the tank down. (Tr. 234, 239)

Photographs of the tanks on which Wogan claimed he and three others were working when the fumes caused them to leave the site irrefutably prove that Tank B5 was already completely demolished on August 22. (CP Exh. 17) D-6 had been breached on August 18. (Tr. 396) D6 and B1 had also already been breached by this date. (CP. Exhs. 17, 21, 22) In fact, CP Exh 22 demonstrates that on August 22, 2014, an excavator was tearing down Tank D6. Mr. Sheridan recalled that operating engineers M. Pineau and N. Alessandro were working with the excavator at D-6 that day, not at B-5. (Tr. 40 , Exh. 22) Obviously, all fuel had long since been removed from all those tanks. (CP Exh. 8 ) No other workers left the site that day because of

fumes. (Tr. 406)<sup>4/</sup> Local 1421 Business Manager Troy testified that no Wrecking Laborers complained of fumes on that or any other day. (Tr. 104)

On June 19, 2014, two months before the walk-out, independent Hygienists, New England Marine Chemist Services (an entity hired by Triumvirant Environmental, a JDC subcontractor), had certified that tanks B-3, B-5 and D-6 were safe for mechanical demolition. (CP Exh. 8) B-1 was not certified as safe, solely because the tank needed to be “dewatered”. (Tr. 385-390; CP Exh. 8) Safety Officer Peter Noyes testified that no employee had complained about fumes from the tanks, the only complaint he received relating to fumes came from operator Peretti who notified Noyes in October that there were diesel fumes coming from the bobcat that he was operating. (Tr. 271-272)

Furthermore, all employees, before starting to work on site must attend a Safety Seminar at which they learn the safety requirements on the site and how to report safety concerns. (Tr. 409, CP Exh. 8) On those aspects of the project where safety is an issue, employees are required to attend a pre-job meeting to learn of the safety issues and to sign the Safety Log. (Tr. 409, CP Exh.18) But, no safety report was filed by Mr. Diminico or any of the four operating engineers.(Tr. 264)

Pursuant to a subpoena, Wrecking Laborers Local 1421 Steward, Glenn Troy, who drives the only lull on the project, gave evidence that he was present at the job site on August 22 and saw operators working with a loader and excavator at tank (D6), a tank that had been breached some days before. (Tr. 279) This is evident as well in Charging Party Exhibit # 17 which shows that on August 22 the excavator was being used at Tank D6. Glenn Troy also testified that he spent his day traveling across the site on the lull and that, at no time, did he smell or become affected by fumes. (Tr. 272, 279)

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<sup>4/</sup> Operating Engineer Roger Peretti was not present on August 22.

Immediately following August 22, Mr. Berardi contacted Mr. Diminico and asked if the Operating Engineers were going to be sick again. (Tr. 28, 29) Mr. Diminico said, "It could happen... unless things change, unless Local 4 is put into the bobcat and the lull." (Tr. B. 28, 29)

JDC President Chris Berardi was concerned that similar occurrences would further, endanger his ability to complete the contract on time as well as significantly increase the cost of the job which had been bid on the basis of Wrecking Laborers working the bobcats and lulls. (Tr. 25) In order to try to deal with these issues, he called Operators' Business Manager Louis Rasetta. (Tr. 32 ) Mr. Rasetta, who is also a Vice President of the International Union of Operating Engineers, threatened Mr. Berardi that there would be job actions if Local 4 members were not assigned the work in dispute. (Tr. 33, 43) Mr. Rasetta did agree to resolve the issue if the Operators were assigned the machines working outside buildings while the Wrecking Laborers operated the machines inside the buildings, stating to Mr. Berardi that this that this was the way the work was always done. (Tr. 29, 30)

Mr. Berardi, who has been in the demolition business for over twenty years, first as owner of NASDI (which had and still has contracts with both Locals 1421 and Local 4), and after the sale of NASDI as President of JDC, had never used Operating Engineers on demolition work requiring bobcats or lulls when they were used either inside and outside of buildings and other structures being demolished. (Tr. B. 22) Mr. Berardi testified that the large mechanical equipment on his work and all other demolition jobs of which he is aware such as excavators, loaders and cranes have always been driven by Operating Engineers but not the bobcats (skidsteers) or lulls. (Tr. 22) Mr. Sheridan who has 48 years of work in the construction industry and Mr. Brooks who owned and managed a demolition contracting company for 35 years, both testified that the Wrecking Laborers had always operated lulls and bobcats on

demolition jobs, both inside and outside the structures being demolished. (Tr. 398) Neither man had ever previously seen Operating Engineers on those machines on a wrecking job either inside or outside a structure. (Tr. 75, 378)

Mr. Rasetta then demurred, demanding as a fall back position that there be a one to one ratio and that the Operators be given the first bobcat and the Wrecking Laborers the second, Mr. Berardi stated that he would first have to speak with Wrecking Laborers Local 1421 Business Manager Tom Troy. (Tr.30). However, in order to prevent further walkouts, JDC placed Operating Engineer Roger Peretti on a bobcat on August 25. (Tr. 220) Mr. Peretti testified that when he first started, he worked on the stack (“chimney”) and was “just sitting around waiting for someone to tell me something to do.” (Tr. 220) He also said that he had one to two hours of down time a day but was paid the standard 40 hours. (Tr. 220, 225) Mr. Wogan and Mr. Sheridan testified as to why work on the stack was so sporadic. The chimney contractor was demolishing the stack from the top, sending debris into the stack. When the wrecking crew left for lunch for 1 ½ to 2 hours, the steel doors at the bottom of the stack were opened and, only then the debris could be removed by the bobcat. (Tr. 247, 398 )

After August 25, the one to one operation of bobcats and lulls fell through and, on August 29, 2014, the Operators walked off the job again. (Tr. 416) This time their excuse was that the badge allowing their Business Agent’s entry to the site had been taken away. The badge had been removed as a result of Mr. Diminico’s failure to be escorted while on site. (Tr. 416) Following the August 22 walkout, Footprint owner and Manager Justin Paige had issued a directive that business agents be escorted by management of Footprint or JDC while on site. (Tr. 65, 416) Mr. Diminico acknowledged that he was aware of this requirement. (Tr. 146) Mr. Sheridan testified that early on the morning of August 29, soon after Mr. Diminico rejected

Mr. Sheridan's offer to escort him onto the site, Mr. Diminico appeared on site without a company escort. (Tr. 414, 415) As he was leaving, his badge was returned to Security, and he left and checked out at 7:18 a.m. (CP Exh. 11)

Mr. Diminico then notified his operators by telephone that he was in the parking lot and they all joined him for a "meeting" in the parking area which lasted approximately four hours. (Tr. 64. 147 -148 416)<sup>5/</sup> As a result, the entire work site shut down early because the Wrecking Laborers, who work in tandem with the Operators, did not have sufficient work to do. (Tr. 285, 418-420)

A meeting was held after this event attended by Dave Howe, owner of J. Derenzo, JDC's Chris Berardi and Lou Rasetta. (Tr. 329-330)<sup>6/</sup> At that meeting Mr. Rasetta was questioned on his holding up Cooperative Trust Funds due JDC owner, J. Derenzo, Mr. Rasetta responded stating he knew nothing about it but the funds would start flowing again. (Tr. 35) Immediately after this information being communicated to Mr. Rasetta, who is Co-Chair of the Cooperative Trust Committee, J. Derenzo received \$113,760 worth of commitments from the Fund. (Tr. Exhs.13-15)

Mr. Berardi did speak with Wrecking Laborers Business Manager Tom Troy after Mr. Rasetta proposed the one to one ratio. Mr. Troy adamantly refused to cede his historic jurisdiction over the two machines. (Tr. 30) Mr. Troy told Mr. Berardi that he should file for an injunction, and Mr. Berardi attempted to get temporary resolution of the disturbances on the job pending resolution of the issue by the NLRB. (Tr. 36) Because there was no action, this assuaged the Operators, but angered Mr. Troy who threatened to pull the laborers off the job site in a letter dated September 12, 2014. (CP Exh. 3) Joseph Bonfiglio, the Business Manager of

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<sup>5/</sup> Because the workers remained in the parking lot, they did not have to check out at Security because they were not leaving the property. (Tr. 404, 417)

<sup>6/</sup> Mr. Rasetta was unsure of the date of this meeting. (Tr. 329)

the Massachusetts and Northern New England Council of Laborers, also threatened Mr. Berardi with a job action if his men were not placed back on the bobcat given to an Operating Engineer as a result of Local 4's threats. (Tr. 36) Because no resolution was in sight, on Friday, September 26, 2014, Tom Troy pulled all of the 50 Wrecking Laborers from the site. (Tr. 102)

Messers. Barardi, Sheridan, and Brooks all testified that Wrecking Laborers had always operated the bobcats and lulls on demolition job sites at which they had worked as well as to the efficacy of such an assignment. (Tr. 22, 75, 378) They noted that while operating engineers could not get out of their vehicles to perform other necessary work, the Wrecking Laborers were allowed to do so and that the Wrecking Laborers were better able to deal with the tight quarters as well as to perform the other work necessary on a demolition jobsite. (Tr. 104) While the collective bargaining agreements of both unions contain language relating to both bobcats and lulls, Berardi and Sheridan and Brooks testified that all the work they had performed in the past, including a combined total of more than seventy years of experience in demolition construction, had utilized Wrecking Laborers on bobcats and lulls. (Tr. 21, 34, 75, 378).

Evidence relating to efficiency and the economy of assigning the work to the Wrecking Laborers was presented by Messers. Berardi, Sheridan and Rasetta. The hourly rates plus benefits for Wrecking Laborers are approximately \$20/hour less than those that must be paid to Operating Engineers. (Tr.23, OE Exh. 1, CP Exh. 2) Furthermore, Operating Engineers receive guaranteed pay for a 40 hour workweek once they begin at a site. (OE, Exh. 1, 225,370) Wrecking Laborers receive pay for the hours they work. (CP Exh. 2) Mr. Rasetta testified that the 40 hour guarantee can be changed to an hourly rate, but the contract requires employees on what is called "broken time" to receive eight hours of pay at an increased rate of pay of more than 15% over the regular hourly rate. (Tr. 370 - 373, OE Exh. 1) Making such assignments

even more difficult for employers, as employees on broken time must be notified in the workweek prior to the broken time assignment that they will not be paid for a 40 hour workweek but for an eight hour day. (OE Exh. 1) Wrecking Laborers, but not Operating Engineers, are also able to leave their machines and perform other necessary work such as rivet busting, jackhammering, knocking walls down, watering and clean up. (Tr. 105) Glenn Troy, Mr. Sheridan and Mr. Berardi all testified without disagreement from any Local 4 witness that Operating Engineers only operate equipment, they do no other work, and frequently there is need for the bobcat to be operated only for two hours a day. (Tr. 439-441) Glenn Troy testified to the times he has seen Operating Engineers waiting to be engaged who sit in the bobcat talking on the phone, sleeping or reading the newspaper. (Tr. 276, 283-284) The Wrecking Laborers, however, when a bobcat is idle, perform other necessary work on site. (Tr. 105) Even Operating Engineer witness Peretti admitted that the bobcat is not needed all day. He testified that there may be one or two hours in a workday when it is not in operation. (Tr. 225)

While the Operating Engineers professed that their members would only claim work on the machines outside of structures, when Operating Engineer Peretti testified, he made it clear that he used the bobcat inside structures to remove debris. (Tr. 225, 229) Wogan made the same admission. (Tr. 247) Mr. Sheridan testified that on Roger Peretti's first day of work he ran the bobcat, cleaning in and around the stack. (Tr. 409) Wrecking Laborers steward Glenn Troy noted that as of the date of the hearing buildings had not been penetrated so the Wrecking Laborers were utilizing bobcats outside. (Tr. 302)

#### Motion To Quash

On the first day of hearing in this matter, two months after the dispute had resulted in delays and disruption at the job site, Local 4 presented a Motion to Quash the Notice of Hearing

to the parties, claiming that its agreement with JDC required that all jurisdictional disputes be settled under the Plan for Settlement of Jurisdictional Disputes in the Construction Industry (“the Plan”). (OE Exh. 1) The October 17, 2014 letter from the Operating Engineers to the Administrator for the Plan seeking arbitration under the Plan as well as the letter from Mr. Resnick, Plan Administrator, both incorrectly assume that Samuel S. Brooks, who filed all 8(b)(4)(D) charges, was President of union signatory employer JDC. (OE Exh. 1) Mr. Brooks is not President of JDC. He is President of the Wreckers’ Association which does not have a contract with the Operating Engineers and is, therefore, not under the jurisdiction of the Plan. (CP Exh 2, 74-75) He filed the charges in the instant matter because JDC is a member of his Wreckers’ Association and because all of the Wreckers’ Association’s members have a stake in this dispute.

The Plan itself states at Article II, Section 1:

In order to process Impediment to Job Progress disputes pursuant to Article III of the Procedural Rules and Regulations and Article VI of the Plan, all parties to the dispute must be stipulated to the Plan.

At Article II Sec. 1 (b) it states:

An Employer may become stipulated to the Plan by virtue of its membership in a stipulated association of employers with authority to bind its members, a signed stipulation form setting forth that it is willing to be bound by the terms of the Plan or a provision in a collective bargaining agreement.

(OE Exh. 1 Plan)

Mr. Rasetta admitted that Local 4 did not have an agreement with the Wreckers’ Association. (Tr. 49) Additionally, neither Mr. Brooks nor his Wreckers’ Association ever stipulated to the Plan for Settlement of Jurisdictional Disputes. Mr. Brooks responded to Mr. Resnick’s letter on September 22, stating that he was not signatory to any agreement requiring

his association to utilize the Plan for Settlement of Jurisdictional Disputes. (Tr. 426- 427 (CP Exh. 16))

## ARGUMENT

### I. THE BOARD HAS JURISDICTION TO DETERMINE THIS DISPUTE

Section 8(b)(4)(D) of the National Labor Relations Act as amended (the “Act”) prohibits unions from “forcing or requiring any employer to assign particular work to employees in a particular labor organization ... rather than to employees in another labor organization” unless the union activities are meant to require conformance to a Board certification or order. The Act provides, through the Section 10(k) hearing process, a means for efficient resolution of such disputes.<sup>7/</sup>

Of great significance in the resolution of the current dispute is that just a few weeks ago the Board decided a Section 10(k) dispute that is essentially identical in all material ways to the current one. That dispute was a jurisdictional dispute in Northeastern Ohio between Operating Engineers Local 18 and a Laborers Local 310 over which local had jurisdiction over the operation of forklift and skid steer<sup>8/</sup> equipment on construction sites in areas where the geographic jurisdiction of these locals overlap. Laborers’ International Union of North America, Local 310 (KMU Trucking & Excavating), 361 NLRB No. 37 (2014) (hereinafter “Laborers’ Local 310”) (slip opinion copy attached hereto). (Tr. 11-13) In that matter the Board assigned the work in question to the Laborers. For the same reasons set out in Laborers’ Local 310, the Board should reach an identical conclusion in the instant matter.

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<sup>7/</sup> The only instance in which a 10(k) hearing is not appropriate is where all parties are bound to an alternative agreed upon method for voluntary adjustment of the dispute. As discussed in detail above and below, all parties in the current matter are not bound to such an alternative agreed upon method for the voluntary adjustment of the dispute.

<sup>8/</sup> A skid steer is “a type of small front-end loader.” Laborers’ Local 310, slip op at 1; accord Laborers International Union of North America, Local 860 (Ronyak Paving, Inc.), 360 NLRB No. 40 (2014), slip op at 1 n. 2).

A. ALL PARTIES STIPULATED THAT THE PARTIES CAME UNDER THE BOARD'S STATUTORY JURISDICTION

On the first day of the hearing all parties, including Wreckers Local 1421, Operating Engineers Local 4 and the Massachusetts Building Wreckers and Environmental Remediation Association stipulated that they came under the Board's jurisdiction to resolve this matter. (Tr. 8-11)

Most importantly, all parties stipulated that the disputed work is the operation of skid steers (Bobcats) and forklifts/lulls on all wrecking sites for the Salem Power Plant project located at 57 Fort Avenue, Salem, Massachusetts, and that Local 4 and Local 421 both claim the work in dispute. (Tr. 10-11)

Thus, the Board has jurisdiction over this dispute. See, e.g., Laborers' Local 310, slip op at 1-3.

B. THERE IS REASONABLE CAUSE FOR THE BOARD TO FIND THAT LOCAL 4 AND LOCAL 421 BOTH CLAIMED THE SAME WORK AND THAT BOTH PARTIES USED MEANS PROSCRIBED BY SECTION 8(b)(4)(D) TO SUPPORT THEIR CLAIMS TO THE DISPUTED WORK

For the Board to resolve a jurisdictional dispute, 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 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." Laborers' Local 310, slip op. at 2-3, citing Operating Engineers Local 150 (R&D Theil), 345 NRLRB 1137, 1139 (2005). This standard is easily met in the current matter.

Of note is that "to exercise its powers under § 10(k), the Board need only find that there is reasonable cause to believe that a § 8(b)(4)(D) violation has occurred" which is a lower

standard of proof than the “preponderance of the evidence” standard of proof in a § 8(b)(4)(D) violation case. NLRB v. Plasters’ Union Local 79, 404 U.S. 116, 122 n. 10 (1971).

First, and as noted above, both Local 4 and Local 1421 stipulated at the beginning of the first day of hearing that they each claimed the same work - the operation of skid steers (Bobcats) and forklifts/lulls. (Tr. 10-11) The hearing testimony and argument also made it clear that both locals claimed the same work, not only at the Salem Power Plan but also on the work of at least 10 other employers from whom Work Assignment letters were solicited by Locals 1421 and 4. (CP Exh. 1, 4; OE Exhs.4-12) In addition, at least with respect to Local 1421, “their performance of the work indicates that they claim the work in dispute.” See Laborers’ Local 310, slip op at 3, citing Sheet Metal Workers Local 54 (Goodyear Tire & Rubber Co.), 203 NLRB 74, 76 (1973). Of course, and as noted above, this is the same type of work dispute between locals of the Operating Engineers and Laborers that was faced recently by the Board in Laborers’ Local 310, slip op. at 1-2 & 6.

Next, and as demonstrated below there is “reasonable cause to believe that ... a party has used proscribed means to enforce its claim to that work.” Indeed, in the current matter both locals, not just one of them, attempted to force or require JDC to assign this disputed work on bobcats and lulls to members of their respective locals by means proscribed by Section 8(b)(4)(D). See Laborers’ Local 310, slip op. at 2-3.

i. Local 1421’s Proscribed Means

Local 1421 engaged in proscribed conduct in an attempt to force JDC to give them the disputed work. More specifically, on September 12, 2014, Local 1421 Business Manager Thomas Troy sent a letter to JDC stating:

”I am now requesting that you immediately remove any and all Local 4 Operators from all the 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.” (CP Ex. 3)

This is the same type of letter from a Laborers’ union local to an employer which the Board has found to be a “proscribed means” in the context of a jurisdictional dispute with Operating Engineers. See, e.g., Laborers’ Local 310, slip op. at 2-3. More specifically, in that matter such reasonable cause for proscribed was found by the Board based on a letter from that local’s Business Agent Terry Joyce to the employers “objecting to any assignment of the forklift and skid steer work to the Operating Engineers represented employees” and stating that “members of the Laborers would picket and strike any projects where forklift and/or skid steer work was assigned to employees other than those represented by Laborers.” Quite simply, “[t]hese statements constitute threats to strike over the assignment of forklift and ski steer work, and such threats are a proscribed means of enforcing claims to disputed work.” Laborers’ Local 310, slip op. at 2-3, citing Operating Engineers Local 150 (R&D Theil), 345 NLRB 1137, 1140 (2005); accord Laborers International Union of North America, Local 860 (Ronyak Paving, Inc.), 360 NLRB No. 40 (2014), slip op at 4; Teamsters Local 20 (Midwest Terminals of Toledo International, Inc.), 359 NLRB No. 107, slip op. at 2-3 (2013); Laborers International Union of North America, Local No. 6 (Anderson Interiors, Inc), 353 NLRB No. 62, slip op. at 2 (2008) (in a 10(k) context, a union job action that has an objective of obtaining disputed work “is sufficient to bring the union’s conduct within the ambit of Section 8(b)(4)(D).”)

Furthermore, on September 26, 2014, Mr. Troy pulled all laborers (45 – 50 workers) off the jobsite because an operating engineer from Local 4 was working on a bobcat and Mr. Troy thought he could engage in the same type of job actions in which the Operating Engineers had engaged in order to have the work returned to his members. (Tr. 102)

These actions, both individually and jointly, are clear and convincing evidence of proscribed conduct by Local 421, and certainly meet the “reasonable cause” standard.

ii. Local 4’s Proscribed Means

Although the Board need only have reasonable cause to find the use of proscribed means in a Section 10(k) jurisdictional dispute by “a party” (i.e., one local), in this case reasonable cause exists to find that both locals engaged in such conduct.

Local 4’s proscribed means included its Business Agent Paul Diminico financially threatening Chris Berardi, and then his pulling Local 4 workers from the jobsite on August 22 and August 29, 2014, when Mr. Berardi and JDC did not agree to Local 4’s demands for the disputed work.

On August 21, 2014, Mr. Diminico threatened JDC President Chris Berardi with a walkout if Berardi did not assign an operating engineer to the bobcat being operated by a Laborer. (Tr. 25, 136) The very next day (August 22), four operating engineers from Local 4 walked off the job after speaking with Mr. Diminico. Local 4 claims that the four operating engineers left the jobsite because “Tank # B-5 had been breached” and there were fumes which made them feel sick. (Tr. 143, 239) The evidence presented by the Charging Party, however, unambiguously demonstrated that the tank at issue had been breached well before August 22<sup>nd</sup> and that it also had been cleaned of all fuel well before that date. (CP Exh. 8, 21, 22) The second tank they allege was emanating fumes, was already demolished as of August 22 as was proved by the daily photos submitted in evidence. (CP Exhs., 17, 21, 22) Furthermore, only two of the operating engineers were working anywhere near where the fumes were alleged to be, and none of these operating engineers went to a doctor or hospital for treatment. Instead, they returned to the site following that 2 to 3 hour walkout even though no changes had been made to the areas or

tanks supposedly emitting fumes. (Tr. 385-390; CP Exh. 8) In addition, they did not return to work with the same alacrity and dedication they had showed prior to that time. (Tr. 438)

A second Local 4 walkout occurred on August 29, this one allegedly motivated by Mr. Diminico's loss of the security badge needed to enter the site. In fact, that morning he had been asked by Mr. Sheridan if he wished to enter the site. (Tr. 414-415) Mr. Diminico had stated he did not wish to enter the site but then appeared on site without the escort required by Justin Paige, owner and manager of Footprint. (Tr. 65, 416)

In addition, there was a threat of economic coercion by Local 4. More specifically, JDC President Chris Berardi testified that he met with Local 4 Business Manager Louis Rasetta and asked him, as Co-Chair of the Cooperative Trust Fund, to stop holding the funds that had been allocated to J. Derenzo (the site development company that owns JDC). (Tr. 25-26, 35) Mr. Berardi said that Mr. Rasetta said he knew nothing about it but that the funds would start flowing again. (Tr. 35) Local 4 submitted into evidence proof that following that meeting, Local 4 agreed to commit \$113,760 in funds to J. Derenzo. (OE Exhs. 13-15)

The fact that the Local 4 Business Agent and Business Manager used subterfuge to disguise their threats and actions does not change the fact that on the facts of this matter reasonable cause clearly exists for the Board to find that Local 4 used prescribed means against JDC.

C. THE CHARGING PARTY HAD NOT AGREED UPON A METHOD FOR THE VOLUNTARY RESOLUTION OF JURISDICTIONAL DISPUTES INVOLVING LOCAL 4 AND LOCAL 1421

Finally, for this matter to be resolved on the merits, the Board must find "that the parties have not agreed upon a method of voluntary adjustment of the dispute." See Laborers' Local 310, slip op at 3, citing Operating Engineers Local 150 (R&D Theil), 345 NRLRB 1137, 1139

(2005). Although Local 4 (but not any other party including Local 1421) claimed at the hearing that all parties agreed upon a method for the voluntary resolution of jurisdictional disputes, this claim is without merit as (among other things) the Charging Party never agreed to such a method.

In the instant matter, Local 4's agreement with JDC states at Article XVII, Section 5, that jurisdictional disputes are to be resolved by the Plan for Settlement of Jurisdictional Disputes in the Construction Industry. (OE Exh. 1)

However, it is undisputed that the agreement of the Association with Local 1421, which was signed by JDC, has no such requirement. (CP Exh. 2) In fact, the Arbitration clause of this agreement specifically excludes jurisdictional disputes. (CP Exh. 2) This is dispositive on this issue, since even if the Board finds that Local 1421 was bound (for example, by its International) to use the same voluntary method of adjudication as Local 4, the fact that the Association never agreed to this method of dispute resolution requires the 10(k) matter to be adjudicated on the merits by the Board. See Laborers International Union of North America, Local No. 6 (Anderson Interiors, Inc), 353 NLRB No. 62, slip op. at 3 (2008).

Furthermore, the Charging Party, which represents over 70 demolition employers, has no collective bargaining agreements except its agreement with Local 1421 (which, as noted above, has no provision for the resolution of jurisdictional disputes).<sup>9/</sup> Because the Association, a party to this matter, has not agreed to submission of such disputes to the Plan, there can be no question but that all of the parties to this 10(k) matter are not bound to secure the services of the Plan for Settlement of Jurisdiction Disputes or any other voluntary method for the resolution of jurisdictional disputes where both unions and the Wreckers' Association have not agreed to a

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<sup>9/</sup> The Association is involved in this Section 10(k) matter because its members have been approached by either or both Local 1421 and Local 4 requesting that each employer take sides with regard to the issue.

singular method of resolution. See NLRB v. Plasters' Union Local 79, 404 U.S. 116, 124-137 (1971) (when both union parties, but not the employer, has agreed to a single method for the voluntary adjudication of a 10(k) jurisdictional dispute, the NLRB must decide the matter – especially since “Congress had expressed a clear preference for Board decision as compared with compelled arbitration”); Operating Engineers Local 150 (Diamond Core Co), 331 NLRB No. 179 (2000) (when all of the parties in a 10(k) matter have not agreed to “a single method of voluntary adjustment” of their dispute, then the Board must decide the matter on the merits).

D. THIS DISPUTE IS NOT ABOUT WORK PRESERVATION

At the very end of the hearing, the Operating Engineers stated that they intended to raise a “work preservation” claim. There is no merit in such a claim. The record clearly demonstrates that Local 1421 wrecking laborers were operating the one bobcat on the Salem Power Plant site and the lull prior to the Operating Engineers making their claim. (Tr. 24, 29, 128, 467) Furthermore, Mr. Berardi testified without challenge from the Operating Engineers that the wrecking laborers operated both bobcats and lulls at all projects on which JDC or his previous employer, NASDI, were engaged in demolition. (Tr.54,69) The Operating Engineers did not put into evidence a single demolition site at which they had operated bobcats and lulls.<sup>10/</sup>

Just as was found in the Laborers' Local 310 matter, the Operating Engineers’ “‘objective is not work preservation, but work acquisition,’ and the Board will resolve the dispute through a 10(k) proceeding.” See Laborers' Local 310, slip op at 3, citing Electrical Workers Local 48 (Kinder Morgan Terminals), 357 NLRB No. 182, slip op. at 3 (2011).

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<sup>10/</sup> Indeed, even if *arguendo* Local 4 Operating Engineers had occasionally performed the disputed work, “an isolated assignment provides no basis to raise a work preservation claim regarding the disputed work.” Laborers International Union of North America, Local 860 (Ronyak Paving, Inc.), 360 NLRB No. 40 (2014), slip op at 4.

II. THE BOARD SHOULD ISSUE A DETERMINATION THAT EMPLOYEES REPRESENTED BY LOCAL 1421 ARE ENTITLED TO PERFORM THE WORK IN DISPUTE

“Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors” the wording of collective bargaining agreements, past practice and employer preference, area and industry practice, relative skills and training, and economy and efficiency of operations. Laborers’ Local 310, slip op. at 3, citing NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting), 364 U.S. 573, 577-579 (1961). In so doing, 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.” Laborers’ Local 310, slip op. at 3. citing Machinists Lodge 1743 (J.A. Jones Construction), 135 NLRB 1402, 1410-1411 (1962).

A. CERTIFICATIONS AND COLLECTIVE BARGAINING AGREEMENTS

It is undisputed that the work in dispute is not directly covered by any Board orders or certifications.

The work jurisdiction article of the Local 1421 agreement claims the work of operating bobcats/skid steers and lulls. Specifically, Section 1 of Article XVIII of the Local 1421 agreement states:

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 . . .

In contrast, the work jurisdiction article of Local 4 mentions fork lifts (lulls) but not bobcats. Specifically, Part C- Article II of the Local 4 agreement (OE Exh. 1) states:

(T)he local has jurisdiction over hoisting and portable engines, boilers, and machinery operated by steam or mechanical power, including pumps, compressors, syphons, pulsometers, fork lifts, . . . all power shovels, cranes scrapers, tractors, bulldozers,

gradalls, shovel dozers, front end loaders. . . or any machine used irrespective of its motive power.<sup>11/</sup>

Accordingly, this factor, because of the specific mention of bobcats in the jurisdiction article should favor the assignment of the work to employees that are members of Local 1421, or is (at most) neutral on this point.

B. EMPLOYER PREFERENCE AND PAST PRACTICE

The President of JDC testified, without any evidence being submitted to the contrary, that it has universally been his and the JDC's past practice and preference to utilize Wreckers Local 1421 members on skid steers (Bobcats) and forklifts/lulls on all its demolition work both inside and outside the structures being demolished. (Tr. 21)

Similarly, in the recent Board matter on this same type of dispute in Ohio, the Board noted that "the Employers testified that they prefer assigning the disputed skid steer and forklift work to employees represented by Laborers." See Laborers' Local 310, slip op at 4. The Board, in that decision, also notes that "the Employers' representatives testified that assignment of this work to their Laborers-represented employees is consistent with their past practice. Id. Importantly, the Board in that matter went on to conclude that while there was evidence of "isolated instances when one of the Employers may have used an employee represented by Operating Engineers to operate a forklift or skid steer", this evidence "neither demonstrates the existence of a practice of using Operating Engineers-represented employees nor shows that the Employers' past practice of using Laborer-represented employees is inconclusive." Laborers' Local 310, slip op. at 4, citing Laborers Local 210 (Surianello General Concrete Contractors), 351 NLRB 210, 212 (2007); Elevator Constructors Local 2 (Kone, Inc.), 349 NLRB 1207, 1210 (2007); Millwrights Local 1026 (Intercounty Construction Corp.), 266 NLRB 1049, 1052 (1983).

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<sup>11/</sup> Bobcats are, however, mentioned elsewhere in the Local 4 agreement.

Thus, the Board in that matter found that “the factor of employer preference and past practice favors an award of the work in dispute to employees represented by Laborers.” Laborers’ Local 310, slip op. at 4; accord Operating Engineers Local 150 (Diamond Core Co), 331 NLRB No. 179 (2000).

There is no evidence on the record in the instant matter of JDC ever using Local 4 operators on fork lifts or Bobcats. For all of the same reasons, this factor favors the assignment of the work to employees who are members of Local 1421.

C. AREA AND INDUSTRY PRACTICE

Mr. Berardi, who has worked in demolition in Massachusetts for over 20 years, 2 years with JDC and 20 years as owner and manager of NASDI, testified that he has never in his years of demolition experience utilized operating engineers on bobcats and lulls at demolition jobsites. (Tr. 21) Mr. Brooks, the President of the Association, who owned and managed a demolition company, Edifice Wrecks, for thirty five years also testified that he had always utilized Local 1421 Laborers on bobcats and lulls at his jobsites. (Tr. 75)

This testimony is consistent with the testimony in the recent Laborers’ Local 310 matter that forklift and skid steer work was assigned by employers to employees who are members of the Laborers local. See Laborers’ Local 310, slip op at 2 (“witnesses for five of the Employers testified that, the time that they have worked for their respective employers, the forklift and skid steer work was always assigned to employees represented by Laborers.”) & 3 (“the Employers have consistently assigned work of the kind in dispute to employees represented by Laborers.”) On this basis, the Board found in that case that “this factor favors an award of the work in dispute to employees represented by Laborers.” Laborers’ Local 310, slip op. at 5.

Accordingly, this factor favors the assignment of the work to employees who are members of Local 421.

D. RELATIVE SKILLS AND TRAINING

The members of both unions assigned work on either bobcats or lulls had training and appropriate licenses to operate the equipment. (Tr., 34, 103, OE Exhs. 6, 7) However, Mr. Berardi testified without rebuttal that the wrecking laborers represented by Local 1421 have more experience and are more capable in working in the small areas in which the bobcats operate, particularly when they are inside buildings, and also with use of the claw bucket on interior and exterior demolition. (Tr. 49) Mr. Troy noted that the Local 1421 Wrecking Laborers also have special expertise in remediation in which bobcats and lulls are utilized (Tr. 97 -98) Business Manager Troy also stated that there is a difference in operating a bobcat for site development as opposed to demolition. In demolition work, the spaces are smaller, debris may be falling and work is at a faster pace than on site development jobs. (Tr. 87 -88)

Accordingly, this factor favors the assignment of the work to employees who are members of Local 421.

E. ECONOMY AND EFFICIENCY OF OPERATIONS

The Local 4 operating engineer's pay plus mandatory benefit package is approximately \$20/hour more than that of the Local 1421 laborers. (Tr. 23; OE Exh. 1; CP Exh. 2)

In addition, the Local 4 operating engineer agreement requires that its members be paid for a 40 hour workweek or receive a 15 – 20% increase in pay for an 8 hour guarantee of daily pay which is called "broken time." (Tr. 23; OE Exh. 1) The Local 1421 laborers have no such provisions in their agreement.

Furthermore, Local 4 operating engineers can do no other work than operate the machines to which they are assigned. Thus, for example, when need for a bobcat or lull is sporadic and there is manual labor to be done, the operating engineer will wait for this manual labor to be completed. In sharp contrast, laborers will work both on and off the bobcats and lulls. (Tr. 105) Since the machines are often needed for as little as 2 hours a day, laborers can perform many other duties on the jobsite when the machines are not working. ( Tr. 439-441)<sup>12/</sup>

In short, it is less expensive and more efficient to utilize laborer employees represented by Local 1421, who are flexible in their work assignments, than the operating engineer employees represented by Local 4.

Similarly, this Board found in the Laborers' Local 310 jurisdictional dispute decided in September 2014 the same facts:

“Representatives of each of the Employers testified that it is more efficient and economical for them to assign the operation of forklifts and skid steers to employees represented by Laborers. They testified that their utilization of forklifts and skid steers is sporadic and is usually intermittent throughout the day. They stated that Laborers represented employees perform multiple tasks in addition to the disputed work and, therefore, can leave the forklift or skid steer when it is not in use to perform these other tasks, which are duties that Operating Engineers-represented employees do not perform. They further explained that it would not be economical to hire employees represented by Operating Engineers to occasionally perform the work in dispute while also retaining employees represented by Laborers to perform the other work within Laborers’ jurisdiction. They additionally testified that, because forklifts and skid steers are only used approximately 25 to 50 percent of the time, Operating Engineers-represented employees would be idle for substantial periods of time, when the equipment was not in use.”

Laborers’ Local 310, slip op at 5, citing Seafarers International Union (Luedtke Engineering Co.), 355 NLRB 302, 305 (2010); Laborers (Eshbach Bros., LP), 344 NLRB 201, 204 (2005).

On this basis, the Board then found that “this factor favors an award of the disputed work to the Laborers-represented employees.” Laborers’ Local 310, slip op. at 5.

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<sup>12/</sup> Even Local 4 operating engineer Peretti, a witness called by Local 4, admitted that there were times where he was idle for 1½ or two hours a day because there was no work for his machine. (Tr. 225)

Similar economy and efficiency factors led the Board to find the same way, in favor of the Laborers local and against an Operating Engineers local, in a yet another recent jurisdiction dispute between these two unions concerning the operation of skid steers and similar small machines. Laborers International Union of North America, Local 860 (Ronyak Paving, Inc.), 360 NLRB No. 40 (2014), slip op at 6-7. In that matter the Board concluded:

“Petersen testified that it is more economical and efficient to use employees represented by Laborers to perform the work in dispute, which involves operation of machinery only 1 hour to 3 hours a day. Employees represented by Laborers perform various other manual labor tasks during the remainder of the day. In contrast, employees represented by Operating Engineers would work the 1 to 3 hours on the skid steer or farm tractor and then, as Petersen testified, “would probably just sit in the machine” for the rest of the day. Petersen emphasized: “[s]o we’re going to pay an Operator 8 hours for the day to stay in that machine that is 1 to 3 hours.” Russell corroborated Petersen’s testimony. He stated that on jobs where employees represented by Operating Engineers used skid steers and farm tractors, the employer would have to pay those employees “8 hours even though it’s a 1 to 2 hour operation.” We find that, because employees represented by Laborers are able to perform additional work on these projects when not performing the work in dispute, this factor favors an award to these employees.”

Id., citing Laborers (Eshbach Bros. LP), 344 NLRB 201, 204 (2005)(greater versatility of Laborers- represented employees supported award of disputed work to them instead of employees represented by Operating Engineers), Wisconsin Laborers District Council (Miron Construction Co.), 309 NLRB 756, 757 (1992) (same).

For all of these reasons, this factor favors the assignment of the work to employees who are members of Local 421.

#### F. CONCLUSION

As every factor favors the assignment of the work to employees who are members of Local 421 (or is at most neutral), the Board should award this work to the members of Wrecking Laborers Local 421. Accord Laborers’ Local 310, slip op at 5-6 (awarding, on very similar facts, the disputed work to the employees represented by the Laborers’ union).

III. THE SCOPE OF THE BOARD'S DETERMINATION SHOULD COVER THE OVERLAPPING GEOGRAPHIC JURISDICTIONS OF LOCALS 4 AND 1421

In the instant matter both Locals 4 and 1421 have taken their message of control over bobcats and lulls at demolition sites to numerous employers in an attempt to control the work within their overlapping geographic jurisdictions. (Tr. 90-92, CP Exh3; OE Exhs. 2, 10, 11, 14)

In order to avoid the further disputes which are likely to occur, the Board can and should grant an area wide award of jurisdiction to the Laborers. The Board has held this to be the case when the local that does not prevail in the 10(k) matter "has a proclivity to violate Section 8(b)(4)(D) and that dispute is likely to recur." Laborers' Local 310, slip op at 6 (awarding the disputed work to the employees represented by the Laborers' union on an area wide basis). This is exactly the case with the current matter.

Respectfully submitted,

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Dated: November 14, 2014

**CERTIFICATE OF SERVICE**

I, Geoffrey R. Bok, co-counsel for the Charging Parties in Case Nos. 01-CD-137069 and 01-CD-138333, certify that I have served a copy of the Post-Hearing Brief of the Massachusetts Building Wreckers and Environmental Remediation Specialists Association upon the following persons, by electronic mail, on the fourteenth day of November, 2014 at the addresses below:

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**Laborers' International Union of North America, Local 310 and KMU Trucking & Excavating, Schirmer Construction Co., Platform Cement, Inc., 21st Century Concrete Construction, Inc., Independence Excavating, Inc., Donley's Inc. and International Union of Operating Engineers, Local 18, AFL-CIO.** Cases 08-CD-109665, 08-CD-109666, 08-CD-109671, 08-CD-109683, 08-CD-109709 and 08-CD-114937

September 3, 2014

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA  
AND JOHNSON

This is a consolidated jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act, as amended, following the filing of charges in Case 08-CD-109665 on July 23, 2013<sup>1</sup> by KMU Trucking & Excavating (KMU). Additional charges were filed on July 23 in Case 08-CD-109666 by Schirmer Construction Co. (Schirmer); on July 23 in Case 08-CD-109671 by Platform Cement, Inc. (Platform); on July 23 in Case 08-CD-109683 by 21st Century Concrete Construction, Inc. (21st Century); on July 23 in Case 08-CD-109709 by Independence Excavating, Inc. (Independence); and on October 18 in Case 08-CD-114937 by Donley's Inc. (Donley's).<sup>2</sup> The Employers<sup>3</sup> allege that Laborers' International Union of North America, Local 310 (Laborers) violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing the Employers to assign certain work to employees it represents rather than to employees represented by International Union of Operating Engineers, Local 18 (Operating Engineers). An order consolidating cases and notice of hearing issued September 30, 2013, a second order consolidating cases and notice of hearing issued December 13, 2013, and a hearing was held on January 13 and January 14, 2014, before Hearing Officer Melanie R. Bordelois.<sup>4</sup> Thereafter, the Employers, Operating Engi-

neers, and Laborers filed posthearing briefs.<sup>5</sup> 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.

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 in the 12-month period prior to the hearing, Employers KMU, Schirmer, Platform, 21st Century, Independence, and Donley's each purchased and received materials valued in excess of \$50,000 directly from points located outside the State of Ohio. The parties further stipulated, and we find, that the Employers are 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 of the Dispute*

The Employers, all of whom operate in northeastern Ohio, are involved in various aspects of construction work ranging from site development and demolition to general contracting and concrete work, and have employed employees represented by both Operating Engineers and Laborers for many years. They have also all been signatories to a series of successive collective-bargaining agreements, negotiated by the Construction Employer's Association of Greater Cleveland (CEA) with both Unions.<sup>6</sup> The respective contracts cover construction work performed in Cuyahoga County in northeastern Ohio, where the jobsites at issue in this case are located. The most recent of these contracts are effective from 2012 through 2015.<sup>7</sup>

The Employers utilize various kinds of equipment in their construction projects, including forklifts and skid steers, a type of small front-end loader. Representatives of the Employers testified that they have a long-held

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and Laborers. *Donley's I* involved Laborers Locals 310 and 894; *Donley's II* involved Laborers Local 310. Laborers and the Employers moved that the records in those cases be incorporated into the instant proceeding, and the hearing officer granted the motion.

<sup>5</sup> Laborers filed a brief stating that it incorporates the Employers' posthearing brief and adopted the Employers' arguments as its own.

<sup>6</sup> CEA is a multiemployer bargaining association that represents construction industry employers in negotiating and administering collective-bargaining agreements with various labor organizations.

<sup>7</sup> The CEA-Operating Engineers contract states that it is effective May 1, 2012 through April 30, 2015. Although it does not include exact dates, the CEA-Laborers was entered into on May 1, 2012 and states that it is effective from 2012 through 2015.

<sup>1</sup> All dates are in 2013 unless otherwise indicated.

<sup>2</sup> We note that the hearing officer inadvertently stated in her report that these dates were in 2012.

<sup>3</sup> KMU, Schirmer, Platform, 21st Century, Independence, and Donley's will be referred to as "the Employers."

<sup>4</sup> In two recent related cases, *Laborer's Local 894 (Donley's, Inc.) (Donley's I)*, 360 NLRB No. 20 (2014), and *Operating Engineers Local 18 (Donley's, Inc.) (Donley's II)*, 360 NLRB No. 113 (2014), the Board found reasonable cause to believe that Sec. 8(b)(4)(D) had been violated with respect to two disputes involving Operating Engineers Local 18

practice of assigning the operation of forklift and skid steer equipment to employees represented by Laborers. Specifically, witnesses for five of the Employers testified that, in the time they have worked for their respective employers, the forklift and skid steer work was always assigned to employees represented by Laborers. In addition, Rob DiGeronimo, vice president of Independence, testified that Independence has assigned its forklift and skid steer work to employees represented by Laborers except that, on the “rare” occasion when it had “full-time, continuous work,” it would assign the work to employees represented by Operating Engineers.

After the ratification of successor 2012–2015 contracts between CEA and Laborers and CEA and Operating Engineers, the Employers began work on various construction projects in Cuyahoga County. On each of these projects, the forklifts and/or skid steers were operated by employees represented by Laborers. Upon learning of the assignment of this work to employees represented by Laborers, Operating Engineers filed “pay-in-lieu” grievances against each Employer, seeking the payment of wages and fringe benefits for each day that employees other than those represented by Operating Engineers operated the forklift and/or skid steer equipment on the construction projects.

Following the filing of each pay-in-lieu grievance, the recipient Employer sent a letter to Laborers’ business manager, Terence Joyce, stating that if it were to lose the grievance it would need to reassign the forklift and skid steer work to employees represented by Operating Engineers. Joyce sent each Employer a letter in response, stating that if the forklift and skid steer work were reassigned to Operating Engineers-represented employees, Laborers would “picket and strike any and all projects where such assignments took place.”

#### B. *Work in Dispute*

The work in dispute in Case 08–CD–109665 (KMU) involves the operation of forklifts and skid steers as part of a construction project at Equity Trust in Westlake, Ohio. The work in dispute in Case 08–CD–109666 (Schirmer) involves the operation of skid steers as part of a construction project at South Pointe Hospital in Warrensville Heights, Ohio. The work in dispute in Case 08–CD–109671 (Platform) involves the operation of skid steers as part of a construction project at Equity Trust in Westlake, Ohio. The work in dispute in Case 08–CD–109683 (21st Century) involves the operation of forklifts as part of a construction project at Southwest General Hospital in Middleburg Heights, Ohio. The work in dispute in Case 08–CD–109709 (Independence) involves the operation of forklifts and skid steers as part of a construction project at Alcoa in Cleveland, Ohio. Lastly, the

work in dispute in Case 08–CD–114937 (Donley’s) involves the operation of forklifts and skid steers as part of a construction project at University Hospitals’ Lot 59 Garage in Cleveland, Ohio and the operation of forklifts as part of a construction project at Commerce Park in Beechwood, Ohio.

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

The Employers and Laborers contend that there are competing claims for the work in dispute, that there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated by the threats to picket and strike over the assignment of forklift and skid steer work at the construction projects referenced above,<sup>8</sup> and that the work in dispute should be awarded to employees represented by Laborers based on the factors of employer preference and past practice, area and industry practice, and economy and efficiency of operations. Finally, they contend that a broad area wide award is warranted, coinciding with the territorial jurisdiction of Operating Engineers Local 18, because it is likely that disputes over the assignment of forklift and skid steer work will arise on future projects.

Operating Engineers contends that the notice of hearing should be quashed because it has not claimed the work in dispute. Operating Engineers contends that it is merely seeking economic damages for breaches of the CEA-Operating Engineers contract, and thus the disputes are not cognizable under Section 10(k). Operating Engineers further argues that the notice of hearing should be quashed because Laborers’ threat to picket and strike was a sham, resulting from collusion with the Employers to manufacture a jurisdictional dispute. Operating Engineers alternatively contends that, if the notice of hearing is not quashed, the disputed work should be awarded to employees it represents based on the factors of collective-bargaining agreements, employer preference and past practice, area and industry practice, economy and efficiency of operations, and relative skills and training. Lastly, Operating Engineers contends that the scope of the award, if any is made, must be limited to the jobsites that were the subject of Operating Engineers’ pay-in-lieu grievances.

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

The Board may proceed with a determination of a dispute under Section 10(k) of the Act only if there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. *Operating Engineers Local 150 (R&D Thiel)*,

<sup>8</sup> They also point to evidence from *Donley’s I* and *Donley’s II* that, prior to the filing of the charges in this case, Operating Engineers threatened to strike over forklift and skid steer work at other worksites in the Cleveland area.

345 NLRB 1137, 1139 (2005). 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 on a method of voluntary adjustment of the dispute. *Id.* On this record, we find that this standard has been met.

#### 1. Competing claims for work

We find reasonable cause to believe that both Unions have claimed the work in dispute for the employees they respectively represent. Laborers has claimed the work by its letters from Local Business Manager Terry Joyce to each of the Employers, objecting to any assignment of the forklift or skid steer work to Operating Engineers-represented employees. In addition, “their performance of the work indicates that they claim the work in dispute.” *Sheet Metal Workers Local 54 (Goodyear Tire & Rubber Co.)*, 203 NLRB 74, 76 (1973); see also *Operating Engineers Local 513 (Thomas Industrial Coatings)*, 345 NLRB 990, 992 fn. 6 (2005) (same), citing *Laborers Local 79 (DNA Contracting)*, 338 NLRB 997, 998 fn. 6 (2003) (same).

We also find, despite its claims to the contrary, that Operating Engineers has claimed the disputed work. Operating Engineers filed pay-in-lieu grievances against each of the Employers, alleging contract violations with respect to their assignment of forklift and/or skid steer work to employees represented by Laborers. “The Board has long held that pay-in-lieu grievances alleging contractual breaches in the assignment of work constitute demands for the disputed work.” *Operating Engineers Local 18 (Donley’s, Inc.) (Donley’s II)*, 360 NLRB No. 113, slip op. at 4 (2014), citing *Laborers Local 265 (AMS Construction)*, 356 NLRB No. 57, slip op. at 3 (2010); *Laborers (Eshbach Bros., LP)*, 344 NLRB 201, 202 (2005).

Moreover, we find no merit in Operating Engineers’ contention that it has made a work preservation claim. The record shows that Laborers-represented employees were performing the forklift and skid steer work at all of the Employers’ construction projects, and that the Employers have consistently assigned work of the kind in dispute to employees represented by Laborers. Where, as here, a labor organization is claiming work that has not previously been performed by employees it represents, the “objective is not work preservation, but work acquisition,” and the Board will resolve the dispute through a 10(k) proceeding. *Electrical Workers Local 48 (Kinder Morgan Terminals)*, 357 NLRB No. 182, slip op. at 3 (2011), and cases cited.

#### 2. Use of proscribed means

We find reasonable cause to believe that Laborers used means proscribed by Section 8(b)(4)(D) to enforce its claims to the work in dispute. As set forth above, Laborers’ Local business manager, Terry Joyce, sent a letter to each Employer stating that members of Laborers would picket and strike any projects where forklift and/or skid steer work was assigned to employees other than those represented by Laborers. These statements constitute threats to strike over the assignments of forklift and skid steer work, and such threats are a proscribed means of enforcing claims to disputed work. *Operating Engineers Local 150 (Patten Industries)*, 348 NLRB 672, 674 (2006).

We find no merit in Operating Engineers’ assertion that the Employers have colluded with Laborers to fashion a sham jurisdictional dispute. The Board has consistently rejected this argument “[i]n the absence of affirmative evidence that a threat to take proscribed action was a sham or was the product of collusion.” *Operating Engineers Local 150 (R&D Thiel)*, above, 345 NLRB at 1140; see also *Donley’s II*, above, slip op. at 5. In this case, there is no evidence that Laborers’ written threats to “picket and strike” over the assignment of the disputed work were the result of collusion with CEA and/or the Employers or were otherwise not genuine.

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

We further find no agreed-upon method for voluntary adjustment of the dispute to which all parties are bound. The Employers and Laborers stipulated accordingly, and Operating Engineers provided no evidence or argument to the contrary.

Based on the foregoing, we find that there are competing claims for the work in dispute, there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, and there is no agreed-upon method for the voluntary adjustment of the dispute. We accordingly find that the 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 (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

The work in dispute is not covered by any Board orders or certifications.

As noted above, the Employers are signatories to a multiemployer collective-bargaining agreement with Operating Engineers. Paragraph 10 of the current collective-bargaining agreement between the CEA and Operating Engineers states:

In accordance with the terms of this Agreement, the Employer shall employ Operating Engineers for the erection, operation, assembly and disassembly, and maintenance and repair of the following construction equipment regardless of motive power: . . . Forklifts, Skid steers . . . .

The Employers are also signatory to a separate multiemployer collective-bargaining agreement with Laborers. Article 1, section 7 of that agreement specifies numerous types of work within the jurisdiction of Laborers. Each provision states:

The operation of forklifts, . . . [and] skid-steer loaders, . . . when used in the performance of the aforementioned jurisdiction shall be the work of the laborer [or laborers].

We find that the language in both contracts covers the work in dispute. Therefore, the factors of certifications and collective-bargaining agreements do not favor an award to either group of employees.

#### 2. Employer preference and past practice

Representatives of the Employers testified that they prefer assigning the disputed skid steer and forklift work to employees represented by Laborers.

In addition, the Employers' representatives testified that assignment of this work to their Laborers-represented employees is consistent with their past practice. Specifically, Representatives for KMU, Schirmer, Platform, 21st Century, and Donley's testified that they always assign work of the kind in dispute to employees represented by Laborers.<sup>9</sup> Rob DiGeronimo, vice presi-

<sup>9</sup> Kevin Urig, owner of KMU, testified that since 2010, when KMU became a signatory to the Laborers-CEA agreement, KMU has assigned its forklift and skid steer work solely to Laborers. Urig further testified that, prior to signing the Laborers-CEA agreement, KMU did not use forklifts and it assigned skid steer work almost exclusively to non-union employees. John Roche, vice president of Schirmer, testified that, during his 30 years with Schirmer, Schirmer's forklifts and skid steers have been operated exclusively by employees represented by Laborers. Jason Klar, president of Platform, testified that Platform

dent of Independence, testified that Independence assigns forklifts and skid steers to Laborers except on "rare" occasions when they would assign the work to Operating Engineers, which occurred "less than five percent" of the time.

Operating Engineers cites to evidence of isolated instances when one of the Employers *may* have used an employee represented by Operating Engineers to operate a forklift or skid steer.<sup>10</sup> Such evidence, however, neither demonstrates the existence of a practice of using Operating Engineers-represented employees nor shows that the Employers' past practice of using Laborers-represented employees is inconclusive.<sup>11</sup> See, e.g., *Laborers Local 210 (Surianello General Concrete Contractor)*, 351 NLRB 210, 212 (2007); *Elevator Constructors Local 2 (Kone, Inc.)*, 349 NLRB 1207, 1210 (2007); *Millwrights Local 1026 (Intercounty Construction Corp.)*, 266 NLRB 1049, 1052 (1983).

We find, therefore, that the factor of employer preference and past practice favors an award of the work in dispute to employees represented by Laborers.

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has assigned its forklift and skid steer work solely to employees represented by Laborers since Platform became a signatory to the Laborers-CEA agreement in 2002. Patrick Butler, president of 21st Century, testified that 21st Century has assigned its forklift and skid steer work to employees represented by Laborers since the company was founded in 2001. Mike Dille, Donley's vice president of concrete operations, and Greg Przepiora, Donley's operations manager of Concrete, testified that during their 14 and 16 years, respectively, with Donley's, the forklift and skid steer work has always been assigned to employees represented by Laborers.

<sup>10</sup> In addition to DiGeronimo's testimony, above, about the rare occurrences, Operating Engineers cites to the following evidence in the record: (a) a picture of someone who resembles an Operating Engineers-represented employee on a skid steer at a Platform site at an unspecified time; (b) the testimony of KMU owner Kevin Urg that KMU utilized Operating Engineers-represented employees "at one point in time"; (c) the testimony of 21st Century President Patrick Butler that he reassigned a skid steer from a Laborers-represented employee to an Operating Engineers-represented employee for about a week at a job site in Southwest Ohio after "the Operators BA . . . threatened my laborers on site"; and (d) the testimony of Operating Engineers member David Russell that he witnessed the intermittent operation of a skid steer and forklift by an Operating Engineers member at a Schirmer jobsite.

<sup>11</sup> Relying on *Longshoremen ILWU Local 50 (Brady-Hamilton Stevedore Co.)*, 223 NLRB 1034, 1037 (1976), reconsideration granted and decision rescinded on other grounds 244 NLRB 275 (1979), Operating Engineers also contends that the Employers' stated preference should be treated with skepticism because it is based on a sham. We find no merit in this argument. First, as noted above, the stated preference is consistent with the Employers' past practice. Second, *Longshoremen ILWU Local 50* is distinguishable because the employer's preference in that case changed after the charged union initiated a work action. *Id.* No such change has occurred here.

### 3. Area and industry practice

The Employers and Laborers argue that area and industry practice supports an award of the disputed work to Laborers-represented employees. In *Donley's II*,<sup>12</sup> Tim Linville, executive vice president of the CEA, testified that forklifts and skid steers are usually assigned to Laborers-represented employees and are sometimes assigned to carpenters or iron workers. And in both this proceeding and *Donley's II*, Joyce testified that, in his experience, the area practice in the building industry of Northeast Ohio is to assign forklifts to Laborers-represented employees, and not to Operating Engineers-represented employees.

In arguing that this factor weighs in favor of the employees it represents, Operating Engineers' introduced work orders from signatory contractors for the referral of Operating Engineers' members capable of operating skid steers and forklifts. Without more, however, this evidence does not establish that any Operating Engineers-represented employees actually performed skid steer and forklift work on the jobs to which they were referred. See *Donley's II*, above, slip op. at 6-7.<sup>13</sup>

We find based on the foregoing evidence that this factor favors an award of the work in dispute to employees represented by Laborers.

### 4. Relative skills and training

Both Laborers and Operating Engineers introduced evidence that they provide training in the operation of forklifts and skid steers and that the employees they represent are certified to operate this equipment. In addition, several representatives of the Employers testified that they provide training in the operation of forklifts and skid steers to their Laborers-represented employees, and that they are satisfied with the skills of those employees.

<sup>12</sup> As mentioned above in fn. 4, the hearing officer granted the motion of Laborers and the Employers to incorporate the records in *Donley's I* and *Donley's II*, into the instant proceeding.

<sup>13</sup> Operating Engineers additionally cites to a 1954 interunion agreement between the International Union of Operating Engineers and the International Hod Carriers, Building and Common Laborers Union of America that appears to have been admitted into the record in *Donley's I*. However, neither the terms of that agreement, nor anything else in the record, indicates that the 1954 agreement covers the disputed work at these jobsites. Additionally, the record does not show that the Employers have agreed to be bound by the agreement, or that the area and industry practice in fact conforms to the terms of the agreement. See, e.g., *Plumbers Local 562 (Charles E. Jarrell Contracting Co.)*, 329 NLRB 529, 533 (1999) (finding that interunion agreement does not favor award of disputed work to either group of employees where record did not contain conclusive evidence as to whether the agreement covered the work in dispute, whether the employer had agreed to be bound by the agreement, or that area and industry practice conformed to the terms of the agreement).

We find from this evidence that this factor does not favor an award of the disputed work to either group of employees.

### 5. Economy and efficiency of operations

Representatives of each of the Employers testified that it is more efficient and economical for them to assign the operation of forklifts and skid steers to employees represented by Laborers. They testified that their utilization of forklifts and skid steers is sporadic and is usually intermittent throughout the day. They stated that Laborers-represented employees perform multiple tasks in addition to the disputed work and, therefore, can leave the forklift or skid steer when it is not in use to perform these other tasks, which are duties that Operating Engineers-represented employees do not perform. They further explained that it would not be economical to hire employees represented by Operating Engineers to occasionally perform the work in dispute while also retaining employees represented by Laborers to perform the other work within Laborers' jurisdiction. They additionally testified that, because forklifts and skid steers are only used approximately 25 to 50 percent of the time, Operating Engineers-represented employees would be idle for substantial periods of time, when the equipment was not in use. See, e.g., *Seafarers International Union (Luedtke Engineering Co.)*, 355 NLRB 302, 305 (2010); *Laborers (Eshbach Bros., LP)*, above, 344 NLRB at 204.<sup>14</sup>

We find that this factor favors an award of the disputed work to the Laborers-represented employees.

### Conclusion

After considering all of the relevant factors, we conclude that employees represented by Laborers are entitled to perform the work in dispute. We reach this conclusion based on the factors of employer preference and past practice, area and industry practice, and economy and efficiency of operations. In making this determination,

<sup>14</sup> Operating Engineers contends that assigning the work in dispute to Laborers-represented employees would subject the Employers both to the labor costs of paying those employees and to the damages resulting from their breach of the pay-in-lieu provisions. This contention is without merit, as maintenance of pay-in-lieu grievances after the Board has awarded the work in dispute violates Sec. 8(b)(4)(ii)(D). *Iron Workers Local 433 (Otis Elevator Co.)*, 309 NLRB 273, 274 (1992), enf. 46 F.3d 1143 (9th Cir. 1995).

Operating Engineers additionally contends that it would be equally efficient to assign the disputed work to Operating Engineers-represented employees if the Employers would also assign them other tasks, specifically, those that Laborers-represented employees currently perform. This contention, too, is without merit, as representatives of the Employers testified that the other tasks that Laborers-represented employees perform are within the jurisdiction of the Laborers in the CEA-Laborers contract and not the type of work typically performed by Operating Engineers-represented employees.

we award the work to employees represented by Laborers, not to that labor organization or its members.

#### Scope of Award

The Employers and Laborers request a broad area wide award, covering the geographic jurisdiction of Operating Engineers. In support, they argue that the evidence in prior Board cases (*Donley's I* and *Donley's II*) shows that Operating Engineers has a proclivity to violate Section 8(b)(4)(D) and that the dispute here is likely to recur.

In *Donley's II*, which issued after the conclusion of this proceeding, the Board granted a broad area wide award to employees represented by Laborers, for work of the kind in dispute. See *Donley's II*, supra, slip op. at 7–8. That award covers the area where Local 310's and Local 18's jurisdictions overlap, which encompasses the instant disputes in Cuyahoga County, Ohio. Our award in the instant cases restates and applies that area wide order.

#### DETERMINATION OF DISPUTE

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

Employees of KMU Trucking & Excavating, Schirmer Construction Co., Platform Cement, Inc., 21st Century Concrete Construction, Inc., Independence Excavating,

Inc., and Donley's Inc., who are represented by Laborers' International Union of North America, Local 310, are entitled to perform forklift and skid steer work in the area where their employers operate and the jurisdiction of Laborers International Union of North America, Local 310 and the International Union of Operating Engineers, Local 18 overlap.

Dated, Washington, D.C. September 3, 2014

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Mark Gaston Pearce, Chairman

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Kent Y. Hirozawa, Member

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Harry I Johnson, III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD