

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

and

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

CASE 01-CD-137069

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-138333

**MOTION OF THE PLAN FOR THE SETTLEMENT
OF JURISDICTIONAL DISPUTES IN THE CONSTRUCTION INDUSTRY
FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE***

The Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (“Plan”) respectfully moves for leave to file the attached amicus curiae brief in the above-captioned matter.

This matter is before the Board pursuant to Section 10(k), 29 U.S.C. § 160(k), of the National Labor Relations Act (“Act”). Section 10(k) grants the Board subject-matter jurisdiction to resolve jurisdictional disputes, unless the parties have agreed

upon a private method for the voluntary adjustment of the disputes or they have actually adjusted the dispute. The Board has long recognized the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (“Plan”) as just such an agreed-upon method for the voluntary adjustment of jurisdictional disputes that will divest the Board of jurisdiction in circumstances in which the involved unions and employer are bound by the Plan. *See, e.g., Laborers Local 60 (Mergentime Corp.)*, 305 NLRB 762, 763 (1991); *Operating Engineers Local 139 (Allied Construction)*, 293 NLRB 604, 605 (1989); *Plumbers Local Union No. 447 (Capitol Air Conditioning, Inc.)*, 224 NLRB 985 (1976); NLRB Casehandling Manual (Part One) Sec. 10216.

All three parties to the jurisdictional dispute at issue in this case are bound to the Plan. The Massachusetts Building-Wreckers and Environmental Remediation Association (“Wreckers Association”) – a charging party, but not an employer involved in the dispute – nonetheless maintains that because it is not bound to the Plan, the matter is properly before the Board. This case therefore presents important questions of identifying the relevant parties for determining whether the Board has jurisdiction to resolve a jurisdictional dispute, or whether the parties have instead agreed to a private dispute resolution method.

In enacting Section 10(k), Congress intended to promote the private settlement of jurisdictional disputes through agreed upon mechanisms, like the Plan. The Plan, in turn, has a strong interest in ensuring that when parties have committed to utilizing it to resolve their jurisdictional disputes, the Board will

honor that commitment and, consistent with Congress' intent in drafting Section 10(k), refrain from deciding the jurisdictional dispute. The Plan therefore writes separately (1) to provide a more complete description of the Plan than that found in the briefs the parties submitted, and (2) to explain more fully why the Board should find that all of the relevant parties to this dispute are bound to the Plan.

Accordingly, the Plan respectfully requests leave to file the attached amicus curiae brief.

/s/ Richard M. Resnick
Richard M. Resnick
Victoria L. Bor
Lucas R. Aubrey
Sherman, Dunn, Cohen, Leifer & Yellig, P.C.
900 Seventh Street, N.W., Suite 1000
Washington, D.C. 20001
(202) 785-9300

Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	1
THE PLAN	2
ARGUMENT	6
I. THE BOARD DOES NOT HAVE SUBJECT-MATTER JURISDICTION TO RESOLVE JURISDICTIONAL DISPUTES SUBJECT TO RESOLUTION THROUGH THE PLAN	6
II. THE BOARD DOES NOT HAVE SUBJECT MATTER JURISDICTION TO RESOLVE THIS JURISDICTIONAL DISPUTE BECAUSE ALL PARTIES TO THE DISPUTE ARE BOUND TO THE PLAN	11
CONCLUSION	20

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Arnold v. Carpenters District Council of Jacksonville</i> , 417 U.S. 12 (1974)	9
<i>Boatmen’s First Nat’l Bank of Kansas City v. Kansas Pub. Employees Ret. Sys.</i> , 57 F.3d 638 (8th Cir. 1995)	6
<i>Bricklayers, Local 7 (Fentron Industries)</i> , 199 NLRB 1256 (1972)	7, 8
<i>Carey v. Westinghouse Electric Corp.</i> , 375 U.S. 261 (1964)	9
<i>Electrical Workers Local 728 (Ebasco Svcs., Inc.)</i> , 153 NLRB 873 (1965)	7
<i>Int’l Longshoreman & Warehousemen’s Union (Catalina Island Sightseeing Lines)</i> , 124 NLRB 813 (1959)	6
<i>Iron Workers Local 25 (Pittsburgh Plate Glass Co.)</i> , 125 NLRB 1035 (1959)	8
<i>Kokkonen v. Guardian Life Ins. Co.</i> , 511 U.S. 375 (1994)	6
<i>Laborers Local 242 (Johnson Western Gunitite Co.)</i> , 310 NLRB 1335 (1993)	19
<i>Laborers Local 310 (KMU Trucking & Excavating)</i> , 316 NLRB No. 37 (2014)	16, 18
<i>Laborers Local 60 (Mergentime Corp.)</i> , 305 NLRB 762 (1991)	2, 20
<i>Manhattan Construction Company, Inc.</i> , 96 NLRB 1045 (1951)	7, 11
<i>NLRB v. Radio and Television Broadcast Eng. Union</i> , 364 U.S. 573 (1960)	9

<i>Operating Engineers Local 139 (Allied Construction),</i> 293 NLRB 604 (1989)	2, 12
<i>Operating Engineers Local 150 (Austin Co.),</i> 296 NLRB 938 (1989)	13, 14, 17
<i>Operating Engineers Local 150 (Diamond Coring Co.),</i> 331 NLRB 1349 (2000)	19
<i>Operating Engineers Local 318 (Kenneth Foeste Masonry, Inc.),</i> 322 NLRB 709 (1996)	19
<i>Pacific Brand Energy Services,</i> 355 NLRB No. 45.....	20
<i>Plumbers & Fitters Local 761 (Matt J. Zaich Construction Co.),</i> 144 NLRB 133 (1963)	8
<i>Plumbers Local Union No. 447 (Capitol Air Conditioning, Inc.),</i> 224 NLRB 985 (1976)	3, 7, 9, 11
<i>Teamsters, Local 627 (George E. Hoffman & Sons, Inc.),</i> 195 NLRB 93 (1972)	7
<i>Wood, Wire and Metal Lathers International Union (Acoustical Contractors),</i> 119 NLRB 1345 (1958)	7
STATUTES	
29 U.S.C. § 158(b)(4)(D)	6, 7, 13, 17
29 U.S.C. § 160(k)	passim
OTHER AUTHORITIES	
93 Cong. Rec. 4155 (Apr. 25, 1947)	8
John T. Dunlop, <i>Jurisdictional Disputes</i> , in NYU SECOND ANNUAL CONFERENCE ON LABOR 496 (1949)	2, 9, 10
NLRB Casehandling Manual (Part One) Sec. 10216	3, 10

INTRODUCTION

This matter is before the National Labor Relations Board pursuant to Section 10(k), of the National Labor Relations Act, 29 U.S.C. § 160(k). The jurisdictional dispute that gave rise to this proceeding involves the operation of two pieces of equipment – skid steers (or Bobcats) and forklifts (or Lulls) – on a large demolition and remediation project at the Salem Power Plant, in Salem, Massachusetts. JDC Demolition Company, the general contractor on this project, is signatory to collective bargaining agreements with two unions, International Union of Operating Engineers Local 4 and Laborers’ International Union of North America Local 1421. As explained below, all three of these parties are bound to resolve their jurisdictional disputes through the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (“Plan”), and the Board lacks jurisdiction to resolve this dispute.

Charging Party Massachusetts Building Wreckers and Environmental Remediation Association (“Wreckers Association” or “Association”) is a multi-employer association that bargains with Laborers Local 1421 on behalf of various employers including JDC. The Association is not, however, an employer on the Salem site, nor has it made any of the job assignments disputed in this matter. It nonetheless has argued that because it is not a party to the Plan, the Board is authorized to resolve the dispute. In doing so, it is asking the Board to assert jurisdiction where it has none.

The Plan, a well-established, contractually-based mechanism for resolving jurisdictional disputes in the construction industry, has a strong interest in ensuring that when parties to a jurisdictional dispute have committed to utilizing the Plan as their agreed upon method for resolving those disputes, the Board honors that commitment and, consistent with Congress' intent in drafting Section 10(k), refrains from deciding the jurisdictional dispute. This case presents important questions of identifying the relevant parties for determining whether there is an agreed-upon method, or whether instead, the Board has jurisdiction to resolve a jurisdictional dispute.

The Plan will therefore begin by providing background about its history and operation. It will then turn to the merits of the case and demonstrate (1) that the Board lacks jurisdiction when all parties to a dispute are bound to an agreed upon mechanism for resolving the dispute; and (2) that the relevant parties to this dispute are all bound to a single agreed upon mechanism, the Plan.¹

THE PLAN

Following passage of the Taft-Hartley Act in 1947, which included the addition of Section 10(k), the modern Plan became operative on May 1, 1948.² The Board has long recognized the Plan – and its predecessors – as a valid agreed-upon method for the voluntary adjustment of jurisdictional disputes when the involved

¹ The Plan adopts the Statement of Facts in Local 4's Post-Hearing Brief.

² See John T. Dunlop, *Jurisdictional Disputes*, in NYU SECOND ANNUAL CONFERENCE ON LABOR 496 (1949).

unions and employer are bound by it. *See, e.g., Laborers Local 60 (Mergentime Corp.)*, 305 NLRB 762, 763 (1991); *Operating Engineers Local 139 (Allied Construction)*, 293 NLRB 604, 605 (1989); *Plumbers Local Union No. 447 (Capitol Air Conditioning, Inc.)*, 224 NLRB 985 (1976); NLRB Casehandling Manual (Part One) Sec. 10216.

The current Plan, which has been in effect since 1984, was established by the Building and Construction Trades Department, AFL-CIO (“BCTD”), and five employer associations.³ A Joint Administrative Committee (“JAC”), composed of four union representatives, four employer representatives, a chairman (the President of the BCTD), and a vice-chairman (a designee of the employer associations), oversees the operation of the Plan.⁴

A union may become bound – or “stipulated” – to the Plan in one of three ways: by virtue of its parent organization’s affiliation with the BCTD, by signing a stipulation of willingness to be bound by the Plan, or through a provision in a

³ Mechanical Contractors Association, National Electrical Contractors Association, The Association of Union Constructors, North American Contractors Association, and Sheet Metal and Air Conditioning Contractors National Association.

⁴ The document described as the Plan (Operating Engineers Exhibit (“OEX”) 1, Ex. 2) is divided into two sections, the Procedural Rules and Regulations for the Plan and the Plan. This brief will use the designation “Proc. Rules” when citing to the Plan’s Procedural Rules, and the designation “Plan,” when citing to the Plan itself.

This brief will use the following designations when citing to the record: “OEX [#]” for Operating Engineers’ exhibits; “CPX [#]” for the Charging Party’s exhibits; and “Tr:[page #]” for citations to the hearing transcript.

collective bargaining agreement. (OEX 1, Ex. 2 (Plan, Art. II, Sec. 1).) An employer may similarly become stipulated to the Plan through its membership in a stipulated association of employers with authority to bind its members, a signed stipulation stating its willingness to be bound by the Plan, or a collective bargaining agreement. (*Id.*)

The Plan increases stability in the construction industry by rapidly resolving jurisdictional disputes and preventing work stoppages and slowdowns from disrupting construction jobsites. The Plan is widely utilized in the construction industry, as evidenced by the Plan's processing of 50 disputes in 2013.

When a jurisdictional dispute arises, the national or international union challenging the assignment, the employer, or the employer's signatory association notifies the Administrator of the Plan. (OEX 1, Ex. 2 (Proc.Rules, Art. IV).) The notice must advise whether the parties have attempted to resolve the matter locally or agreed to mediation through the Federal Mediation and Conciliation Service ("FMCS"). Upon receiving the notice, the Administrator informs the involved parties of the dispute. (*Id.* (Plan, Art. V, Sec. 2).) The parties then have five days to resolve the matter informally or with the assistance of an FMCS mediator. (*Id.* (Plan, Art. V, Sec. 3).)

If the parties fail to resolve the dispute during the five-day period, the involved unions or contractor may request arbitration. (*Id.*) The parties then have three days to select an arbitrator from a permanent panel of arbitrators

knowledgeable in the construction industry. (*Id.* (Plan, Art. V, Sec. 5).) Once selected, the arbitrator must hold the hearing within seven days. (*Id.*)

The Arbitrator must issue his decision within three days of the close of the hearing, applying the criteria set forth in the Plan. (*Id.* (Proc. Rules, Art. VIII, Sec. 5).) The arbitrator may not award back pay or damages for misassignment of work, nor may any party bring an independent action for damages based on the arbitrator's award. (*Id.* (Plan, Art. V, Sec. 10).) The arbitrator's decision is final and binding. (*Id.* (Proc. Rules, Art. VIII, Sec. 5).) If the arbitrator fails to explain fully the Plan criteria on which he relied in rendering his decision, a party may appeal to the Plan's JAC to have the case decided by another arbitrator. (*Id.* (Plan, Art. V, Sec. 12).) The parties may not, however, appeal the merits of the arbitrator's decision. (*Id.*) Any party to the dispute may file a court action to enforce the decision. (*Id.* (Plan, Art. VII).)

In addition to providing a mechanism for the expeditious resolution of jurisdictional disputes, the Plan prohibits work stoppages, slowdowns, NLRB and court actions, and grievances where the issue is a jurisdictional dispute or assignment of work by a stipulated contractor. (*Id.* (Plan, Art. VI, Sec. 1).) These types of disputes are referred to as "impediment to job progress" disputes. (*Id.*) The Plan provides for expedited arbitration to resolve these disputes. (*Id.* (Plan, Art. VI, Sec. 2).) Upon notice of an impediment to job progress, the Administrator informs the representative of the party accused of engaging in the prohibited action. If the union president or the accused contractor's representative is unable to stop the

impediment, the Administrator selects an arbitrator to hold a hearing within 24 hours. The sole issue at the hearing is whether there has been an impediment to job progress. The arbitrator must issue a decision within three hours of the close of the hearing. (*Id.*)

In short, the parties to the Plan are bound to procedures that ensure rapid resolution of jurisdictional disputes and effectively preclude activity that would interfere with job progress.

ARGUMENT

I. THE BOARD DOES NOT HAVE SUBJECT-MATTER JURISDICTION TO RESOLVE JURISDICTIONAL DISPUTES SUBJECT TO RESOLUTION THROUGH THE PLAN

The Board has long recognized that, like all Federal “tribunals, be they Federal district courts, courts of appeal, the Supreme Court, or administrative agencies,” it has limited jurisdiction, and that “some showing of legal jurisdiction must be made in every case brought before [it].” *Int’l Longshoreman & Warehousemen’s Union (Catalina Island Sightseeing Lines)*, 124 NLRB 813, 814-15 (1959); *see also Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) (“Federal courts are courts of limited jurisdiction.”); *Boatmen’s First Nat’l Bank of Kansas City v. Kansas Pub. Employees Ret. Sys.*, 57 F.3d 638, 640 n.4 (8th Cir. 1995) (courts of appeals are obligated to consider their jurisdiction).

When it comes to resolving jurisdictional disputes, the Act places clear limits on the Board’s jurisdiction. Section 10(k) provides that when a party is charged with violating Section 8(b)(4)(D), “the Board is empowered and directed to hear and

determine the dispute out of which such unfair labor practice shall have arisen, *unless . . .* the parties to such dispute submit to the Board satisfactory evidence that *they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute.*” 29 U.S.C. § 160(k) (emphasis added).⁵ The Board has long understood this provision to mean that it lacks subject-matter jurisdiction to resolve a Section 10(k) dispute *either* if the parties have agreed upon a method for resolving the dispute *or* if the dispute has actually been resolved. *Capitol Air Conditioning*, 224 NLRB at 988 n.8. Indeed, the Board has explained, “Section 10(k) of the Act, although directing that the Board hear and determine disputes out of which Section 8(b)(4)(D) charges have arisen, contains *equally mandatory language* directing that in certain circumstances the Board is *not* to make any determination.” *Manhattan Construction Company, Inc.*, 96 NLRB 1045, 1047-49 (1951) (emphasis added). *Electrical Workers Local 728 (Ebasco Svcs., Inc.)*, 153 NLRB 873, 875 (1965) (describing Section 10(k) as placing “mandatory limitations” on Board’s authority). Thus, where an agreed-upon method exists, “the matter is beyond [the Board’s]

⁵ The provision states in full that,

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of [Section 8(b)(4)(D)], the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

29 U.S.C. § 160(k).

jurisdiction,” *Bricklayers, Local 7 (Fentron Industries)*, 199 NLRB 1256, 1258 (1972), and the Board accordingly “has no authority to determine the dispute,” *Teamsters, Local 627 (George E. Hoffman & Sons, Inc.)*, 195 NLRB 93, 95 (1972) (stating, where agreed upon method exists. “The Board is barred from making a 10(k) award”); *Wood, Wire and Metal Lathers International Union (Acoustical Contractors)*, 119 NLRB 1345, 1351 (1958) (holding that if an agreed-upon method exists, “the Board’s authority to make a determination is terminated”).

In crafting Section 10(k), Congress intended to promote the private resolution of jurisdictional disputes. During the Senate’s consideration of Section 10(k), Senator Murray stated, “[w]e are confident that the mere threat of governmental action will have a beneficial effect in stimulating labor organizations to set up appropriate machinery for the settlement of such controversies within their own ranks where they properly should be settled.” 93 Cong. Rec. 4155 (Apr. 25, 1947). Consistent with Section 10(k)’s text and legislative history, the Board has routinely recognized “the preferred status awarded private methods of adjustment in Section 10(k) of the Act.” *Fentron Industries*, 199 NLRB at 1258. Indeed, the Board has emphasized that “[t]he manifest purpose of [Section 10(k)] is to afford the parties an opportunity to settle jurisdictional disputes among themselves, without Government intervention *whenever possible*.” *Iron Workers Local 25 (Pittsburgh Plate Glass Co.)*, 125 NLRB 1035, 1038 (1959) (emphasis added); *see also Plumbers & Fitters Local 761 (Matt J. Zaich Construction Co.)*, 144 NLRB 133, 140 (1963) (noting that “the import of Section 10(k) of the Act is to encourage the parties

involved in jurisdictional disputes to settle their differences amicably within the stabilizing compass of the collective bargaining agreement and its resultant contracts . . .”). Thus,

the only means by which to implement the congressional mandate [of Section 10(k)] is to require parties themselves to resolve their disputes when they have agreed to procedures for this purpose. Indeed, this is what Section 10(k) provides and this is what Congress intended. To this end, we shall continue to quash notices of hearing upon a showing that there exists a voluntary method for the resolution of disputes.

Capitol Air Conditioning, 224 NLRB 985, 989.

The Supreme Court has long agreed that this is the appropriate construction of Section 10(k). In *Arnold v. Carpenters District Council of Jacksonville*, 417 U.S. 12, 18 (1974), for example, the Court endorsed the Board’s recognition of “Congress’ preference for voluntary settlement of jurisdictional disputes.” The Court has explained that Section 10(k) “offers strong inducements to quarrelling unions to settle their differences by directing dismissal of unfair labor practice charges upon voluntary adjustment of jurisdictional disputes.” *NLRB v. Radio and Television Broadcast Eng. Union*, 364 U.S. 573, 577 (1960). Thus, Section 10(k) “not only tolerates but actively encourages voluntary settlements of work assignment controversies between unions.” *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 266 (1964).

The Plan is precisely the type of private settlement mechanism Congress envisioned. In 1949, John T. Dunlop, who subsequently served as Secretary of Labor, wrote about the resolution of jurisdictional disputes following the passage of the Taft-Hartley Act, and noted “[p]ublic policy has now undoubtedly firmly

established the principle that jurisdictional disputes are a matter of public concern; unless these disputes are settled within the industry the government will intervene.” John T. Dunlop, *Jurisdictional Disputes, supra*, at 503. He further explained that the procedures the construction industry adopted to resolve jurisdictional disputes provided a means for “preserv[ing] self-government with all the advantages of flexibility, special knowledge, and private responsibility that would be impossible with a government agency.” *Id.* The Board has agreed, recognizing the Plan as the prototype of the kind of mechanism Congress intended to promote. Thus, the NLRB Casehandling Manual provides,

One of the most common methods of adjustment [of jurisdictional disputes] is the mechanism established by the Building and Construction Trades Department, AFL-CIO on behalf of its constituent National and International Unions and signatory Employer Associations. If the Regional Office is investigating a charge involving parties eligible for participation in this plan, the Regional Office should investigate whether the parties are bound by the plan.

NLRB Casehandling Manual (Part One) Sec. 10216 (emphasis added). The Manual goes on to confirm that when the parties are bound by the Plan *or* have actually adjusted their dispute, “Section 10(k) divests the Board of its power to resolve the jurisdictional dispute.” *Id.* (emphasis added).

In short, Congress intended jurisdictional disputes to be resolved privately within labor’s “own ranks” *whenever* an agreed-upon voluntary method for dispute resolution exists. Because, as explained in the next section, all parties to this dispute are bound to resolve their jurisdictional disputes through the Plan, the

Board must find that it does not have subject-matter jurisdiction to render a Section 10(k) determination in this matter.

II. THE BOARD DOES NOT HAVE SUBJECT MATTER JURISDICTION TO RESOLVE THIS JURISDICTIONAL DISPUTE BECAUSE ALL PARTIES TO THE DISPUTE ARE BOUND TO THE PLAN

As just explained, when the parties to a jurisdictional dispute have agreed to a mechanism for resolving such disputes, the NLRB does not have jurisdiction over the dispute. At base, the facts in this case permit a straightforward application of this principle. JDC Demolition Company is performing demolition and remediation work at the Salem Power Plant. The work involves operation of skid steers/Bobcats and forklifts/Lulls. JDC has collective bargaining agreements with two unions – IOUE Local 4 and Laborers Local 1421 – both of which claim jurisdiction over the work. All three parties to the dispute – JDC, Local 4 and Local 1421 – are stipulated to the Plan. The Board therefore lacks jurisdiction over this dispute.⁶

Local 4 and Local 1421 are both locals of international unions affiliated with the BCTD. See list of affiliated unions on BCTD’s website, <http://www.bctd.org/About-Us/Affiliates.aspx> (IUOE and LIUNA are BCTD affiliates); Tr:43.) The BCTD Constitution – which is binding on all of its affiliated unions – provides that “All jurisdictional disputes between or among affiliated National and International Unions and their affiliated Local Unions and employers shall be settled and adjusted according to the [Plan].” (OEX 1, Ex.1, Article X.) Both

⁶ As explained in the previous section, under the express terms of Section 10(k) and established Board law (e.g., *Capitol Air Conditioning*, 224 NLRB at 988-89; *Manhattan Construction*, 96 NLRB at 1048), the Board must defer to the agreed-upon method, regardless whether the parties have actually invoked it.

of the local union parties to this dispute are therefore bound to the Plan, a fact LIUNA's General President Terry O'Sullivan acknowledged in directing Local 1421 to process this dispute through the Plan. (OEX 3); *see also Operating Engineers Local 139 (Allied Construction)*, 293 NLRB 604, 605-06 (1991) ("local constituent bodies of member unions of the [BCTD] . . . are . . . required to abide by the Plan's procedures for the settlement of jurisdictional disputes.")

Like both of the unions, JDC is also bound to use the Plan to resolve this jurisdictional dispute. The Plan provides that an employer may become stipulated to it, *inter alia*, "by virtue of . . . a provision in a collective bargaining agreement." (OEX 1, Ex.2 at 17.) By signing a short-form agreement, JDC became a party to Local 4's Master Agreement with four multi-employer associations. (Tr:44-45, 68; OEX 1 ¶7 and Ex.3.)⁷ Local 4's Master Agreement provides that

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

⁷ The four associations are the Labor Relations Division of the Construction Industries of Massachusetts, the Foundry and Marine Contractors Association of New England, Inc., the Building Trades Employers Association of Boston and Eastern Massachusetts, and the Labor Relations Division of the Associated General Contractors of Massachusetts, Inc. ("AGC"). The AGC Agreement, Part C of the Master Agreement, applies to the work in dispute in this case. (Tr: 214, 212-14.)

OEX 1, Ex. 4 at 64. As a party to the Master Agreement, JPC is therefore stipulated to the Plan. All of the parties to this dispute are therefore bound to a single method for resolving their jurisdictional disputes.⁸

The Wreckers Association has attempted to make this case appear more complicated by claiming that because it, a Charging Party, is not bound to the Plan, the Board has jurisdiction to resolve the jurisdictional dispute. Thus, the Association argues that its multi-employer agreement with Local 1421 makes no reference to the Plan, and in fact, specifically excludes jurisdictional disputes from its dispute resolution procedure. The Association's agreement, however, is simply irrelevant to this case, because the Association is not the responsible employer for purposes of resolving the jurisdictional dispute.

“[I]t is well settled that it is the company that ultimately controls and makes the job assignment that is deemed to be the employer” in a § 10(k) proceeding. *Operating Engineers Local 150 (Austin Co.)*, 296 NLRB 938, 940 (1989). In *Austin*, Operating Engineers Local 150's bargaining agreement with Austin, the general contractor, provided that an operating engineer would operate certain elevators on a pier. Austin subcontracted work at the pier to Ross, which had a collective bargaining agreement with Carpenters Local 1. The subcontract granted Ross

⁸ Although JDC is also a party to the multi-employer collective bargaining agreement the Wreckers Association negotiated on its behalf with Local 1421, as discussed below, the Local 1421/Wreckers Association agreement contains no mechanism for resolving jurisdictional disputes. (Tr:20; CPX 2 at 28.) JDC therefore is not bound to any mechanism that could potentially expose it to decisions conflicting with those issued under the Plan.

permission to use and provide operators for the elevators. When Ross refused to assign Local 150 operators to work the elevators, the Operating Engineers engaged in area standards picketing, and Austin filed § 8(b)(4)(D) charges.

In the resulting Section 10(k) proceeding, Local 150 argued that all parties were bound by the same agreed upon method for resolving the dispute, pointing to its agreement with Ross and Local 1's agreement with Austin. The Board rejected that argument, noting that it was "premised on the erroneous assumption that the collective-bargaining agreement allegedly binding Austin and Local 150 is applicable to the assignment of work by the party responsible for assigning it." *Id.* at 940. Thus, it was immaterial that Austin – like the Wreckers Association – was the charging party, because "the company that ultimately controls and makes the job assignments . . . is deemed to be the employer, . . . it is Ross, not Austin, that is the employer for the purpose of deciding the work in dispute." *Id.* at 940-41. The agreement between Austin and Local 150 accordingly was simply "not germane to this case." *Id.* at 941.

There is absolutely no evidence in this record that the Association operated as an employer on the Salem site, performed any work on the site or, most importantly, made any of the disputed job assignments.⁹ The Association nonetheless has attempted to establish its presence in this case by asserting that

[m]embers of the Wreckers' Association, other than JDC, are involved in this dispute as a result of the two unions' demands that various

⁹ In fact, the parties stipulated only that the Association is a "non-profit 501(c)(6) organization which represents employers" engaged in commerce, and not that the Association is itself an employer. (Tr:9.)

members sign Work Assignment Agreements committing them to use one or the other union on the disputed work, the operating of skidsteers (Bobcats) and forklifts (Lulls) on wrecking sites.

(Wrecker Association's Brief ("Ass'n Br.") at 3.) There is no basis for the Association's claim that unions either "demanded" or received "Work Assignment Agreements" from various contractors "committing them to use one or the other union on the disputed work," that is, the operation of bobcats and lulls on the Salem site. Instead, the record shows that Local 1421 Business Agent Thomas Troy and Local 4 Business Manager Louis Rasetta did nothing more than *ask* various contractors for work assignment letters. As Rasetta described his conversation with a contractor that he approached about a letter, "I said, 'All I want is for you to write down the truth, write down on a piece of paper that you have assigned this work, that we have done that work for you, that we have operated Bobcats on the demolition sites[.]'" When the contractor declined to get involved, Rasetta "said, 'That's fine, I don't want – I'm not pressuring anybody, that's fine.'" (Tr: 354.) Business Agent Troy similarly testified that when he heard Rasetta was asking for work assignment letters, he "called around" and did the same thing. (Tr: 92.) There is no testimony suggesting otherwise.

Moreover, there is no way the letters the unions received can be fairly read as "commitments" to assign the Salem work to one union or the other. Most of the letters simply state how the contractors generally conduct their business. (*See, e.g.*, OEX 10 ("F&D Truck is a signatory with IUOE Local 4 and *assigns* all operation of all heavy equipment . . . to [Local 4]"); OEX 11 ("Vinagro Corporation *has assigned*

operation of all equipment . . . to . . . IOUE Local 4”); OEX 12 (“RSG Contracting Corp. *has assigned*” work to IOUE Local 4); CPX 4 (American Environmental, Inc. “endorses the assignment of skid steer, Bobcat, and fork boom lift operation to Local 1421;” Atlantic Coast Dismantling’s “position is to assign” work to Local 1421; “McConnell Enterprises, Inc., assigns the operation of bobcats and manlifts” to Local 1421; W.K. MacNamara reports that “Local 1421 have [sic] been doing an excellent job with providing skilled certified and trained operators for these pieces of equipment”) (emphasis added)).

Moreover, with the exception of JDC, there is no evidence that even the contractors that signed letters stating they “will assign” the operation of bobcats and lulls to Local 1421 have performed or will perform any work on the Salem Project, or have actually been called upon to make any work assignments at the site. Thus, instead of being commitments to assign the disputed work at Salem to one or the other unions, the letters are nothing more than evidence collected by the unions to assist them in establishing “area and industry practice” for purposes of this Section 10(k) dispute. *See, e.g., Laborers Local 310 (KMU Trucking & Excavating)*, 316 NLRB No. 37, slip op. at 5 (2014) (area and industry practice is among the factors in awarding disputed work).

In short, despite the Association’s claim that all of its “members have a stake in this dispute” (Ass’n Br. at 15; *see also id.* at 22 n. 9), JDC is the sole employer actually involved in this dispute. JDC is employing workers at the Salem site under two separate collective bargaining agreements (Tr:17); JDC made the work

assignments at the Salem site that gave rise to this dispute (CPX 1); it was JDC's representatives to whom the two unions' representatives aired their grievances over the work assignments at the site, and who initially agreed to resolve the dispute by assigning the work to the unions on a one-to-one basis (e.g., Tr: 124-28, 135-36 (Local 4 Business Agent DiMinico's conversations with Chris Berardi regarding the work assignments); Tr:136-38 (DiMinico's conversations with JDC representative Mark Berardi regarding agreement to resolve dispute); OEX 5, Tr:159-71 (text messages between DiMinico and Mark Berardi regarding agreement to resolve dispute); CPX 3 (Local 1421 Business Agent Troy's letter to JDC, threatening to "conduct my own job actions on this project" if JDC did not remove the Operators from the bobcats and lulls); Tr: 102 (Troy followed through on his letter by pulling his members off the jobsite); Tr:133 (Troy's reaction to JDC President Chris Berardi's agreement to assign work to Local 4)). And, by the Association's own account, all of the "proscribed means" the unions allegedly used to enforce their respective work claims were directed at JDC: "[I]n the current matter both locals, not just one of them, attempted to force 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)." Ass'n Br. at 18. JDC is therefore the responsible employer in this matter. Whether the Wreckers Association itself is bound to the Plan, to other dispute resolution mechanisms, or to no mechanism at all is therefore simply "not germane to this case." *Austin Co.*, 296 NLRB at 941.

What is germane, however, is that the Wreckers Association's agreement with Local 1421 in no way binds JDC – the responsible employer – to a mechanism other than the Plan to resolve its jurisdictional disputes. The sole dispute-resolution mechanism in the Association's agreement is its grievance procedure, which specifically excludes jurisdictional disputes from its scope:

If any difference of opinion or dispute should arise between the parties as to the interpretation or application of this Agreement, *other than a jurisdictional dispute*, a complaint will be made by the aggrieved party immediately.

CPX 2 at 28 (emphasis added). Thus, as JDC President Chris Berardi acknowledged, JDC's contract with Local 1421 contains no mechanism for resolving jurisdictional disputes. (Tr:37); *see also* Ass'n Br. at 22 (while JDC's agreement with Local 4 states that jurisdictional disputes will be resolved by the Plan, the Association's agreement with Local 1421 contains no mechanism for resolving jurisdictional disputes).¹⁰

This case therefore presents none of the issues the Board faces when some, but not all, of the parties are bound by an agreed-upon procedure for resolving their jurisdictional disputes. *See, e.g., KMU Trucking & Excavating*, 316 NLRB No. 37, slip op. at 3 (employer and Laborers local stipulated that they had an agreed-upon method, but Operators provided no evidence). Nor is this a case in which the parties

¹⁰ The Wreckers Association has seemed to suggest that this clause not only fails to bind it and its members to the Plan, but that it also insulates jurisdictional disputes involving the parties to the contract from any form of arbitration, whatever the source. (CPX 16; Tr:13.) That reading simply finds no support in the language of this provision. That is, the provision speaks only to how jurisdictional disputes will *not* be resolved. It says nothing about how they *will be resolved*.

are bound by different dispute resolution procedures, posing the risk of conflicting judgments. *See, e.g., Operating Engineers Local 150 (Diamond Coring Co.)*, 331 NLRB 1349, 1350 (2000) (collective bargaining agreement between Operators and employer on the one hand, and Laborers and employer, on the other, contained different procedures for resolving jurisdictional disputes); *Operating Engineers Local 318 (Kenneth Foeste Masonry, Inc.)*, 322 NLRB 709, 712 (1996) (no single determinative agreed-upon procedure where employer was bound by two agreements providing for different methods for resolving jurisdictional disputes); *Laborers Local 242 (Johnson Western Gunite Co.)*, 310 NLRB 1335, 1337 (1993) (unions' collective bargaining agreements contained different procedures).¹¹

Instead, this is a straightforward case in which all three parties to the dispute – JDC, the responsible contractor, and Local 4 and Local 1421, the two unions claiming the work – are bound to a single agreed-upon procedure, the Plan. It is immaterial that they are bound through differing avenues: JDC and Local 4 through the Master Agreement, and Local 1421 and Local 4 through their affiliation

¹¹ As explained above, under the Plan's procedures, it is considered a prohibited "impediment to job progress" for a party bound to the Plan to pursue another method for resolving its jurisdictional disputes. Accordingly, even if a contractor and union bound to the Plan were also signatories to a collective bargaining agreement that provided a different mechanism for resolving jurisdictional disputes, they would be precluded from pursuing the alternative mechanism, and therefore would not be subject to potentially conflicting decisions. It is therefore the Plan's position that whenever the parties to a dispute are bound to the Plan, there is a single agreed upon method for resolving the dispute, and the Board has no jurisdiction. The Board does not, however, have to resolve that question in this case because, as demonstrated, there is no alternative mechanism and JDC is bound only to the Plan.

with the BCTD. The issue is not how they got there; the issue is that they are all bound. *See Mergentime*, 305 NLRB 762 (all parties bound to Plan, either through affiliation with the BCTD or by virtue of the collective bargaining agreement between the employer and one of the unions); *cf.*, *Pacific Brand Energy Services*, 355 NLRB No. 45, slip op. at 5 (Carpenters bound to Plan through same project agreement as Laborers and employer, but also through participation agreement with local building trades council). And given that fact, the Board has no jurisdiction to resolve this dispute.

CONCLUSION

The notice of hearing in this matter should be quashed.

Respectfully submitted,
/s/ Richard M. Resnick
Richard M. Resnick
Victoria L. Bor
Lucas R. Aubrey
Sherman, Dunn, Cohen, Leifer & Yellig, P.C.
900 Seventh Street, N.W. Suite 1000
Washington, D.C. 20001
202/785-9300
bor@shermardunn.com

Counsel for the Plan

November 21, 2014

CERTIFICATE OF SERVICE

Pursuant to Rule 102.114(i) of the National Labor Relations Board's Rules and Regulations, I hereby certify that I have served a copy of the foregoing Motion of the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry for Leave to File a Brief *Amicus Curiae*, and the accompanying *Amicus* Brief, by email, on the following:

Jonathan B. Kreisberg, Regional Director
National Labor Relations Board, Region 1
10 Causeway Street, Sixth Floor
Boston, Massachusetts 02222-1072
Jonathan.Kreisberg@nlrb.gov

Randall E. Nash
111 Devonshire Street, Fifth Floor
Boston, Massachusetts 02109
rnash@attorneyrandallnash.com
Counsel for IUOE Local 4

Thomas B. Coffey
District Counsel Attorney
7 Laborers' Way
Hopkinton, Massachusetts 01748
legal@masslaborers.org
Counsel for Laborers Local 1421

Carol Chandler
Stoneman, Chandler & Miller, LLP
99 High Street
Boston, Massachusetts 02110
cchandler@scmlp.com

/s/ Victoria L. Bor
Victoria L. Bor
Sherman, Dunn, Cohen, Leifer & Yellig, P.C.
900 Seventh Street, N.W. Suite 1000
Washington, D.C. 20001
202/785-9300
bor@shermaddunn.com