

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

THE MASSACHUSETTS BUILDING WRECKERS AND ENVIRONMENTAL
REMEDICATION SPECIALISTS ASSOCIATION'S
OBJECTION
TO THE MOTION OF THE PLAN
FOR THE SETTLEMENT OF JURISDICTIONAL DISPUTES IN THE
CONSTRUCTION INDUSTRY FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Massachusetts Building Wreckers and Environmental Remediation Specialists Association (the "Wreckers' Association") hereby respectfully objects to the Plan's proposed filing of an *Amicus Curiae* brief in this case.

As more fully outlined in its Brief in Support of Its Objection, the Wreckers' Association contends that the Plan has no legal status as a party in this 10k case, nor has the Board sought *Amicus Curiae* briefs in this matter. Further, the Plan is now procedurally barred, under the Board's briefing schedule in this case, from submitting an *Amicus Curiae* brief. In addition, the

brief proffered by the Plan would be unfairly prejudicial to the Wreckers' Association as it effectively would be a proxy reply brief for Operators Local 4.

The Wreckers' Association notes that, on the first day of hearings in this matter, all parties stipulated that the Wreckers' Association was properly before the Board as a charging party employer association. As an employer association, the Wreckers' Association actively bargains on behalf of seventy (70) member contractors whose employees constitute a multiemployer bargaining unit represented by Laborers Local Union 1421. The record is clear that now over twenty (20%) percent of the member contractors of the Wreckers' Association have been directly impacted by this dispute when they were pressured to submit letters of assignment to either Operators Local 4 or Laborers Local 1421. These letters were solicited while three separate job actions took place on the Salem jobsite. This has obviously placed an enormous amount of improper stress and pressure on the Wreckers' Associations' affiliated employers.

Contrary to the Plan's assertions, the Board has always required that all, as opposed to most, of the involved parties to a dispute be bound to a single alternative method of dispute resolution before the Board can relinquish its jurisdiction. In this case, it is undisputed that the Wrecker's Association, the charging party, is a proper party to this dispute and is not bound by the Plan. To dismiss this action because the Wrecker's Association itself did not make a job assignment, as proposed by the Plan, would effectively disenfranchise every employer association in the United States from securing relief for its members under the 10k process and potentially under other sections of NLRB law. It would also mean that the Board would have to find that a charging party is not a necessary party to an adjudication of a dispute, which would be

an extraordinary ruling that could have far reaching and unforeseen implications in other matters that would come before the Board in the future.

For the above reasons, and as more fully outlined in the Associations' Brief, the Wreckers' Association requests that the request to submit an *Amicus Curiae* brief be denied.

Respectfully submitted,

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Dated: December 2, 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 this Objection upon the following persons, by electronic mail, on the second day of December, 2014 at the addresses below:

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THE MASSACHUSETTS BUILDING WRECKERS AND ENVIRONMENTAL
REMEDICATION SPECIALISTS ASSOCIATION'S
BRIEF IN SUPPORT OF ITS OBJECTION
TO THE MOTION OF THE PLAN
FOR THE SETTLEMENT OF JURISDICTIONAL DISPUTES IN THE
CONSTRUCTION INDUSTRY FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Massachusetts Building Wreckers and Environmental Remediation Specialists Association (the “Wreckers’ Association”) hereby incorporates the facts, case authority and arguments made in its Post-Hearing Brief submitted to the Board on November 14, 2014 – the official deadline established by the Board for the submission of briefs by all parties in these consolidated cases. The Wreckers’ Association notes that the record is clear that the Plan was notified of the pendency of this case prior to the hearings. It is also clear that Richard Resnick, Esq., Counsel to the Plan and author of the proposed *Amicus Curiae* Brief, was specifically

advised that the hearings were ongoing when Wrecker's Association President Samuel Brooks sent the following letter to Mr. Resnick in response to the Plan's demand that he immediately terminate the NLRB proceedings and proceed under the Plan:

Dear Mr. Resnick:

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

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

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

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

Sincerely,

Samuel Brooks

Accordingly, with the above actual notice to its counsel, the Plan should have attempted to submit their proposed *Amicus Curiae* Brief within the Board's original seven (7) day schedule for all such 10k cases or the subsequent brief submission time table established by the Board for all of the parties in this case. At the very least, the Plan should have asked for an extension, in

accordance with the Board's rules, prior to the expiration of the above deadlines for submission. In fact, the Plan failed to even submit within the 2 week extended time period provided by the Board to all parties.

1. THE PLAN HAS NO LEGAL STATUS AS A PARTY IN THIS 10K CASE.

The Wrecker's Association contends that the Plan has no standing as a "party" in this action and it therefore has no right to submit a Brief. The Plan is neither an employer association nor an employer under the Act. In this case, the Plan cannot be considered an international union or a local union under the Act. The Plan is clearly not an employee under the Act. No matter how it is packaged, the Plan is not covered by the Act in this case.

The Plan simply coordinates an arbitration service similar to the American Arbitration Association. While the American Arbitration Association would not have the audacity to attempt to meddle in a NLRB 10k case, the Plan apparently does. The goal of the Plan in this case appears to be to force a charging party employer association into a "voluntary" arbitration process to which it never agreed to be covered. This goal is accomplished by attempting to strip the Wreckers' Association of its legal right to file 8(b)(4)(D) charges and then petition the Board to conduct a 10k hearing.

Finally, as the Board has not sought *Amicus Curiae* briefs in this 10k matter, the Plan has no special right to submit its brief.

2. THE PLAN IS NOW PROCEDURELY BARRED FROM SUBMITTING A BRIEF.

Assuming, for the sake of argument, that the Plan did have standing to submit a brief, it would be procedurally barred at this point from submitting a brief. The Plan was completely aware of the hearings in this case but failed to submit its brief within the original post-hearing

seven (7) period allowed in all 10k cases. The Plan also never requested an extension before the seven (7) day deadline under the Board Rules. When the Board was properly petitioned and extended this briefing period, for all parties, to November 14, 2014, the Plan again failed to submit a Brief in accordance with that extended period or to request an additional extension, prior to the new deadline, in accordance with the Board Rules. The Wreckers' Association contends that the Board Rules would procedurally bar any other party from submitting a Brief in this action under the above circumstances. As such, the Plan, even if it were a Party to this action, should be barred from submitting a brief.

3. A BRIEF SUBMITTED BY THE PLAN WOULD BE HIGHLY UNFAIR TO THE WRECKERS' ASSOCIATION AND WOULD EFFECTIVELY BE A PROXY REPLY BRIEF FOR A PARTY - OPERATORS' LOCAL 4.

The Wreckers' Association further notes that the Board 10k procedural rules envision rapid and simultaneous submission of briefs by all parties without reply and cross briefs. In this case, the Plan's proposed *Amicus Curiae* Brief is highly prejudicial and unfair to the Wreckers' Association. The Plan has had the opportunity to review all of the submitted briefs and it actually cites portions of these briefs in its *Amicus Curiae* brief. The Plan has attempted to strengthen the arguments made by Operators' Local 4 and to undermine the arguments made by the Wreckers' Association. Local 4 is procedurally prohibited from submitting a reply brief in this matter. As such, the Plan should not now be allowed to submit a proxy brief on its behalf.

4. ON THE FIRST DAY OF HEARINGS, OCTOBER 20, 2014, THE PARTIES STIPULATED THAT WRECKERS' ASSOCIATION WAS PROPERLY BEFORE THE BOARD AS A CHARGING EMPLOYER ASSOCIATION.

On October 20, 2014, all parties stipulated that the Charging Party/Employer, Massachusetts Building-Wreckers and Environmental Remediation Specialists Association, Inc., is a non-profit 501(c)(6) association engaged in commerce within the meaning of Sections 2(6)

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

5. AS AN EMPLOYER ASSOCIATION, THE WRECKERS ASSOCIATION BARGAINS ON BEHALF OF SEVENTY MEMBER CONTRACTORS WHOSE EMPLOYEES CONSTITUTE A MULTIEMPLOYER BARGAINING UNIT REPRESENTED BY LIUNA LOCAL UNION 1421.

The seventy (70) employer members of the Wreckers' Association have chosen to bargain through the Association because their employees constitute a multiemployer unit represented by Laborers' Local Union 1421. Specifically, the wages, hours, working conditions and benefits of all of the Local 1421 member-employees, covered under the terms and conditions of the Massachusetts State-Wide Wrecking and Environmental Remediation Agreement, have been negotiated by the Wreckers' Association on behalf of its Employer members. (CPX-2). In such a case, the Board has clearly recognized the party status of this employer association. Stack Electric, Inc. and International Brotherhood of Electrical Workers, Local No. 110, AFL-CIO and International Brotherhood of Electrical Workers, Local No. 292, AFL-CIO, 290 NLRB 575 (No. 73) (1988).

6. OVER TWENTY PERCENT OF THE MEMBERSHIP OF THE WRECKERS ASSOCIATION HAVE NOW BEEN IMPACTED BY THIS DISPUTE WHEN THEY WERE PRESSURED TO SUBMIT LETTERS OF ASSIGNMENT TO EITHER OPERATORS LOCAL 4 OR LABORERS LOCAL 1421.

Contrary to the representation being made by the Plan that this case is limited to the Salem jobsite, this case has had a major and ongoing impact on over twenty (20%) percent of

the member-employers of the Wreckers' Association. Laborers' Local 1421 submitted fourteen assignment confirmation letters which constitute written obligations from twenty (20%) percent of the Wrecker's Association's seventy members. (CPX-1 & 4) Operators Local 4 increased this total when they submitted an additional four (4) letters of assignment confirmation. (OX-2, 10, 11 & 12). These letters were also being secured by the two union locals with party status in this matter while three separate job actions took place on the Salem jobsite. Wrecker's Association member-employers were well aware of these job actions when they were approached by the union locals. They also remain justifiably concerned that, with the issuance of these letters, the same dispute could now impact their jobsites. This is why the Wreckers' Association has asked the Board to issue a determination that would cover the overlapping jurisdiction of Operators Local 4 and Laborers Local 1421. This is also why the Wreckers' Association is now obligated to pursue this case on behalf of all of its impacted members and not just JDC Demolition Company, Inc.

Such relief was exemplified in the recent *KMU Trucking* case, issued on September 3, 2014, in which the Board awarded the forklift and skid steer work to the employees who were represented by Laborers' International Union of North America, Local 310, in the entire area where these employers operate and the jurisdiction of Laborers International Union of North America, Local 310 and the International Union of Operating Engineers, Local 18 overlap. (*Laborers' International Union of North America, Local 310 and KMU Trucking & Excavating, Schirmir 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.* 361 NLRB No. 37, Page 6. (2014).

7. THE PLAN ARGUES THAT THE BOARD IS DIVESTED OF ITS JURISDICTION EVEN WHERE NOT ALL OF THE CHARGING PARTIES ARE NOT BOUND BY IT.

The Wreckers Association NEVER agreed to submit their jurisdictional disputes to the Plan. Yet, in its Motion and Brief, the Plan is arguing that the Board is now “divested of its jurisdiction” because three of the four parties to this action are covered by the Plan. This radical position flies in the face of scores of Board cases in which it was determined that for the Board to cede jurisdiction all parties had to be voluntarily bound to an alternative procedure. The Plan would have the Board simply ignore the claims and interest of the charging party Wreckers’ Association and the direct impact that this specific case has had on over twenty (20%) percent of its seventy members to date.

Despite the Plan’s claim, the Board has always maintained that, where it finds that there exists no single method of voluntary adjustment binding on all the parties, it would proceed on the merits. *International Union of Operating Engineers Local 150, AFL-CIO and Diamond Coring Company, Inc. and Laborers’ International Union of North America, State of Indiana District Council and its Local 81, AFL-CIO* 331 NLRB 1349 (No. 179) (2000); and *Hod Carriers and General Laborers Union, Local 242, affiliated with Laborers’ International Union of North America, AFL-CIO and Johnson Western Gunitite Company and Cement Masons, Local 528, affiliated with the Operative Plasters’ and Cement Masons’ International Association, AFL-CIO* 310 NLRB 1335 (No. 223) (1993).

Contrary to the Plan’s position, all parties before the Board must be specifically bound to submit jurisdictional disputes to the Plan before a Motion to Quash is granted. For example, in *Allied Construction*, as in the instant matter, the Board found that the Allied Construction

Employer's Association (ACEA) had filed the underlying 8(b)(4)(D) charges on behalf of certain member employers. The Board further found that:

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

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

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

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

As Wreckers' Association President Samuel Brooks advised in the October 22, 2014 letter to the Administrator and Counsel to the Plan quoted above, the Wreckers' Association had no such contractual obligation and he would therefore not participate in an arbitration directed by the Plan or honor any resulting award. (CPX-16). In light of the above case authority, the Wreckers' Association submits that this 10k case should not be dismissed or quashed because the parties have not all agreed to Plan or any other method of voluntary adjustment of the dispute.

Finally and as argued in its post-hearing brief, the Wrecker's Association also notes that JDC Demolition Company did not agree to use the Plan to resolve its jurisdictional disputes involving Local 421.

8. ACCEPTANCE OF THE PLAN'S POSITION WOULD EFFECTIVELY DISENFRANCHISE EVERY EMPLOYER ASSOCIATION IN THE UNITED STATES FROM SECURING RELIEF FOR ITS MEMBERS UNDER THE 10K PROCESS.

The Plan argues that the Wreckers' Association Agreement "is simply irrelevant to this case, because the Association is not the responsible "employer" for purposes of resolving the jurisdictional dispute." (Plan Brief, Page 13). The Plan bases this erroneous assumption on case authority involving the unrelated issue of subcontractor assignments. *Operating Engineers Local 150 (Austin Co.)*, 296 NLRB 938. The Plan completely ignores the status of employer associations under the Act.

Since employer associations do not make direct work assignments, the Plan is effectively arguing that no employer association, whether affiliated with it or not, would ever have standing to proceed with 8(b)(4)(D) charges and participate in 10k hearings. If the Board were to adopt the Plan's position, it would eviscerate the legal rights of all employer associations in the United States including the five (5) employer associations that founded the current Plan with the Building and Construction Trades Department of the AFL-CIO. The Plan's Brief lists these five employer associations as the *Mechanical Contractors Association*, the *National Electrical Contractors Association*, *The Association of Union Contractors*, *North American Contractor's Association*, and *Sheet Metal and Air Conditioning Contractors National Association*. (Plan Brief, Page 3).

Finally, ruling as the Plan requests would also mean that the Board would have to find that a charging party is not a necessary party to an adjudication of a dispute, which would be an extraordinary ruling that could have far reaching and unforeseen implications in other matters that would come before the Board in the future.

9. THE BOARD'S RECENT DECISION IN THE KMU TRUCKING CASE FLIES IN THE FACE OF THE PLAN'S THEORY AND SHOULD BE FOLLOWED BY THE BOARD IN THIS CASE.

In the KMU Trucking case, the Board had before it a 10k hearing involving employees represented by the Laborers and the Operating Engineers. The employers were all signatories to collective bargaining agreements negotiated, with both unions, by a multiemployer association—the Construction Employer's Association of Greater Cleveland (CEA). Laborers' International Union of North America, Local 310 and KMU Trucking & Excavating, Schirmir 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. 361 NLRB No. 37. (2014).

In the KMU Trucking case, the Board held, “Employees of KMU Trucking & Excavating, Schirmir 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.” (KMU Trucking, Id at 6).

However, under the Plan's theory, the Board may not have had the jurisdiction to make this Decision. In the KMU Trucking case, the Board stated, “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 the Operating engineers provided no evidence or argument to the contrary.” (*KMU Trucking, Id* at 3). The Plan would apparently now have the Board scour the parties’ collective bargaining agreements, memorandums of agreement and general correspondence to be positively assured that it has jurisdiction to proceed. And, if any one of the employers parties, as opposed to all the parties, were bound to the Plan with the two unions, the Plan would most likely argue that the Board proceeding should grind to a halt. The Plan’s theory is clearly not the practice of the Board and should not be imposed upon the employer parties in this case.

CONCLUSION

The Board should deny the Plan’s request to file an *Amicus Curiae* Brief in this case. The Plan is not a party to this action and has no legal status as a party in this 10k case. Further, the Plan is now procedurally barred, under the Board’s briefing schedule in this case, from submitting an *Amicus Curiae* brief. In addition, the Wreckers’ Association contends that a brief submitted by the Plan would be highly prejudicial to the Wreckers’ Association and would effectively be a proxy reply brief for Operators Local 4. Moreover, the Board has not granted non-parties a right to submit post-hearing briefs by way of a request for the submission of *amicus curiae* briefs.

The Wreckers’ Association notes that, on the first day of hearings, all parties stipulated that the Association was properly before the Board as a charging party employer association. As an employer association, the Wreckers’ Association actively bargains on behalf of seventy (70) member contractors whose employees constitute a multiemployer bargaining unit represented by Laborers Local Union 1421. The record is clear that now over twenty (20%) percent of the

member contractors of the Wreckers' Association have now been directly impacted by this dispute when they were pressured to submit letters of assignment to either Operators Local 4 or Laborers Local 1421. These letters were solicited during the same period of time when three job actions took place on the Salem jobsite. This has placed an enormous amount of stress and pressure on the Wreckers' Associations' affiliated employers.

Contrary to the Plan's assertions, the Board has always required that all, as opposed to most, of the involved parties to a dispute be bound to an alternative method of dispute resolution before the Board would relinquish its jurisdiction. In this case, clearly the Wrecker's Association, the charging party, is not bound by the Plan. To dismiss this action because the association did not make a job assignment, as proposed by the Plan, would effectively disenfranchise every employer association in the United States from securing relief for its members under the 10k process.

For the above reasons, the Wreckers' Association requests that the Plan's request to submit an *Amicus Curiae* brief be denied.

Respectfully submitted,

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