

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 14**

LABORERS' INTERNATIONAL UNION OF  
NORTH AMERICA LOCAL 110

and

Case 14-CD-153807

U.S. SILICA COMPANY

and

INTERNATIONAL UNION OF OPERATING  
ENGINEERS, AFL-CIO, LOCAL 513

LOCAL 513 POST HEARING BRIEF IN SUPPORT OF MOTION TO QUASH

COME NOW the International Union of Operating Engineers, AFL-CIO, Local 513, ("Local 513") by and through counsel and file this post-hearing brief and memorandum in support of its Motion to Quash.

**Standard**

To proceed with a dispute determination under 10(k) the Board needs a reasonable cause to believe Section 8(b)(4)(D) has been violated. *Laborers' International Union of North America, Local 265 (Henkels & McCoy)* 360 NLRB No. 102 (May 5, 2014) citing, *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1139 (2005). The meaning and requirement of "reasonable cause" is not a nullity.

The explicit standard the Board follows to find reasonable cause is three pronged:

- (1) There are competing claims of rival groups of employees to the disputed work;
- (2) A party has used proscribed means to enforce its claim to the work in dispute; and
- (3) The parties have not agreed on a method for the voluntary adjustment of the dispute.

National Labor Relations Board Members have previously opined that there is no burden of proof on any party in a Section 10(k) proceeding. *Teamsters Local No. 864*, 226 NLRB 1127, 1129 (1976). However, because the Charging Party has made allegations requiring an affirmative finding on

each of three separate prongs, the burden to establish a dispute should properly be placed upon it. Neither the Charging Party nor Local 110 have established competing employee claims to what individuals are to operate the Track Mobile in question.

### **Stipulation and Issue**

At hearing U.S. Silica Company (the “Company”) and the International Union of North America, Local 110 (“Local 110”) stipulated all three prongs were satisfied and a 10(k) determination should follow. Local 513, as during the Region’s initial investigation, its Motion to Quash, and at the 10(k) hearing itself, maintains there are no competing claims to the work under the Board’s traditional jurisprudential understanding.

### **Facts**

The facts are simple. Prior to the Track Mobile’s introduction rail cars were moved under two separate collective bargaining agreements. Company employees who did not use mobile equipment rode the rail cars while gravity moved them from one resting position to another. While releasing the rail car brakes and riding it downhill those employees worked under a collective bargaining agreement between the Company and Local 110. With only rare, incidental and de-minimis exception, Company employees who operated mobile equipment to mechanically position the rail cars against the forces of gravity worked under a collective bargaining agreement between the Company and Local 513.

The employment terms and conditions contained in the Local 110 agreement pertain to employees when they are “production and maintenance employees, except operators of shovels, front end loaders, cranes and dozers, employed in the Company’s plant near Pacific, St. Louis County, Missouri.” [Company Ex. 6]. The employment terms and conditions that are contained in the Local 513 agreement pertain to employees when they “operate all mobile equipment except for Drills and Production Forklifts, and excluding general laborers, crusher, dryer and mill operators, sand loaders, mine helpers, drillers sharpener operators, truck operators” and other traditionally excluded job

classifications. [Company Ex. 5]. When the Company introduced the Track Mobile it exclusively applied the terms and conditions of employment contained in the Local 110 agreement.

No employee, group of employees, or Local 513 member objected to the actual person or persons operating the Track Mobile. No employee, group of employees, or Local 513 member indicated they should operate the Track Mobile to the exclusion of anyone else.

Local 513 itself, by its non-Company employee Business Representative Gary Howard, filed a grievance regarding the terms and condition of employment applicable to Company employees while operating the Track Mobile. [Company Ex. 3]. That grievance, by its own terms, does not require any specific person or class of persons to cease operating the Track Mobile or exclusively operate the Track Mobile. Neither do the grievance's terms claim or demand pay in-lieu of work. The grievance's plain words simply state that whomever the Company assigns to operate the Track Mobile is to have the terms and conditions of employment embodied in the Local 513 collective bargaining agreement applied. That is, when operating the Track Mobile, the individual operator is a bargaining unit member under Local 513's collective bargaining agreement, and the terms of that agreement apply. [Company Ex. 3].

If the grievance's plain language position was not clear on March 30, 2015 it certainly was clarified by Local 513 counsel's letter of June 2, 2015. [Charged Party Ex. 2]. The Local 513 grievance only concerned the "proper wages and benefits due the individuals operating the Track Mobile. Ibid. In the unlikely event the Company was confused as to Local 513's position, it never inquired. In the unlikely event Local 110 was confused as to Local 513's position, it never inquired.

Instead Local 110, whose members were already operating the Track Mobile, threatened to attempt to instigate a strike of the Company's employees if the Company assigned Local 513 members to operate the Track Mobile. [Company Ex. 3]. On June 9, 2015 the Company's attorney authored an 8(b)(4)(D) Charge requesting a 10(k) hearing. [Bd. Ex. 1(a)]. This Charge came though the Company

had no intention assigning the Track Mobile to any employees other than those it wished, no employee or group of employees demanded or claimed an alternate assignment, and Local 513 itself did not demand or claim alternate assignment.

In the unlikely event he was confused, the Company's attorney neither contacted Local 513 nor its counsel before alleging there were competing demands of assignment by Company employees to operation of the Track Mobile. If he or the Company had inquired, they would have been corrected as to the errors of their assumptions; Local 513 and its members do not dispute who the Company assigns to perform the actual Track Mobile operation. Local 513 merely contends the Company must apply the terms and conditions of employment contained in the Local 513 collective bargaining agreement to whoever is assigned to operate the Track Mobile.

### **Argument**

#### *A. There are no competing claims*

Congress created the 8(b)(4)(D) and 10(k) to protect a neutral employer from “competing claims to the disputed work **among rival groups of employees**, and that a party has used proscribed means to enforce its claim to the work in dispute.” *A.W. Farrell & Sons, Inc.*, 360 NLRB No. 34 (January 30, 2014). The record is devoid of competing claims of work among “rival groups of employees.” The Taft-Hartley amendments to 8(b)(4)(D) and 10(k) were designed to remedy **inter employee** disputes and curb work stoppages. Robert A. Gorman & Mathew W. Finkin, *Labor Law Analysis and Advocacy* 439 (2013). The record only evidences to an allegation of dispute between Local 110 and the Company on one side and Local 513 as an entity on the other.

In alleging a 10(k) dispute, Local 110 and the Company have confused “union membership” with “bargaining unit membership.” Membership in one union or the other is “irrelevant” to a 10(k) dispute. *Id.* “What matters is that all parties agree that the employees currently performing the [Company's Track Mobile] work should continue to perform that work.” *Id.* Local 513 has never

disagreed with that position. That is why Local 513 members never claimed the work, they merely wanted whomever performed the work to receive the contractual wages and benefits due those who operated mobile equipment while that individual operated mobile equipment.

B. *A grievance is not coercive and not a claim*

Board law rightly does not find grievances, in and of themselves, coercive. *Stage Employees LATSE Local 695 (Vidtronics Co.)*, 296 NLRB 133, 141 (1984). In fact, the Board has previously taken the position that enforcement of a contract is not a matter for the National Labor Relations Board's proceedings, leaving contractual matters to the usual processes established in the contract. *Id.* at 143 citing, H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 42 (1974), quoted in *Textile Workers of America v. Lincoln Mills*, 353 U.S. 448, 452 (1957).

Similarly, a demand for recognition and application of a collective bargaining agreement to an employer's employees performing specific work does not itself present a jurisdictional dispute for the purposes of 8(b)(4)(D) or 10(k). *International Union of Operating Engineers*, 217 NLRB 19 (1975). Nor should it. No Local 513 member, or any group of employees, attempted to take a work assignment from another. For there to be an actionable "claim" to work for 10(k) jurisdiction purposes, there must be a dispute between "assignments of work between two competing groups of employees." *A.W. Farrell & Sons*, slip op. at 3; see also, *Carpenters Local 1307 (J&P BLDG. Maintenance)*, 331 NLRB 245, 247 (2000); citing *Laborers Local 1 (DEL Construction)*, 285 NLRB 593, 595 (1987).. There is no such dispute here. Rather, Local 513's grievance purports it to be the bargaining representative for employees doing a particular job while they are doing it.

C. *Recognized exceptions finding grievances to be claims do not apply*

There is at least one circumstance where the Board finds a grievance can be a "claim" for 10(k) purposes: where the grievance demand is for "pay-in-lieu of work." See, e.g., *Laborers Local 860 (Ronyak Paving, Inc.)*, 360 NLRB No. 40, slip op. at 4 (2014); *Laborers Local 265 (AMS Construction)*, 356 NLRB

No. 57, slip op. at 3, (2010). Though the logic and original purpose of the 8(b)(4)(D) and 10(k) jurisdictional dichotomy arguably would, and perhaps should, find pay-in-lieu of work grievances are not “claims” in the 10(k) context, because there is no dispute over the actual individual performing the work in question, the Board has found such distinctions “ephemeral.” *Local 30, United Late, Tile & Composition Roofers v. NLRB*, 1 F.3d 1419, 1427 (3d Cir. 1993), enfg. 307 NLRB 1429 (1992). However, this is not a concern in the instant matter.

The grievance Local 513 representative Gary Howard filed is not a pay-in-lieu of work grievance. The grievance does not say Local 513 members need to be paid for work non-513 members are performing. [Company Ex. 3]. The grievance merely states mobile equipment is the type of work covered by the Local 513 collective bargaining agreement and the terms of that agreement are to be applied to whomever the Company assigns. *ibid.* The grievance did not relate to the identity of the person physically performing work, but the “proper wages and benefits due the individuals operating the track mobile.” [Charged Party Ex. 2]. From Local 513’s perspective, the matter is strictly representational.

### **Disclaimer**

Finally, on July 6, 2015 Local 513 formally withdrew its grievance reflected in the record as Company Exhibit 3 and fully and unequivocally disclaimed interest in the Track Mobile at the U.S. Silica Company facility in Pacific, Missouri by filing the same with the National Labor Relations Board. The disclaimer was sent to the Company and Local 110 counsel the next day by electronic mail. The Pacific facility is the only facility in which Local 513 represents U.S. Silica employees. The request for a 10(k) determination only concerned the Track Mobile. There is no indication operation of the Track Mobile will cease at the Pacific facility any time soon. The disclaimer is valid and complete.

**Conclusion**

For the foregoing reasons the Notice of 10(k) hearing must be quashed or, in the alternative, the National Labor Relations Board should find Local 513 validly disclaimed the Charging Party and Local 110 believed was in dispute.

Respectfully submitted,

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Certificate of Services

I hereby certify that the forgoing was served on all parties of record listed below by the Board's E-Filing System, email and first class mail to the following:

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