

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

INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 18

Respondent

and

CASE 08-CD-135243

NERONE & SONS, INC.

Charging Party

and

LABORERS' LOCAL 310 a/w INTERNATIONAL
UNION OF NORTH AMERICA, AFL-CIO

Party-In-Interest

and

INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 18

Respondent

and

CASE 08-CD-143412

R.G. SMITH COMPANY, INC.

Charging Party

and

LABORERS' LOCAL 310 a/w INTERNATIONAL
UNION OF NORTH AMERICA, AFL-CIO

Party-In-Interest

and

INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 18

Respondent

and

CASE 08-CD-147696

KMU TRUCKING & EXCAVATING, INC.

and

SCHIRMER CONSTRUCTION CO.

and

PLATFORM CEMENT, INC.

and

21st CENTURY CONCRETE CONSTRUCTION, INC.

and

INDEPENDENCE EXCAVATING, INC.

Charging Parties

and

LABORERS' LOCAL 310 a/w INTERNATIONAL
UNION OF NORTH AMERICA, AFL-CIO

Party-In-Interest

**GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S
EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION**

TABLE OF CONTENTS

I. **Introduction**.....5

II. **The Judge Did Not Err in Finding that Local 18’s Work Preservation Defense Lacks Merit and Must be Rejected as a Matter of Board Precedent**.....6

III. **The Judge Did Not Err in Finding that Local 18 Violated Section 8(b)(4)(D) of the Act by its Continued Maintenance of Grievances Against the Charging Party Employers**.....7

IV. **The Judge Did Not Err in Finding that the Instant Section 10(k)Decisions “for all practical purposes” Determined the Disposition of the Instant Matter**.....8

V. **The Judge Did Not Err in Finding that Local 18 Sought to Contest the Underlying Board Awards**.....9

VI. **The Judge Did Not Err in Denying Local 18’s Motion to Reopen the Record**.....10

VII. **The Judge Did Not Err in Denying Local 18’s Motion to Reopen the Record**.....10

VIII. **The Judge Did Not Err in Granting the Motion in Limine**.....11

IX. **Conclusion**.....12

CERTIFICATE OF SERVICE.....13

TABLE OF AUTHORITIES

Cases

<u>Allis-Chalmers Corp.</u> , 286 NLRB 219, 219 fn. 1 (1987)	11
<u>Chicago Carpenters (Prate Installations, Inc.)</u> , 341 NLRB 543 (2004).....	8
<u>County Waste Ulster</u> , 354 NLRB 392 (2009), reaffd. 355 NLRB 413 (2010)	11
<u>Fitel/Lucent Technologies, Inc.</u> , 326 NLRB 46, 46 fn. 1 (1998)	10, 11
<u>ILWU (Bellingham Division)</u> , 291 NLRB 89 (1988)	7
<u>ILWU Local 6 (Golden Grain Macaroni Co.)</u> , 289 NLRB 1 (1998)	12
<u>Int'n Union of Operating Engineers, Local 18 (Nerone and Sons) (Nerone)</u> 363 NLRB No. 19 (2015).....	5-6, 9
<u>ITT v. Local 134, IBEW</u> , 419 U.S. 428 (1975)	8
<u>Kerry, Inc.</u> , 358 NLRB No. 113, pg. 981 (2012).....	11
<u>Laborers Local 894 (Donley's, Inc.) (Donley's I)</u> , 360 NLRB No. 20 (2014)	5
<u>Laborers' Int'n Union of North America Local 310 (Donley's III)</u> , 361 NLRB No. 37 (2014)	5, 6, 9, 12
<u>Local 7, ILWU (Bellingham Division)</u> , 291 NLRB 89 (1988).....	7
<u>Operating Engineers Local 18 (Donley's, Inc.) (Donley's II)</u> , 360 NLRB No. 113 (2014)	5, 6
<u>Operating Engineers Local 18 (Donley's, Inc.) (Donley's IV)</u> 363 NLRB No. 184 (2016).....	5-8, 10
<u>Planned Building Services, Inc.</u> , 347 NLRB 670, n 4 (2006).....	10
<u>Stage Employees IATSE Local 29, (Shepard Exposition Services)</u> , 337 NLRB 721 (2002).....	8

I. Introduction

Pursuant to Section 102.46(a) of the Board's Rules and Regulations, Counsel for the General Counsel files this Answering Brief to Respondent's Exceptions to Administrative Law Judge's Decision in the above-captioned cases. Administrative Law Judge David I. Goldman issued a decision on August 1, 2016, in which he concluded that Respondent, IUOE Local 18, violated Section 8(b)(4)(ii)(D) of the National Labor Relations Act (the Act) by filing and maintaining pay-in-lieu grievances after the issuance of the Board's decisions in Laborers' International Union of North America Local 310 (Donley's et al.) (Donley's III), 361 NLRB No. 37 (September 3, 2014), and International Union of Operating Engineers, Local 18 (Nerone and Sons) (Nerone), 363 NLRB No. 19 (October 1, 2015). JD-71-16, August 1, 2016. Respondent now excepts to the Judge's findings, rulings, and orders.¹

ALJ Goldman's findings of fact are fully supported by the record and his conclusions of law and rulings are consistent with established Board precedent. Recounting his findings and analysis here is unnecessary particularly as Respondent's exceptions are a mere renewal of the same defenses and arguments raised throughout these proceedings, as well as in the numerous preceding proceedings,² which have repeatedly been rejected by the Board.³

These cases concern Respondent's failure to comply with two related Section 10(k)

¹ Respondent excepts to the Recommended Order (JD-71-16), the May 3, 2016 Amended Order Granting the Charging Parties' Motion in Limine, as well as the ruling denying Local 18's Motion to Reopen the Record. *See* fn. 1, R. Brief.

² Operating Engineers Local 18, 363 NLRB No. 184 (2016).

³ Respondent's defenses and arguments were rejected by the Board in the following cases: Laborers Local 894 (Donley's, Inc.) (Donley's I), 360 NLRB No. 20 (2014); Operating Engineers Local 18 (Donley's, Inc.), Donley's II, 360 NLRB No. 113 (2014); Laborers' International Union of North America Local 310 (Donley's et. al) (Donley's III), 361 NLRB No. 37 (2014); International Union of Operating Engineers, Local 18 (Nerone and Sons) (Nerone) 363 NLRB No. 19 (2015) and Operating Engineers Local 18 (Donley's, Inc.), (Donley's IV) 363 NLRB No. 184 (2016).

awards: *Donley's III* and *Nerone*. The Board awarded the work in both *Donley's III* and *Nerone* to the Laborers' Local 310, which had previously been awarded the same skid steer and forklift work in *Donley's I* and *Donley's II*. In *Donley's I* and *Donley's II* and in the instant matter, Respondent has refused to comply with the Board's Section 10(k) awards, maintaining its recalcitrant position that it would continue processing and filing pay-in-lieu grievances for the forklift and skid steer work at issue. Respondent's continued maintenance of the grievances and its filing of new grievances is in direct conflict with the Board's area-wide awards in *Donley's III* and *Nerone*. Accordingly, the ALJ correctly found that Respondent had once again violated Section 8(b)(4)(D) of the Act.⁴ Counsel for the General Counsel respectfully replies to Respondent's Exceptions to the decision issued by ALJ Goldman and states as follows.

II. The Judge Did Not Err in Finding that Local 18's Work Preservation Defense Lacks Merit and Must be Rejected as a Matter of Board Precedent.

Respondent argues that the ALJ incorrectly relied upon Operating Engineers Local 18 (Donley's, Inc.), 363 NLRB No. 184 (2016) ("*Donley's IV*") in finding that Local 18's work preservation affirmative defense in the instant matter lacks merit.⁵ In its exceptions, Respondent contends that the Board incorrectly decided *Donley's IV* and its analysis and decision is fundamentally flawed. Respondent's disagreement with the Board's *Donley's IV* decision is of no moment in the instant matter. Respondent ignores that the ALJ correctly applied longstanding legal precedent in rejecting Local 18's work preservation defense. (JD-71-16 at 13). In reaching his decision, ALJ Goldman rejected Respondent's work preservation dispute and the alleged factual underpinnings to it based on established Board law, which notably fully

⁴ On May 6, 2016, the Board issued its decision affirming the underlying ALJD regarding *Donley's I* and *Donley's II* unfair labor practice case. Operating Engineers Local 18 (Donley's, Inc.), (*Donley's IV*), 363 NLRB No. 184 (2016).

⁵ Respondent's Exceptions Nos. 1, 2.

supports the Board's decision in *Donley's IV*. Id. ALJ Goldman correctly stated that the only issue in a work preservation defense is whether Local 18-represented employees performed work for these Charging Party Employers and how much of the disputed work was performed by them. There is no record evidence to show that Local 18-represented employees performed the work at issue on a regular basis. ALJ Goldman correctly noted that even if Respondent were permitted to re-litigate its work preservation defense, Respondent had no relevant additional evidence to support its Respondent's offer of proof. Id. at 15-16. Accordingly, the Board should deny Respondent's Exceptions 1 and 2.

III. The Judge Did Not Err in Finding that Local 18 Violated Section 8(b)(4)(D) of the Act by its Continued Maintenance of Grievances Against the Charging Party Employers.

Respondent argues in its Exceptions 3, 4 and 13, that the ALJ improperly relied upon *Donley's IV* and similar Board precedent to determine that the maintenance of the grievances subsequent to the Section 10(k) awards violated Section 8(b)(4)(d) of the Act. Respondent likewise argues that the work preservation clause contained in the 2012-2015, and 2015-2019, CEA Agreements contains legitimate work preservation language that does not trigger a jurisdictional dispute cognizable under Section 10(k). R. Brief at 42. Respondent repeats the same arguments from the underlying Section 10(k) cases and in *Donley's IV*, which the Board properly rejected. ALJ Goldman also properly rejected Respondent's claim that this matter does not involve a jurisdictional dispute. Respondent's disagreement with Board precedent does not negate that a union's pursuit of contractual claims to obtain work already awarded in a 10(k) determination or to secure monetary damages in lieu of that work violates Section 8(b)(4)(ii)(D). *See Donley's IV* (and cases cited therein); Local 7, ILWU (Bellingham Division), 291 NLRB 89 (1988) (pay-in-lieu-of-work grievances violate Section 8(b)(4)(D)).

ALJ Goldman correctly noted that there is no basis in the record for any claim by the Respondent that its demonstrated efforts to obtain all of the Employers' forklift and skid steer work represents work preservation and not work acquisition. Rather, the record in this case, as well as the records in the prior Section 10(k) proceedings and in *Donley's IV*, demonstrates that Local 310-represented employees have consistently been assigned the work and, at most, there were only isolated instances of the Respondent-represented employees performing the work for the Employers. JD-71-16 at 15.⁶

Accordingly, Respondent's Exceptions 3, 4 and 13 should also be rejected.

IV. The Judge Did Not Err in Finding that the Instant Section 10(k) Decisions “for all practical purposes” Determined the Disposition of the Instant Matter.

In its fifth exception, Respondent takes issue with the ALJ's analysis of ITT v. Local 134, IBEW, 419 U.S. 428 (1975). Contrary to Respondent's assertion, the ALJ never found that the Section 10(k) decisions in *Donley's III* and *Nerone* have “for all practical purposes” determined the disposition of the present matter. Respondent cites to the pages 11 and 38-50 of the ALJD for this assertion yet conveniently quotes only part of the ALJD and ignores the full context. JD-71-16 at 11. The ALJ correctly applied the Supreme Court rationale when he held:

And the reason the Section 10(k) award “for all practical purposes” determines the outcome of the 8(b)(4)(D) hearing, it is not because the Board will reweigh the award of the work in the unfair labor practice hearing, but because it still must be proven at the unfair practice hearing what the 10(k) hearing found only “reasonably likely”- that the union continues to picket, grieve, or otherwise act coercively to obtain the work awarded by the Board to another union.⁷

The ALJ did not, as Respondent suggests, disregard the 8(b)(4)(D) hearing. Rather, he plainly and explicitly explained that the burden of proof in the Section 10(k) hearing is different from

⁶ See also Chicago Carpenters (Prate Installations, Inc.), 341 NLRB 543, 545 (2004); Stage Employees IATSE Local 39, (Shepard Exposition Services), 337 NLRB 721, 723 (2002).

⁷ JD-71-16 at 11.

that of the unfair labor practice hearing and the General Counsel bears the burden in the unfair labor practice hearing to show that after a Section 10(k) award, a union continues to engage in coercive conduct to obtain the work at issue.

Respondent argues that the ALJ should have made a credibility determination with regard to whether or not Local 18 had a history of performing the work in dispute and that the ALJ should not have precluded Local 18 from presenting its affirmative defenses of collusion and work preservation. R. Brief at 30. This argument is without merit. The ALJ correctly examined the scope of the 8(b)(4)(D) proceeding by applying Board precedent and properly determined the issues to be litigated. JD-71-16 at 12. The ALJ then correctly determined that Respondent had stipulated to every element of the 8(b)(4)(D) violation that needed to be decided. Id. Accordingly, Respondent's Exception 5 is without merit.

V. The Judge Did Not Err in Finding that Local 18 Sought to Contest the Underlying Board Awards.

Respondent's Exception 6 is to the ALJ's finding that Local 18 seeks to contest the underlying Board awards of work in *Donley's III* and *Nerone*. Respondent's Brief fails to support this Exception with any coherent argument. Respondent surmises that the ALJ erroneously concluded that Local 18 is attempting to contest the Board's award of work yet Respondent cites nothing from the ALJD to support its Exception. The ALJ properly found, consistent with the stipulations reached among the parties, that Local 18 maintained and filed pay-in-lieu grievances, which the Board has long held to be coercive in violation of Section 8(b)(4)(D) of the Act. Id. at 12.

VI. The Judge Did Not Err in Finding that Local 18's Affirmative Defenses are Without Merit.

In its Brief, Respondent wishes to re-litigate the affirmative defenses of collusion and work preservation and claims that the ALJ improperly applied Board precedent in making his determination that such defenses are without merit. The ALJ correctly rejected both Respondent's work preservation defense and its collusion defense by properly noting that these very issues have been raised and rejected multiple times by the Board. JD-71-16 at 11-16. Indeed, the ALJ correctly found no merit to Respondent's work preservation defense and rejected the defense based on Board precedent and because Respondent had no additional relevant evidence to support its claim. JD-71-16 at 15. For these reasons, the Board should deny Respondent's Exceptions 7, 8, 10 and 11.

VII. The Judge Did Not Err in Denying Local 18's Motion to Reopen the Record.

Respondent argues that the ALJ improperly denied its Motion to Reopen the Record. Local 18 asserts that based on newly discovered and previously unavailable evidence, the ALJ erred in denying its motion to reopen the record. In JD-71-16 at footnote 4, the ALJ properly rejected Respondent's Motion on the basis that even if the new evidence is true, it is simply more of the same argument expressly rejected by the Board in *Donley's IV*. Additionally, Counsel for the General Counsel submits that the Respondent likewise failed meet the requisite showing for reopening the record.

Section 102.35(a)(8) of the Board's Rules and Regulations permits the filing of a motion to reopen the record after the close of the trial but before issuance of the ALJ's decision. In the context of newly discovered evidence, a movant must show that the evidence is, in fact, newly discovered and that the introduction of the evidence would require a different result than that reached by the judge. FiteLUcent Technologies, 326

NLRB 46, 46 fn. 1. *See also County Waste Ulster*, 354 NLRB 392 (2009), *reaffd.* 355 NLRB 413 (2010).

“Newly discovered” evidence must have existed “at the time of the trial.” Thus, Respondent concedes that the alleged statement of Don Dreier, of which Respondent submits as its evidence, occurred on June 6, 2016, *after* the instant hearing closed. Respondent’s motion must be denied as the statement was not in existence at the time of the hearing. Allis-Chalmers Corp., *supra*; Fitel/Lucent Technologies, Inc., 326 NLRB at 46.

The rule set forth in *Allis-Chalmers* and its progeny prevents parties to Board proceedings from using events occurring after the hearing as an excuse to repeatedly return to the ALJ to reopen the record. The Board's interest in securing finality of the administrative record is so strong that with evidence in existence at the time of the trial, a movant must show its ignorance of such evidence was excusable. Kerry, Inc., 358 NLRB No. 113, pg. 981 (2012) (finding that although memorandum union belatedly discovered “was in existence at the time of the hearing, the union failed to show that its ignorance was excusable.) Here, Respondent seeks to admit evidence of post-hearing developments. Under well-settled Board law, it cannot do so. Therefore, Respondent’s Exception 9 is without merit.

VIII. The Judge Did Not Err in Granting the Motion in Limine.

Respondent argues in Exception 12 that its affirmative defenses of collusion and work preservation are not threshold matters in underlying Section 10(k) proceedings and as such, the Administrative Law Judge incorrectly granted the Charging Party Employers’ Motion in Limine. Respondent’s arguments are without merit.

As discussed at length previously, Respondent's affirmative defenses of collusion and work preservation are without merit. In his Amended Order to the Motion in Limine, the ALJ properly concluded that collusion was a threshold issue that is not subject to re-litigation after a 10(k) award. Similarly, the ALJ properly concluded that ILWU Local 6 (Golden Grain Macaroni Co.), 289 NLRB 1 (1998) does not permit a party to re-litigate every issue from the underlying Section 10(k) award. As noted by the ALJ, Respondent's work preservation defense was previously fully considered and rejected by the Board in *Nerone* and *Donley's III*. Moreover, Respondent's objection to the ALJ's ruling on the Motion in Limine was the subject of Respondent's Request for Special Appeal, which was denied on July 12, 2016. Respondent's Exception 12 is without merit.

IX. Conclusion

For all of the above-mentioned reasons, the General Counsel respectfully requests that the Board uphold the ALJ's findings and recommended order.

Respectfully submitted,

/s/ Sharlee Cendrosky

SHARLEE CENDROSKY
COUNSEL FOR THE GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD
REGION 08
1240 E 9TH ST
STE 1695
CLEVELAND, OH 44199-2086

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing General Counsel's Response to Respondent's Exceptions was served by e-mail and regular mail on the following counsel on this **26th** **day of September, 2016:**

Timothy R. Fadel, Esq.
Fadel & Beyer, LLC
The Bridge Building,
Suite 120
18500 Lake Road
Rocky River, OH 44116

Meridith Shoop, Esq.
Littler Mendelson, P.C.
1100 Superior Avenue, 20th Floor
Cleveland, OH 44114-2518
Shoop, Meredith C.
[MShoop@littler.com]

Basil W. Mangano, Esq.
Mangano Law Offices
2245 Warrensville Center Road, STE 213
Cleveland, OH 44118-3145
bmangano@bmanganolaw.com

/s/ Sharlee Cendrosky

SHARLEE CENDROSKY
COUNSEL FOR THE GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD
REGION 08
1240 E 9TH ST
STE 1695
CLEVELAND, OH 44199-2086