

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
WASHINGTON, D.C.**

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INTERNATIONAL UNION OF OPERATING ENGINEERS,  
LOCAL 18

Respondent; and

NERONE & SONS, INC.  
R.G. SMITH COMPANY, INC.  
KMU TRUCKING & EXCAVATING  
SCHIRMER CONSTRUCTION CO.  
PLATFORM CEMENT  
21st CENTURY CONCRETE CONSTRUCTION, INC.  
INDEPENDENCE EXCAVATING, INC.

08-CD-135243

Charging Parties; and

LABORERS' INTERNATIONAL UNION OF NORTH  
AMERICA, LOCAL 310

Party-In-Interest.

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**RESPONDENT'S REPLY BRIEF TO THE GENERAL COUNSEL'S ANSWERING  
BRIEF**

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Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Respondent International Union of Operating Engineers, Local 18 hereby submits its Reply Brief to the General Counsel's Answering Brief in the present matter.

Respectfully Submitted,

*/s/ Timothy R. Fadel*  
TIMOTHY R. FADEL (0077531)  
Fadel & Beyer, LLC  
The Bridge Building, Suite 120  
18500 Lake Road  
Rocky River, Ohio 44116  
(440) 333-2050  
tfadel@fadelbeyer.com  
*Counsel for the International Union of  
Operating Engineers, Local 18*

## REPLY BRIEF

### I. Introduction

The gravamen of the General Counsel's Answering Brief is that the ALJ correctly determined that the International Union of Operating Engineers, Local 18 ("Local 18") violated Section 8(b)(4)(D) of the Act because it continued to file so-called contractual "pay-in-lieu" grievances, contrary to the Board's decisions in *Laborers' Local 310 (KMU Trucking & Excavating)*, 361 NLRB No. 37 (2014) and *Operating Engineers Local 18 (Nerone & Sons)*, 363 NLRB No. 19 (2015). The General Counsel further contends that the ALJ correctly relied on Board precedent, including, but not limited to *Operating Engineers Local 18 (Donley's, Inc.)*, 363 NLRB No. 184 (2016) (*Donley's IV*). However, as Local 18 explained at length in its Brief in Support of Exceptions – arguments which the General Counsel does not address at all – the ALJ utilized a troubled line of authorities that do not consider whatsoever the scope of the bargaining unit before assessing the merits of the work preservation defense. If the ALJ had done otherwise, a preponderance of the evidence would have established that within the appropriate multiemployer bargaining unit, forklift and skid-steer work is fairly claimable by Local 18 members in the present matter. As such, Local 18's conduct through enforcement of its work preservation grievances does not violate Section 8(b)(4)(D) of the Act and the General Counsel's Complaint must be dismissed in its entirety.

### II. The ALJ Erred in Finding That Local 18's Work Preservation Defense Lacks Merit and Should Not be Rejected as a Matter of Board Precedent.

Without elaboration, the General Counsel reiterates that the correct test for evaluating the validity of 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." (GC Ans. Br., p. 7.) The General Counsel does not address the very shortcomings of this

approach utilized by the Board in *Donley's IV* which Local 18 vigorously addressed in its Brief in Support of Exceptions. The General Counsel's position does not attack or deconstruct Local 18's arguments, but robotically heeds purported jurisprudence. This approach is symptomatic of a stagnant application of precedent to the facts at hand when the appropriate bargaining unit in a Section 8(b)(4)(D) work preservation dispute is multiemployer in scope. The General Counsel's failure to explain *why* Local 18's position lacks merit, other than to cry *stare decisis*, suggests that it has no good argument to counter the Union's claim: under Board law concerning the validity of work preservation clauses and a union's efforts to enforce them, the legality of such conduct necessarily depends on evaluating the applicable bargaining unit's scope and whether such work performed within that unit is fairly claimable by the union alleging preservation.

The General Counsel's conclusory contention that the ALJ properly relied on *ILA Local 1332 (Philadelphia Marine Trade Assn.)*, 219 NLRB 1229 (1975) for the proposition that the Board's determination of a work preservation argument is binding upon the ALJ in a subsequent Section 8(b)(4)(D) proceeding is likewise misguided. (GC Ans. Br., p. 6.) Indeed, the General Counsel does not attack, let alone address Local 18's critique that *ILA Local 1332* is inapplicable to the present case. As Local 18 explained in its Brief in Support of Exceptions, *ILA Local 1332* contains the outdated holding that a subsequent 8(b)(4)(D) proceeding "is based entirely on the record evidence introduced in the 10(k) proceeding." *Id.* at 1229, fn. 1. Yet, under current Board jurisprudence, Local 18's work preservation affirmative defense "is a mixed question of fact and law" and may be relitigated during the subsequent 8(b)(4)(D) proceedings. *ILWU Local 6 (Golden Grain Macaroni Co.)*, 289 NLRB 1, 2 (1988) That is, a Section 8(b)(4)(D) hearing is appropriate when, *inter alia*, the respondent union "denies the existence of an element of the 8(b)(4)(D) violation, *either directly or by raising an affirmative defense.*" *Id.* at 2, fn. 4.

Moreover, in *ILA Local 1332*, the Board subsequently found that a work preservation argument could not subsequently be raised “[u]pon the basis of the undisputed facts the [Board] decided in the 10(k) proceeding[.]” *Id.* Critically, unlike here, the respondent in *ILA Local 1332* did not dispute that it had an unlawful object through proscribed behavior. *Id.* As such, *ILA Local 1332* is entirely distinguishable and has no bearing on the ALJ’s responsibility to consider Local 18’s affirmative defenses.

**III. The ALJ Erred 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.**

As explained above, the General Counsel’s argument that the ALJ correctly found a Section 8(b)(4)(D) violation is erroneously predicated on limiting the work preservation inquiry to the Charging Party Employers. Rather, the proper scope of the bargaining unit for assessing Local 18’s work preservation defense is as follows: no fewer than 51 different building construction employers were bound to the CEA Agreement set to expire in 2015 (*Donley’s IV*: L18 Ex. 171 A-C); no fewer than 89 different building construction employers were bound to the CEA Agreement that expired in 2012 (*Donley’s IV*: L18 Ex. 171D-F); and no fewer than 30 different building construction employers were bound to the CEA Agreement that expired in 2009 (*Donley’s IV*: L18 Ex. 171G-H.) Within the scope of the CEA’s multiemployer bargaining unit, a preponderance of the evidence establishes that forklift and skid-steer work is fairly claimable by Local 18 members. There is no need to determine whether the individual Charging Parties had historically employed operating engineers to perform forklift or skid-steer work. Hundreds of contractors within the unit have historically assigned forklifts and skid-steers to operating engineers. (*Donley’s IV*: L18 Ex. 177; L18 PHB, Attachment A.) Indeed, hundreds upon hundreds of referrals establish that these same employers have traditionally and repeatedly requested that Local 18 refer operating engineers to run forklifts and/or skid-steers. (*Donley’s IV*:

L18 Ex. 180-186; L18 PHB, Attachment C.) Moreover, dozens of Local 18 members testified as to their own personal experiences operating forklifts and skid-steers for building construction employers that were bound to the AGC Agreement and/or the CEA Agreement. In each instance, the witness offered credible and reliable testimony as to the name of their employer, the type of work performed, the location of the jobsite, and their understanding of which CBA governed their employment. (*Donley's IV*: Tr. 601-611, 818-30, 846-62, 917-30, 933-54, 990-1000, 1467-86, 1515-20, 1527-32, 1572-82, 1603-07, 1622-36, 1639-59, 1669-73, 1695-1707, 1729-1738; L18 PHB, Attachment B.)

Local 18 members also specifically performed work for the Charging Parties. This fact lends no credence to the General Counsel's contention that the ALJ was correct in finding "only isolated instances" of Local 18 members performing forklift and skid-steer work. (GC Ans. Br., p. 8.) Specifically, Local 18 members Jennifer Miller, Richard Pavelecky, Everee Springer, and Phillip Latessa all credibly testified that they had – for long periods of time and on many multiple occasions – performed forklift and/or skid-steer work for R.G. Smith and Independence. (*Donley's IV*: Tr. 776-96, 867-914, 959-67, 1020-35.) Ms. Miller had worked for R.G. Smith operating such equipment throughout 2013, Mr. Pavelecky had worked for Independence operating such equipment from 2010 through 2014, Ms. Springer had worked for Independence operating such equipment throughout 2014, and Mr. Latessa had worked for Independence for decades. (*Id.*) Similarly, Charging Parties KMU and 21st Century themselves *admitted* that they had consistently utilized operating engineers to operate forklifts and skid-steers. (*Donley's III*: Tr. TR 245-246, 264-265, 291.) At bottom, all of the foregoing evidence sufficiently establishes that forklift and skid-steer work within the multiemployer bargaining unit is fairly claimable by Local 18.

**IV. The ALJ Erred in Finding That the Underlying Section 10(k) Decisions “for all practical purposes” Determined the Disposition of the Instant Matter.**

The General Counsel misreads the ALJ’s recitation of *ITT v. Electrical Workers Local 134*, 419 U.S. 428, 95 S.Ct. 600, 42 L.Ed.2d 558 (1975). (See GC Ans. Br., p. 8.) The ALJ’s purpose in arguing that the disposition of the subsequent 8(b)(4)(D) hearing “for all practical purposes” is based on the outcome of the underlying 10(k) proceeding was to explain the nature of the former – that the Board does not “reweigh the award of work,” but must prove the elements of the 8(b)(4)(D) violation. (ALJ Dec., p. 11.) The ALJ was not focusing on the separate standard of proof, but instead prefacing a more detailed, and incorrect, analysis that the 8(b)(4)(D) hearing is limited to the elements of the violation, and even affirmative defenses constitute threshold matters which cannot be relitigated.

**V. The ALJ Erred in Finding That Local 18 Sought to Contest the Underlying Board Awards and that Local 18’s Affirmative Defenses are Without Merit.**

Contrary to the General Counsel’s curious assertion otherwise (GC Ans. Br., p. 9), Local 18 explicitly cites to the ALJ’s decision in support of its argument that the ALJ erroneously viewed Local 18’s arguments in the instant matter as nothing more than an attempt to relitigate the award of work in the underlying 10(k) cases. Local 18 specifically pointed to page 12, lines 17-18 of the ALJ’s decision. (L18 Br., p. 32.) Therein, the ALJ stated that what Local 18 “seeks to contest is what it may not contest: the underlying Board award of the disputed work to the Laborers.” A thorough reading of the ALJ’s decision reveals that he believed Local 18’s use of collusion and work preservation as affirmative defenses were merely part and parcel of this impermissible effort. Accordingly, Local 18 specifically raised Exceptions 7 through 11 to contest these findings. (L18 Br., p. 32.) The General Counsel’s single claim that Local 18 has failed to provide “any coherent argument” is a non-starter. (GC Ans. Br., p. 9.) Indeed, the

General Counsel offers no rebuttal to the specific arguments raised by Local 18 that the affirmative defenses of collusion and work preservation can and should be relitigated in subsequent 8(b)(4)(D) proceedings under Board precedent. Perhaps this silence is based on the fact that the Board has repeatedly made clear since *Golden Grain* that the affirmative defense of work preservation “does not raise . . . purely preliminary or threshold matters” that cannot be relitigated in a subsequent 8(b)(4)(D) proceeding. *Glaziers Local 513 (Custom Contracting Co.)*, 292 NLRB 792, 793 (1989). Rather, because the respondent union’s “object was to preserve work, its demand for the disputed work *did not amount to a violation of Section 8(b)(4)(D).*” *Id.* (Emphasis added.)

#### **VI. The ALJ Erred in Denying Local 18’s Motion to Reopen the Record.**

Other than merely repeating that the ALJ’s Ruling on Local 18’s Motion to Reopen the Record was correct on the merits, the General Counsel attempts to foreclose consideration of the Union’s proffered evidence as a procedural matter. However, this position is unavailing as a matter of law. While Section 102.35(a)(8) of the Board’s Rules and Regulations provides the ALJ with authority to reopen the record, it does not identify the grounds upon which this may occur. Rather, only Section 102.48(d)(1) identifies the types of permissible evidence in the context of a motion to reopen in ULP proceedings. In relevant part, “newly discovered evidence [or] evidence which has become available only since the close of the hearing” may be considered. Sec. 102.48(d)(1). The General Counsel’s claim that proffered evidence must have existed at the time of the hearing only applies to newly discovered evidence. (GC Ans. Br., p. 11.) Specifically, such evidence is that “which was in existence at the time of the hearing, and of which the movant was excusably ignorant.” *E.g., Owen Lee Floor Serv., Inc.*, 250 NLRB 651, 651 (1980), fn. 2. Clearly, this leaves the other category of evidence – that which “has become

available only since the close of the hearing” – not subject to this rule. Local 18’s proffered evidence through the affidavit of Richard Dalton, the Union’s Business Manager, constitutes evidence which was not available until after the hearing closed, as it concerns statements made in June of 2016. Under these grounds, Local 18’s Motion to Reopen the Record is manifestly appropriate, even if the proffered evidence did not exist at the time of the hearing. *See, e.g., Wal-Mart Stores, Inc.*, 348 NLRB 833, 834-35 (2006) (the Board granted a motion to supplement the record when certain documents were made available in an unrelated proceeding by a party post-ULP hearing through waiver of attorney-client privilege).

#### **VII. The ALJ Erred in Granting the Charging Parties’ Motion in Limine.**

Other than stating that the ALJ correctly granted the Charging Parties’ Motion in Limine on the merits, the General Counsel notes that the Board already denied Local 18’s Request for Special Permission to Appeal the ALJ’s Order on the Motion. (CP Ans. Br, p. 12.) That the Board previously addressed Local 18’s arguments concerning this Order does not prevent the Board from fully reconsidering these arguments upon a proper exception and supporting brief, which Local 18 has provided. As a matter of course, a party may renew its position addressed in a request for special permission to appeal in a subsequent exception. *E.g., Royal Components, Inc.*, 317 NLRB 971, 972 (1995); *Progressive Cafeterias, Inc.*, 176 NLRB 83, 86 (1969); *Jos. L. Rozier Machinery Co.*, 174 NLRB 1170, 1171 (1969).

#### **VIII. Conclusion**

For all the foregoing reasons, the General Counsel’s Answering Brief lacks merit and Local 18 respectfully requests that the Board overrule the ALJ’s Decision in its entirety.

Respectfully Submitted,

/s/ Timothy R. Fadel

TIMOTHY R. FADEL (0077531)

Fadel & Beyer, LLC

The Bridge Building, Suite 120

18500 Lake Road

Rocky River, Ohio 44116

(440) 333-2050

tfadel@fadelbeyer.com

*Counsel for the International Union of  
Operating Engineers, Local 18*

## CERTIFICATE OF SERVICE

A copy of the foregoing was electronically filed with the National Labor Relations Board, Office of the Executive Secretary, and served via email to the following on this 4th day of October, 2016:

Sharlee Cendrosky  
National Labor Relations Board, Region 8  
1240 East 9th Street, Room 1695  
Cleveland, OH 44199  
sharlee.cendrosky@nlrb.gov  
*Counsel for the General Counsel*

Basil W. Mangano  
Mangano Law Offices Co., LPA  
2245 Warrensville Center Road  
Suite 213  
Cleveland, Ohio 44118  
bmangano@bmanganolaw.com  
*Counsel for Party-in-Interest  
Laborers' International Union  
of North America, Local 310*

Meredith C. Shoop  
Littler Mendelson P.C.  
1100 Superior Ave. East  
20th Floor  
Cleveland, Ohio 44114  
mshoop@littler.com  
*Counsel for Charging Parties*

/s/ Timothy R. Fadel  
TIMOTHY R. FADEL