UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

LOCAL 876, INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS (IBEW), AFL-CIO,

Charged Party,

and Case No. 07-CD-182456

NEWKIRK ELECTRIC ASSOCIATES, INC.,

Charging Party,

and

LOCAL 324, INTERNATIONAL UNION OF
OPERATING ENGINEERS, AFL-CIO,

Intervenor.

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) provides the Board with subject matter jurisdiction to resolve a jurisdictional dispute, unless the parties have agreed upon a private method for the voluntary adjustment of the dispute or they have actually adjusted the dispute. The National Labor Relations Board ("Board") has repeatedly found that the Plan constitutes an

agreed-upon method for the voluntary adjustment of jurisdictional disputes. *Laborers Local 60 (Mergentime Corp.)*, 305 NLRB 762, 763 (1991); *Operating Eng'rs Local 139 (Allied Constr.)*, 293 NLRB 604, 605 (1989); *Plumbers Local 447 (Capitol Air Conditioning, Inc.)*, 224 NLRB 985 (1976); NLRB Casehandling Manual (Part One) Sec. 10216. When the parties are bound to the Plan, the Board has found that it is divested of jurisdiction to resolve the dispute. *Plumbers Local 447*, 224 NLRB at 988. The parties are required to comply with the Plan's procedures and abide by the Plan's adjustment of their dispute. *Id.*

All three parties to the jurisdictional dispute at issue are bound to the Plan. The Charged Party, Electrical Workers Local 876 ("Local 876"), and the Charging Party, Newkirk Electric Associates ("Newkirk"), nevertheless argue that the case is properly before the Board because Local 876 is an "outside" local of the IBEW, which, they claim releases Local 876 from its obligation to resolve disputes through the Plan. Local 876 and Newkirk raise arguments that present important questions concerning whether the parties have an agreed upon method for the voluntary adjustment of jurisdictional disputes.

By enacting Section 10(k), Congress specifically promoted the private settlement of jurisdictional disputes through agreed upon mechanisms, like the Plan. Consequently, the Plan 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 refrain from deciding the disputes. The Plan therefore writes separately to (1) provide a more complete description of the Plan than that found in the briefs submitted by the parties; and (2) to explain more fully why the Board should find that all of the parties to this dispute are bound to the Plan.

Accordingly, the Plan respectfully requests that the Board grant the motion for leave to file the attached *amicus curiae* brief.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF THE PLAN FOR THE SETTLEMENT OF JURISDICTIONAL DISPUTES IN THE CONSTRUCTION INDUSTRY

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INTRODUCTION

This case is before the National Labor Relations Board ("Board") pursuant to Section 10(k) of the National Labor Relations Act ("Act"), 29 U.S.C. § 160(k). Section 10(k) authorizes the Board to hear and determine a jurisdictional dispute *unless* the parties have adjusted or are bound to an agreed-upon method for the voluntary adjustment of the dispute. *Id.*

A jurisdictional dispute has arisen between Local 876, International Brotherhood of Electrical Workers, AFL-CIO ("Local 876") and Local 324, International Union of Operating Engineers, AFL-CIO ("Local 324"). The dispute involves "the use of earth moving/digging equipment, cranes, and other power driven equipment in connection with the purpose of the assembly, disassembly, erection and modification of cell towers, including the hoisting of cell towers, clearing land and constructing roads" (hereinafter "cell tower work"). (BX 2, ¶ 9.)[1] The work is being assigned by Newkirk Electric Associates ("Newkirk"), who is a signatory to collective bargaining agreements with Local 876[2] and Local 324.[3]

All three parties are bound to resolve the dispute over the proper assignment of cell tower work through the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry ("Plan"). The Plan is a well established, contractually based mechanism for resolving jurisdictional disputes in *all* aspects of the construction industry. The Plan has a strong interest to ensure that, when parties have committed themselves to its process to adjust jurisdictional disputes, the Board honors that commitment by refusing to decide those disputes. The Board's

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[1] Citations to exhibits will be "BX" for Board Exhibits, "EX" for Employer Exhibits, "CPX" for Charged Party (Local 876) Exhibits, and "IX" for Intervenor (Local 324) Exhibits. Citations to the transcript will be by witness, followed by page number and line number(s).

[2] CPX 4; EX 5.

[3] IX 1.

restraint preserves the integrity of the Plan and discourages parties from attempting to circumvent their contractual obligations.

This case presents an important question as to whether the parties are bound to the Plan and are required to use it to resolve their dispute over the assignment of cell tower work. The Plan will therefore begin by providing background about its history and operation. It will then turn to the merits of this case. The Plan will demonstrate that (1) the Board lacks jurisdiction when all parties to a jurisdictional dispute are bound to an agreed upon method for resolving the dispute; and (2) that the parties to this dispute are bound to such a method, *viz.* the Plan.

THE PLAN

The Plan became operative on May 1, 1948, following the passage of the Taft-Hartley Act in 1947, which included Section 10(k).[4] Since the Plan's inception, the Board has repeatedly recognized that the Plan – along with its predecessors – is a valid, agreed upon method for the voluntary adjustment of jurisdictional disputes when the unions and employers are bound to its terms. *Laborers Local 60 (Mergentime Corp.)*, 305 NLRB 762, 763 (1991); *Operating Eng'rs Local 139 (Allied Constr.)*, 293 NLRB 604, 605 (1989); *Plumbers Local 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.[5] A Joint Administrative Committee ("JAC") oversees the operation of the Plan. The JAC is composed of four (4) union representatives, four (4) employer representatives, a chairman (who

[4] John T. Dunlop, *Jurisdictional Disputes*, *in* NYU Second Annual Conference on Labor 496 (1949).

[5] The five associations are the Mechanical Contractors Association, National Electrical Contractors Association, The Association of Union Constructors, North American Contractors Association, and the Sheet Metal and Air Conditioning Contractors National Association.

is the President of the BCTD), and a vice-chairman (who is a designee of the employer associations).

The Plan's governing document (IX 10) is divided into two parts, the Procedural Rules and Regulations and the Plan itself.[6] The process by which parties bind themselves to the Plan, as well as the procedures for resolving jurisdictional disputes, are clearly set forth in that governing document.

A union may bind itself – or, as it is known, become "stipulated" – to the Plan in one of three ways: (1) by virtue of its parent organization's affiliation with the BCTD; (2) by signing a stipulation of willingness to be bound by the Plan; or (3) through a provision in a collective bargaining agreement. (IX 10 at 17 (Plan, Art. II, Sec. 1.).) Likewise, an employer may become "stipulated" to the Plan in one of three ways: (1) through its membership in a stipulated association of employers with authority to bind its members; (2) a signed stipulation stating its willingness to be bound to the Plan; or (3) through the provisions of a collective bargaining agreement. (*Id.*)

When a jurisdictional dispute arises, the Plan's Administrator is notified by the union challenging the assignment, the employer or the employer's signatory association. (IX 10 at 6 (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 & Conciliation Service ("FMCS"). Upon receiving the notice, the Administrator informs the involved parties of the dispute. (*Id.* at 21-22 (Art. V, Sec. 2).) The parties then have five days to resolve the matter informally or with the assistance of an FMCS mediator. (*Id.* at 22 (Art. V, Sec. 3.))

[6] 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.

If the parties are unable to resolve the dispute during the five-day period, the involved unions or the employer may request arbitration. (IX 10 at 22-23 (Plan, Art. V, Sec. 2).) The parties then have three days to select an arbitrator from a permanent panel of arbitrators knowledgeable in the construction industry. (*Id.* at 23 (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. (IX 10 at 24-25 (Plan, Art. V, Sec. 8).) 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.* at 25 (Plan, Art. V, Sec. 10).) The arbitrator's decision is final and binding. (*Id.* at 11 (Proc. Rules, Art. VII, Sec. 5).) If the arbitrator fails to explain fully the Plan criteria upon 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.* at 26 (Plan, Art. V, Sec. 12).) However, the parties may not appeal the merits of the arbitrator's decision. (*Id.*) Any party to the dispute may file a court action to enforce the Plan's decision. (*Id*. at 29-31 (Plan, Art. VII).)

In addition to providing for the expeditious resolution of jurisdictional disputes, the Plan prohibits work stoppages, slowdowns, charges and complaints before the NLRB and courts, and grievances where the issue is a jurisdictional dispute or assignment of work by a stipulated contractor. (IX 10 at 27-29 (Art. VI).) These types of disputes are referred to as "impediment to job progress" disputes.[7] (*Id.*) The Plan provides for expedited arbitration of these disputes. (*Id.*) Upon notice of an impediment to job progress, the Administrator informs the representative of

[7] As explained *infra* in Section II.C. of the Argument section, the proceedings before the Plan in this case involved an impediment to job progress, *viz.*, Newkirk's filing of the Section 8(b)(4)(D) unfair labor practice charge.

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 twenty-four 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.*)

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]." *International Longshoremen & Warehousemen's Union (Catalina Island Sightseeing Lines*), 124 NLRB 813, 814-815 (1950).

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).

The Board has long interpreted the language of Section 10(k) to mean that it lacks subject matter jurisdiction to resolve a jurisdictional dispute either if the parties have agreed upon a method for resolving the dispute or if the dispute has actually been resolved. *Plumbers Local 447*, 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." *Carpenters Local 943 (Manhattan Constr. Co.)*, 96 NLRB 1045, 1047-49 (1951). Thus, where an agreed-upon method exists, "the matter is beyond [the Board's] jurisdiction." *Bricklayers Local 7 (Fentron Indus.)*, 199 NLRB 1256, 1258 (1972). The Board simply "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, "[t]he Board is barred from making a 10(k) award"). *See also Wood, Wire and Metal Lathers Int'l Union (Acoustical Contractors)*, 119 NLRB 1345, 1351 (1958) (holding 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." *Bricklayers Local 7*, 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 invention whenever possible. *Iron Workers Local 25 (Pittsburgh Plate Glass Co.)*, 125 NLRB 1035, 1038 (1959). *See also Plumbers Local 761 (Matt J. Zaich Constr. Co.)*, 144 NLRB 133, 140 (1963) (noting "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, as the Board has observed:

> 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.

Plumbers Local 447, 224 NLRB at 989.

The Supreme Court has long agreed with the Board's 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 quarreling 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'rs 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 Elec. Corp.*, 375 U.S. 261, 266 (1964).

The Plan is precisely the type of agreed upon method of adjusting jurisdictional disputes envisioned by Congress. 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, *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 mechanism that Congress intended to promote. *See Pacific NW Council of Carpenters (Brand Energy Svcs., LLC)*, 355 NLRB 274, 279 (2010); *Operating Engineers Local 139*, 293 NLRB at 606. 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 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. The Manual goes on to confirm that when parties are bound by the Plan or have actually adjusted their dispute, "Section 10(k) divests the Board of its power to decide the jurisdictional dispute." *Id.*

In short, Congress intended jurisdictional disputes to be resolved privately within labor's "own ranks" whenever an agreed-upon voluntary method for dispute resolution exits. 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 JURISIDCTIONAL DISPUTE BECAUSE ALL PARTIES TO THE DISPUTE ARE BOUND TO THE PLAN

All of the parties to the jurisdictional dispute over cell tower work – Local 876, Local 324 and Newkirk – are bound to the Plan. This conclusion is supported by both the facts in the record and the governing Board precedent.

A. <u>The Evidence Establishes that all Parties are Bound to the Plan</u>

First, the record establishes that each party is contractually bound to the Plan. Both Local 324 and Newkirk are bound by virtue of the short form agreement executed on May 1, 1984. The agreement expressly states:

> The parties hereto agree that in the event of a jurisdictional dispute with any other union or unions, the dispute shall be submitted to the Impartial Jurisdictional Disputes Board for settlement in accordance with the plan adopted by the Building Trades Department of the AFL-CIO. The parties hereto further agree that they will be bound by any decision or award of the Disputes Board. There shall be no stoppage of work, or slowdown arising out of any such dispute, nor shall either party resort to proceedings before the National Labor Relations board, State Boards, or State or Federal Courts before a decision is rendered by the Impartial Jurisdictional Disputes Board.

(IX 1.) This language is sufficient to bind both Newkirk and Local 324 to the Plan, which has been adopted by the BCTD.

Local 324 is also bound to the Plan by virtue of its affiliation with the International Union of Operating Engineers ("IUOE"). The IUOE is affiliated with the BCTD. (Graham 238:20-25, 239:1-11.) Article X of the BCTD's Constitution provides:

> 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 present plan established by the Building and Construction Trades Department, or any other plan or method of procedure adopted in the future by the Department for the settlement of jurisdictional disputes. Said present plan or any other plan adopted in the future shall be recognized as final and binding upon all affiliated National or International Unions and their affiliated Local Unions.

(IX 9 at 28.) This Article binds the IUOE and all of its Local Unions (including Local 324) to submit *all jurisdictional disputes* to the Plan for purposes of resolution. (Graham 251:5-8, 252:11-14.)

Likewise, Local 876 is bound to the Plan by virtue of its affiliation with the International Brotherhood of Electrical Workers ("IBEW"). (Clark 451:23-25.) The IBEW is affiliated with

the BCTD. (Graham 239:5-11.) The IBEW and its Local Unions are thus bound to the same provisions of the BCTD Constitution as the IUOE and its Local Unions, including Article X. In other words, the IBEW and its Local Unions are required to submit *all jurisdictional disputes* to the Plan for resolution. (IX 9 at 28.) There are no exceptions or exclusions to that contractual obligation. The IBEW's affiliation with the BCTD is therefore sufficient to establish that Local 876 is bound to the Plan. *See, e.g., Operating Eng'rs Local 4 (Mass. Bldg.-Wreckers and Environ. Remed. Auth.)*, 363 NLRB No. 17, slip op. at 3 (2015).

B. Local 876's Status as an "Outside" Local Union Does Not Preclude a Finding That the Plan is an Agreed-Upon Method of Voluntary Adjustment

Seeking to avoid this clear contractual obligation, Local 876 argues that it does not have an obligation to submit jurisdictional disputes to the Plan because the Local Union is an "outside" local within the IBEW. Local 876 argues that the "unrefuted evidence demonstrates that outside IBEW locals are not bound by the Building Trades Plan" (Local 876 Br. at 23) because Local 876 does not have any "membership" or "affiliation" with the "Building Trades unions." (Clark 451:5-25, 452:6-18.)

Local 876's "unrefuted evidence" or testimony is irrelevant. The issue is not whether Local 876 is affiliated with building trades unions; instead, the issue is whether Local 876 is affiliated with the IBEW. The IBEW has affiliated with the BCTD; and, according to the BCTD Constitution, "[*a]ll jurisdictional disputes* between or among *affiliated National or International Unions and their affiliated Local Unions* and employers shall be settled and adjusted according to the present plan established by the Building and Construction Trades Department…." (IX 9 at 28 (emphasis added).) The current Plan states clearly in its Preamble that "[t]his Agreement is entered into by and among the Building and Construction Trades Department, AFL-CIO, *on behalf of its constituent National and International Unions and their affiliated local unions….*"

(IX 10 at 16 (emphasis added).) Put simply, the fact that Local 876 has not taken any action to affiliate with the BCTD or bind itself to the Plan is immaterial, because Local 876's parent union, the IBEW, did so on the Local Union's behalf. The IBEW also bound itself and its Local Unions to the Plan, not just to resolve jurisdictional disputes involving inside local unions, but to resolve all jurisdictional disputes involving all of its affiliated Local Unions, inside and outside. *Wood, Wire & Metal Lathers Local 46 (Jacobson & Co., Inc.)*, 119 NLRB 1658, 1663 (1958) (finding that parent union's membership in BCTD bound not only parent union, but all of its local unions, to the Plan which the BCTD negotiated).

Board precedent is clear: "where an 'agreed upon' method has been formally and deliberately created by the parties, stability in labor relations requires *a deliberate and formal withdrawal* from such procedure before it will be considered no longer effective and binding." *Laborers Local 423 (V&C Brickcleaning Co.)*, 203 NLRB 1015 (1973) (emphasis added). It is incumbent upon Local 876 (and, by extension, Newkirk) to introduce evidence of a deliberate and formal withdrawal by the IBEW from the Plan with respect to "outside" construction work. There is no such evidence in the record. *Laborers Local 383 (Industrial Turf, Inc.)*, 217 NLRB 424, 427 (1975) (quashing notice of hearing on grounds that all parties were bound to Plan and claims to the contrary were rejected, no evidence of withdrawal from BCTD or Plan and no evidence that they advised Plan they would not submit to its authority).

The only evidence remotely addressing the relevant issue is an excerpt from the IBEW Business Manager's Construction Jurisdiction Handbook. (CPX 15.) The excerpt reads, in part:

> The outside branch of the I.B.E.W. does not participate in the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry, and work recognized by the [International Office] as coming under the outside branch will not be subject to the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry procedures. This does not prevent other trades from submitting such cases unilaterally. However, when this occurs and a decision is

> issued (over our standing protest) the affected [local union] will be advised not to abide by it.

(IX 15 at F-4, F-5 (revised 3/1/00).) This statement is not a "deliberate and formal withdrawal" from the Plan; instead, it is an internal communication setting forth the IBEW's declaration that it will not honor its contractual obligation under the Plan with respect to construction work performed by its "outside branch."

Such unilateral declarations of a refusal to comply with the Plan's procedures or abide by the Plan's awards are also irrelevant with respect to whether there is an agreed-upon method for the voluntary adjustment of disputes. *Sheet Metal Workers Local 1 (Refrigeration and Air Conditioning Contractors Ass'n)*, 114 NLRB 924, 930 (1955) (finding pipefitters union declaration that it would refuse to comply with Joint Board agreement to be "immaterial" because union was bound to the Joint Board by virtue of their parent unions' being signatory to Joint Board); *Wood, Wire and Metal Lathers Local 9 (A.W. Lee, Inc.)*, 113 NLRB 947, 952, 953-54 (1955) (rejecting claim that local union will not abide by decision of Joint Board where evidence established local was bound to Joint Board process by virtue of affiliation with parent union who was party to process).

The Plan recognizes that there are prior decisions in which the Board has decided jurisdictional disputes after observing that the IBEW has "consistently refused" to participate in Plan proceedings involving "outside" work. *See, e.g.*, *Operating Engr's Local 478 (Utility Svc. Corp.)*, 172 NLRB 1877, 1879 (1968) (stating "[a]s we have recognized in the past, the IBEW and NECA have consistently refused to participate in Joint Board proceedings involving 'outside' work"). *See also Electrical Workers Local 357 (Western Diversified Elec.)*, 344 NLRB 1239, 1240 (2005); *Electrical Workers Local 44 (Utility Builders, Inc.)*, 233 NLRB 1099, 1100

(1977);[8] *Electrical Workers Local 702 (JRJ Excavating Co.)*, 189 NLRB 929, 930-31 & n.4 (1971); *Electrical Workers Local 497 (Kemper Constr. Co.)*, 191 NLRB 145, 147 (1971);[9] *Electrical Workers Local 728 (Ebasco Svcs., Inc.)*, 153 NLRB 873, 876, n.7 (1965).

The Board's "acceptance" of the IBEW's unilateral claim in the foregoing cases, *i.e.*, that the Plan does not apply to "outside" construction work, is not only irreconcilable with the plain language of the Plan (*see* Section II.A., *supra*) but also with federal labor policy and pre-existing Board precedent. As the Board succinctly observed in *Wood, Wire and Metal Lathers Local 9*:

> The Board has previously held that a refusal of a party to abide by a determination made pursuant to an agreed upon method, does not nullify the agreement on a method for voluntary adjustment within the meaning of the proviso to Section 10(k). To hold otherwise would condone and sanction [the party's] breach of the agreement, and would tend to discourage and render worthless the making of such agreements, contrary to the statutory purpose to encourage the voluntary adjustment of jurisdictional disputes. Otherwise, any party adversely affected by [the] determination made pursuant to the agreement could breach the agreement with impunity, and then have recourse to this Board for a redetermination of the dispute in the hope that the redetermination might be favorable.

113 NLRB at 954 (footnotes omitted). Although the Board spoke in the context of a pre-existing determination by the agreed upon method in the above quotation, it has applied this analysis equally in a situation where a union preemptively declared its refusal to comply with the agreed upon method. *Sheet Metal Workers Local 1*, 114 NLRB at 930 (rejecting pipefitters' refusal to comply with "any determination of the dispute made by the Joint Board").

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[8] The IBEW did not actually take a position in that case; instead, the Board relied upon testimony by an IBEW representative at the Section 10(k) hearing. *Electrical Workers Local 44*, 233 NLRB at 1099.

[9] In *Electrical Workers Local 497*, the Board also noted there was no evidence that the IBEW participated in the Joint Board proceeding. In this case, there is evidence that the IBEW was aware of and participated in the Plan proceedings, thought eh IBEW chose not to appear at the hearing. (IX 15, 16, 17.) Notice of the hearing before the Plan was provided to the parties, including the IBEW (IX 19.)

Moreover, none of these cases relying upon the IBEW's refusal to participate in the Plan addressed the IBEW's affiliation with the BCTD and how, under both the BCTD Constitution and the Plan itself, that affiliation bound the IBEW's local unions to the Plan. The Board's analysis only addressed the Plan in general terms, without any discussion of its actual provisions, such as the provisions regarding stipulations or the dispute resolution procedures.

When the Board actually considers those provisions closely, it should conclude that Local 876 is bound to the Plan by virtue of its affiliation with the IBEW, which has bound all of its local unions – both inside and outside – to the Plan by virtue of its affiliation with the BCTD. There is nothing in the BCTD Constitution or the Plan that carves out the IBEW's "outside" construction work from the Plan's coverage. Accordingly, Local 876, along with Newkirk and Local 324, are required to submit their jurisdictional dispute over cell tower work to the Plan for resolution and abide by the Plan's resolution of that dispute.

In summation, the record evidence clearly establishes: (1) that the IBEW is affiliated with the BCTD; (2) that the BCTD has negotiated the Plan on behalf of its affiliates (*e.g.*, the IBEW) and their affiliated Local Unions (*e.g.*, Local 876); (3) the Plan requires *all jurisdictional disputes* between affiliates and their affiliated local unions to be submitted to the Plan for resolution; and (4) there is no exception in the Plan itself for disputes involving "outside construction work." Moreover, well established Board precedent leads to the conclusion that the IBEW's unilateral declaration that it will not abide by the Plan is immaterial and contrary to the federal labor policies enshrined in Section 10(k). Accordingly, the Board should find that Local 876 is bound to the Plan for purposes of resolving its jurisdictional dispute regarding cell tower work, as are Local 324 and Newkirk.

C. **The Remaining Challenges to the Plan's Jurisdiction Do Not Alter the Conclusion that the Parties are Bound to the Plan**

Both Local 876 and Newkirk raise a myriad of other challenges to the Plan as an agreed upon method. For the reasons explained below, none of these challenges have merit.

First, Local 876 argues that its collective bargaining agreement does not make reference to the Plan as a method of resolving jurisdictional disputes. (Local 876 Br. at 23.) As noted above, a local union, such as Local 876, can be bound to the Plan in three different ways, two of which do not involve a provision in a collective bargaining agreement. (IX 10 at 17.) Local 876 is bound by virtue of its affiliation with a parent union (the IBEW) that is, in turn, affiliated with the BCTD. *Iron Workers Local 380 (Skoog Constr. Co.)*, 204 NLRB 353, 354 (1973) (finding union bound to Plan even though collective bargaining agreement is silent because union is affiliated with BCTD).

Second, both Local 876 and Newkirk argue that the Plan's award is not binding because Local 876 was not invited and did not participate in the Plan proceeding. (Local 876 Br. at 23; Newkirk Br. at 19.) The evidence establishes that notice of the proceeding was provided to Local 876's parent union, the IBEW, which is the entity that bound all of its Local Unions (including Local 876) to the Plan. Furthermore, as the Plan provides, jurisdictional disputes are resolved by the parent unions on behalf of their local unions. (IX 9 at 8-11, 16, 21-31.) The record contains evidence that the IBEW received notice of the filing of a complaint with the Plan (IX 15), and, as set forth in the Plan Arbitrator's decision, notice of the hearing was provided to the parties. (IX 19 at 1.) Although the IBEW did not participate in the hearing (*id.*), its refusal to do so does not relieve the IBEW or Local 876 of their obligations under the Plan. *Teamsters Local 480 v. Bowling Green Express, Inc.*, 707 F.2d 254, 257 (6th Cir. 1983) (stating "[c]learly a person cannot selectively agree to submit to arbitration and be rewarded by refusing to appear").

Thus, the failure of the IBEW to appear at the hearing does not preclude a finding that the Plan constitutes an agreed-upon method for the voluntary adjustment of the jurisdictional dispute involving cell tower work.

Third, Newkirk argues that Local 324 failed to introduce the documents entered into the record at the Plan proceeding, and that this alleged failure should result in the Board exercising jurisdiction over this dispute. (Newkirk Br. at 19.) The Plan Arbitrator found that Local 876 is bound to the Plan by virtue of its affiliation with the IBEW. The Arbitrator relied upon, *inter alia*, the Plan itself, which Local 324 entered into evidence in the record of this proceeding (IX 10). This case is therefore distinguishable from *Electrical Workers Local 196 (Aldridge Elec.)*, 358 NLRB 737, 738 (2012), relied upon by Newkirk, where an IUOE local union relied solely on the Plan Arbitrator's decision as evidence of IBEW Local 1986's stipulation to the Plan, without introducing into evidence any of the documents on which the Plan Arbitrator relied to reach his conclusion.

Finally, Newkirk argues that the Plan is defective because the Plan Administrator failed to follow the Plan's procedures. (Newkirk Br. at 21.) The alleged failure was that the Plan Administrator did not provide a list of arbitrators to Newkirk or afford an opportunity to strike Arbitrators. However, the proceeding involved an "impediment to job progress" (*see* IX 19 at 1);[10] and, under the Plan's expedited procedures for resolving such disputes, the Plan Administrator selects the arbitrator. (IX 10 at 28 (stating "the Administrator or his designee shall

[10] 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, contractors and unions who are bound to the Plan are not permitted to pursue jurisdictional disputes under the Board's Section 10(k) procedure in order to avoid potentially conflicting awards. 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. This position is wholly consistent with the Board's precedent under Section 10(k). *Bricklayers Local 7*, 199 NLRB at 1258.

select an arbitrator from the panel of arbitrators chosen by the JAC”).) Thus, the Plan Administrator followed the Plan’s procedures when he selected the arbitrator.

CONCLUSION

Accordingly, the record establishes that Local 876, Local 324 and Newkirk are bound to the Plan and the parties are required to submit their jurisdictional dispute over cell tower work to the Plan for resolution. Therefore, the notice of hearing in this matter should be quashed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to 102.114(i) of the National Labor Relations Board's Rules and Regulations, I hereby certify that on this 29th day of November 2016, 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 Brief Amicus Curiae, on the following:

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