

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

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

Charged Party

and

NLRB Case No. 07-CD-182456

NEWKIRK ELECTRIC ASSOCIATES, INC.,

Charging Party

and

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

Intervenor

**BRIEF OF CHARGING PARTY, NEWKIRK ELECTRIC ASSOCIATES, INC.,
IN RESPONSE TO AMICUS BRIEF**

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Preliminary Statement

In its Amicus filing in this case, the AFL-CIO Building and Construction Trades Department's Plan for the Settlement of Jurisdictional Disputes in the Construction Industry ("Plan" or "Amicus") is asking¹ the NLRB to overrule over 50 years of well established, consistent, and controlling precedent which holds that "outside" unions affiliated with the International Brotherhood of Electrical Workers, AFL-CIO ("IBEW") are **not** bound or stipulated to the Plan as an agreed upon method for voluntary adjustment in Section 10(k) proceedings.² In fact, the Board has **never** found an IBEW outside union bound or stipulated to the Plan or its predecessors.

The arguments raised by the Plan are neither novel nor new and must be rejected. Amicus has presented nothing which warrants a review or change in NLRB precedent. Only one conclusion can be reached; the Plan is not an agreed upon method for voluntary adjustment in this Section 10(k) proceeding.

Amicus Is Wrong: The Plan Is Not An Agreed Upon Method For Voluntary Adjustment In This Section 10(K) Proceeding

In this Section 10(k) determination,³ "the employer controlling the work assignment as well as the rival unions involved comprise the 'parties to such dispute'...." *Local 702 International Brotherhood of Electrical Workers (JRJ Excavating Company)*, 189 NLRB 929, 931 (1971)(Footnote omitted, emphasis added). The "employer" is Newkirk. Local 876,

¹ The Plan's Brief is identified as "Amicus Brief".

² Amicus has raised other issues, including its claim that the Employer, Newkirk Electric Associates, Inc. ("Newkirk") is bound to the Plan, which will also be addressed.

³ Newkirk exhibits are identified as "EX", Local 876 exhibits as "EWX", Local 324 as "OEX", and Board exhibits as "BX". Citations to the transcript are identified by page number.

International Brotherhood of Electrical Workers, AFL-CIO (“Local 876”) is one “rival” union.⁴ (70, 175; EX 4) The other “rival” union is Local 324, International Union of Operating Engineers, AFL-CIO (“Local 324”).⁵ Neither the International Brotherhood of Electrical Workers, AFL-CIO (“IBEW”), the International Union of Operating Engineers, AFL-CIO (“IUOE”), nor the Plan are parties to this proceeding.

Moreover, “[A]ll of the parties [in the Section 10(k) proceeding] must approve and enter into a voluntary adjustment procedure in order to preclude a hearing and determination pursuant to that section.” *JRJ Excavating Company*, at 931 (Emphasis added). The NLRB carefully scrutinizes the agreements at issue in order to determine if the parties are truly bound by the Plan. *International Brotherhood of Electrical Worker, Local 196 (Aldridge Electric)*, 358 NLRB 737, 739 (2012).

The penultimate issues raised in the Amicus Brief is whether Local 876, the IBEW outside union, and Newkirk each approved and entered into the Plan’s voluntary adjustment procedure. Here, the burden is on and Local 324 (and Amicus) to produce “satisfactory evidence” that the IBEW and Newkirk agreed to the Plan.⁶ *NLRB v. Millwrights Local 1102, United Bhd. of Carpenters & Joiners of Am., AFL-CIO*, 779 F.2d 349, 351 (6th Cir. 1985). The Plan’s claim that each party approved and entered into the Building and Construction Trades Department’s (BCTD) voluntary adjustment procedure, including the most recent incarnation, the Plan, is wrong and must be rejected for many reasons.

⁴ Newkirk is a member of the American Line Builders Chapter and is signatory to the Local 876-C contract through National Electrical Contractors Association (“NECA”) with Local 876. (EX 4) There is no reference in EX 4 to the Plan.

⁵ Newkirk and Local 324 are parties to a “short form” agreement dated May 3, 1984. (OEX 1)

⁶ Newkirk adopts Local 876’s Response to Amicus Brief at 7-8 regarding Local 324’s failure to introduce evidence to support Amicus’ assert that the IBEW is a member of the Building and Construction Trades Department and bound to the Plan.

1. Local 876 Is An IBEW Outside Union Not Bound Or Stipulated To The Plan

Amicus' first mistake is its decision to reject over 50 years of well-established, consistent, and controlling NLRB precedent which establishes that IBEW "outside" locals⁷ are not bound to the BCTD's voluntary adjustment procedures, including Plan. The Plan's attempt to minimize and overturn this well-established and consistent Board precedent woefully misses the mark. Amicus' claims are fatally flawed⁸ and must be rejected.

As early as in 1962, the NLRB recognized:

The IBEW for many years has consistently taken the position that it will not be bound by any Joint Board determination involving line work. The National Electrical Contractors Association, of which Nichols is a member, has also refused to be bound by any Joint Board determination dealing with line work. Nichols did not participate in that Joint Board proceeding. Lastly, the contract between Nichols and Local 262, directly applicable to this dispute, makes no provision for the referral of any such dispute to the Joint Board. In these circumstances, **we do not believe it can be said the parties have submitted to us 'satisfactory evidence that they have adjusted or agreed upon methods for the voluntary adjustment, the dispute.'**

Local Union 825, International Union of Operating Engineers (Nichols Electric Company), 137 NLRB 1425, 1429 (1962)(Emphasis added).

The outside "line" work at issue in *Nichols Electric* involved the operation of a power-driven auger to bore a hole and power-driven A-frame/derrick to hoist the pole into the hole.

⁷ "Inside work is generally defined as all work performed inside the generating station building; outside work, also called line work, is that performed outside the building." *Local Union No. 181, International Union of Operating Engineers (Service Electric Company)*, 146 NLRB 483, 485 fn 3 (1964). The outside work in the instant case consists of "earth moving, dirt digging equipment, cranes and other power driven equipment in connection with the purpose of the assembly, this assembly, erection and modification of cell towers, including the hoisting of cell towers, clearing land and constructing roads." (BX 2 No. 9)

⁸ Contrary to Amicus' assertion at Amicus Brief at 11-12, there is much more evidence than the IBEW Business Manager's Construction Jurisdiction Handbook. (EWX 15) As will be seen, the evidence that Local 876 is not bound to the Plan is overwhelming.

In 1964, the NLRB recognized that “the IBEW and electrical contractors have agreed to submit to the Joint Board **only jurisdictional disputes involving inside work**, and **expressly refused to submit to that Board disputes relating to outside work**. The present dispute involves outside work. We find, accordingly, that **the parties have not adjusted or agreed upon methods for the voluntary adjustment** of the present dispute.” *Local Union No. 181, International Union of Operating Engineers (Service Electric Company)*, 146 NLRB 483, 485 (1964) (Emphasis added). The outside “line” work in *Service Electric* involved the operation of a “hydra-lift, is a hydraulic hoist mounted on the bed of a truck. It consists of an arm or boom which is operated with a winch that is powered by the motor of the truck.” *Id.*, at 484.

International Union of Operating Engineers No. 428 (Ets-Hokin Corporation), 154 NLRB 907 (1965) is exemplary of these IBEW outside union cases. A National Joint Board for the Settlement of Jurisdictional Disputes (NJB) hearing was held. The IBEW took the position that the dispute was related to outside construction and, therefore, the NJB had no jurisdiction to make an award. Despite the IBEW’s jurisdictional challenge, the NJB ruled in favor of the Operating Engineers. *Id.*, at 909.

The NJB award was rejected by the NLRB in the subsequent Section 10(k) determination because:

The IBEW recognizes the right of NJB to resolve disputes involving inside work, but not outside work. **The IBEW consistently denied to NJB jurisdictional disputes over outside work, including the operational hoisting of equipment.**

Id., at 910-911 (Footnote omitted, emphasis added).

The outside “line” work at issue involved the operation of a crane and A-Frame truck for the purpose of hoisting towers. See also *International Union of Operating Engineers, Local 49 (Egan-McKay Electrical Contractors)*, 164 NLRB 672, 673 (1967). (“The trench digging in

dispute, performed as it is on the public thoroughfare, we find the outside work ... accordingly, we find the Egan-McKay and IBEW have not adjusted or agreed upon the methods of voluntary adjustment of the present dispute.”); *Local 478 International Union of Operating Engineers (Utility Service Corporation)*, 172 NLRB 1877, 1879 (1968) (“As we have recognized in the past, the IBEW...[has] consistently refused to participate in Joint Board proceedings involving ‘outside’ work, which is a kind of work in dispute here.”)(Footnote omitted). *Local 702, International Brotherhood of Electrical Workers (JRJ Excavating Company)*, 189 NLRB 929, 931 (1971) (“[S]ince the record affirmatively shows that IBEW is not bound to the Joint Board with respect to the type of work in controversy, and neither submitted this dispute nor otherwise participated in the Joint Board proceeding, we find that there was no agreement for a voluntary adjustment of the dispute....”); *International Union of Operating Engineers Local 4 (Utec Constructors)*, 194 NLRB 755, 756 (1971)(“In addition, Local 104, as an outside electrical union, is not party to the Joint Board”); *Local 542, International Union of Operating Engineers (W.V. Pangborne and Co.)*, 213 NLRB 124, 126-127 (1974) (Footnotes omitted) (“[W]e in the past recognized that such [IBEW ‘outside’] locals are not members of the AFL-CIO Building Trades Council and are not, therefore, bound by the IJDB⁹ decisions.”); *International Brotherhood of Electrical Workers, Local 44 (Utility Builders)*, 233 NLRB 1099, 1000 (1977) (Footnote omitted)(“Furthermore, we note that the Board has, in several decisions over the years, recognized the distinction between ‘inside’ and ‘outside’ locals of the IBEW and taken official note of the fact that the latter are not subject to procedures for the resolution of jurisdictional disputes established by the Building and Construction Trades Department, AFL-CIO.”),

⁹ Impartial Jurisdictional Disputes Board.

The most recent NLRB pronouncement on the outside local issue is *International Brotherhood of Electrical Workers, Local 196 (Aldridge Electric)*, 358 NLRB 737 (2012). In *Aldridge*, as in the instant case, an arbitrator issued a decision noting, “[T]here is no dispute that IBEW has stipulated to the plan.” *Id.*, at 739. Rejecting the arbitration award, the Board once again affirmed the IBEW outside union’s exclusion from an agreed-upon method for voluntary adjustment:

The International Brotherhood of Electrical Workers did participate in the December 6 arbitral hearing, but Local 196 did not. Even if the arbitrator’s decision establishes that the International is bound under the Plan, it does not necessarily follow that Local 196 was so bound. **Local 196 Business Agent Eric Patrick testified, without contradiction, that only “inside” IBEW locals are bound under the Plan, that Local 196 is an “outside” local, and that Local 196 is not affiliated with the Building and Construction Trades Department.** See *Electrical Workers Local 357 (Western Diversified Electric)*, 344 NLRB 1239, 1240 (2005) (finding no agreed-upon method for voluntary adjustment existed where IBEW local testified that Plan only applied to work claimed under the inside agreement). The record is devoid of documentary evidence tending to show otherwise.

Aldridge Electric, at 739-740 fn 5.

Here, the evidence that Local 876 is an outside union is so overwhelming that the Plan does not challenge it. Amicus Brief at 10. See, Newkirk’s November 10 Brief at 14-15, 17; Local 876’s November 10 Brief at 15-16. Based on over 50 years of NLRB precedent, only one conclusion can be reached – Local 876 is an IBEW outside union which has not agreed to the Plan as a method for voluntary adjustment for Section 10(k) jurisdictional issues. The Board must proceed to a Section 10(k) determination on the merits.

Instead of challenging Local 876’s outside union status, the Plan claims that Local 876 is bound to the Plan by its affiliation with the IBEW. Amicus Brief at 10. Piggybacking on the

non-party IBEW, Amicus also claims that there is “no evidence of withdrawal from BCTD or Plan **and** no evidence that they advised Plan they would not submit to its authority.” Amicus Brief at 11 (Emphasis added). These are all spurious arguments which must be rejected.

Amicus claims that Local 876 is bound to the Plan by virtue of its affiliation with the IBEW (which is bound by the BCTD Constitution) and that its “outside” union status is irrelevant. This assertion is wrong and must be rejected. Local 876 is not bound to the Plan by its affiliation with the IBEW.

At the threshold, it is important repeat that over 50 years of NLRB precedent holds that Local 876 is not bound by the Plan or its predecessors. If this is not enough reason to reject the Plan’s claim, there is more! The Plan’s claim is not new; several NLRB decisions have specifically addressed and rejected Plan’s argument.

Most recently, *Electrical Workers, IBEW, Local 357 (Western Diversified Electric)*, 344 NLRB 1239 (2005) rejected the same argument the Plan made here. After the Operating Engineers challenged an assignment of line work (trenching work by employees classified as heavy equipment operators) to the IBEW outside local, the Operating Engineers filed for a jurisdictional dispute under the Plan, contending:

Operating Engineers contends that the Plan is binding on all national and international unions previously affiliated with the AFL–CIO’s Building and Construction Trades Department and their local constituent bodies, including both Operating Engineers and previous IBEW.

Id., at 1240.

In words applicable here, the NLRB rejected this claim and ruled that:

[T]here is no agreed-upon method for voluntary adjustment of the dispute in this case. Notwithstanding Operating Engineers’ contention that the Plan binds both unions, **there is no evidence in**

the record that the Plan applies to IBEW's claim of the work. IBEW claims the work under its previous outside agreement with the Employer, and that agreement, which is part of the record, makes no reference to the Plan. In addition, **IBEW's business manager testified, without contradiction, that the Plan was not applicable to that agreement, but applied only to the inside agreement between previous IBEW and the Employer, which does not cover the work in dispute.**

Id., at 1240.

Amicus' claim was also addressed and rejected in *JRJ Excavating* where the Operating Engineers alleged:

[T]he assignment of the work in dispute has been resolved in its favor by the decision of the Joint Board which the Employer is bound to observe by virtue of its bargaining agreements with Engineers, and which previous IBEW also must obey because of the absence of evidence indicating that it did not participate in the matter before the Joint Board, and **because its constituent affiliation with the AFL—CIO requires it to observe the AFL—CIO constitution which 'contains no limitations upon the previous affiliated labor organizations in their submissions of jurisdictional disputes to the Joint Board.'** Engineers further contends that only the unions involved in the dispute need agree to voluntary adjustment of the dispute, and, therefore, it is immaterial whether the Employer participated in the Joint Board proceeding. Based thereon, Engineers argues that inasmuch as all, or the necessary, parties have agreed upon a method for the voluntary adjustment of the work assignment dispute within the meaning of Section 10(k) of the Act, the Board should honor its motion first made at the hearing and renewed in its brief to quash the notice of hearing.

Id., at 931.

The line work consisted of trenching work by employees classified as heavy equipment operators.

Rejecting this claim, the NLRB explained:

[S]ince the record affirmatively shows that **IBEW is not bound to the Joint Board with respect to the type of work in**

controversy, and neither submitted this dispute nor otherwise participated in the Joint Board proceeding, we find that there was no agreement for a voluntary adjustment of the dispute within the meaning of Section 10(k), and that the Board is not precluded from making its determination in this proceeding.

Id., at 931.¹⁰

Amicus does not cite one contrary decision involving an IBEW outside union. Instead, Amicus claims that the over 50 years of well-established, controlling, and reaffirmed precedent is allegedly irreconcilable with pre-existing Board non-IBEW related cases, citing *Wood, Wire and Metal Lathers Local No. 9 (Jacobson & Co.)*, 119 NLRB 1658 (1958) and *Sheet Metal Workers Local 1 (Meyer Furnace Company)*, 114 NLRB 924 (1955). The Plan's claim, that the Board's IBEW outside union rulings are irreconcilable with *Jacobson* and *Meyer Furnace* is "flat-out wrong."

Both *Jacobson* and *Meyer Furnace* rely on *Wood, Wire and Metal Lathers Local No. 9 (A. W. Lee)*, 113 NLRB 947 (1958); *Jacobson*, at 1662, fn 6, 8; *Meyer Furnace* at 930, fn 3-7. The NLRB, itself, reconciled the IBEW outside union rulings with *Lee* (and *Jacobson* and *Meyer Furnace*). *Operating Engineers Local 450 (C. A. Turner Construction Company)*, 119 NLRB 339 (1957) explains why the IBEW outside union cases control:

The cases of *A. W. Lee, Inc.*, 113 NLRB 947, and *Meyer Furnace Company (Refrigeration and Air Conditioning Contractors Association)*, 114 NLRB 924, cited by the Engineers are distinguishable. In the *Lee* case, a local union was considered bound by a determination of the Joint Board where its International Union was clearly bound and **the local union had previously complied with decisions of the Joint Board.** In *Meyer Furnace Company* it was clear there had been a **voluntary submission of the dispute to the Joint Board by all the parties.**

¹⁰ Obviously, the Board's analysis in *Western Diversified* and *JRJ Excavating* proves that Amicus is incorrect when claiming, "none of these cases relying upon the IBEW's refusal to participate in the Plan addressed the IBEW's affiliation with the BCTD" See Amicus Brief at 14.

Id., at 344 fn 12 (Emphasis added).

The instant case is no different from *Turner Construction*. There is no evidence that Local 876 ever complied with decisions of the Plan. The opposite is true; Local 876 had no connection to the Plan and there is no evidence that it ever participated in a voluntary submission to Plan.¹¹

NLRB v. Local 825, International Union of Operating Engineers, 326 F.2d 213 (3rd Cir. 1964) also confirms Local 876 is not bound to the Plan. In 1964, the Third Circuit explained the historical basis for the exclusion of IBEW outside unions from the Plan:

IBEW reaffiliated with the Joint Board in 1956 upon the express condition that it would not be bound by decisions involving electrical line transmission work. Accordingly, the Board found that the parties had not agreed upon a method for adjusting their dispute.

In essence, respondent argues that...the IBEW [was] without power to refuse to submit the dispute to the Joint Board because of their affiliation with it...Moreover, not only had the IBEW expressed its refusal to be bound by Joint Board decisions of this nature, but the record indicates that **it was never notified of the submission of this dispute, nor did it participate in the proceedings.** Certainly, in these circumstances, it cannot be held to be bound by the decision rendered by the Joint Board.

Id., at 216¹² (Emphasis added).

¹¹ Amicus' reliance on *Iron Workers Local 380 (Skoog Constr. Co.)*, 204 NLRB 353 (1973), a non-IBEW outside union case, is similarly misplaced. In *Skoog* the Board found, "[A]ll of the parties involved in this proceeding agreed to be bound by a determination of the...Joint Board." *Id.*, at 353. The evidence showed that the Carpenters was affiliated with the Joint Board. While the Board referred to Carpenters and "Carpenters Union," it made no finding that they were different entities. Also missing from *Skoog* is over 50 years of well-established case law regarding IBEW outside unions, continuous non-membership by Local 876 in the BCTD, and evidence of a deliberate and formal withdrawal by the IBEW from the Plan's predecessor with respect to "outside" construction work. See *infra* at 14-16.

¹² Almost concurrently, in 1957, the National Electrical Contractors Association ("NECA") notified the Joint Board, the Plan's predecessor, "all of its IBEW employer members would be bound by Joint Board procedures **for other than line work.**" *Electrical Workers Local 26, International Brotherhood of Electrical Workers (McCloskey & Co.)*, 147 NLRB 1498, 1502 fn 11 (1964). (Emphasis added). NECA membership does not bind Newkirk to the Plan.

The instant case is no different than the Board cases in which IBEW outside unions were not bound by the Plan or its predecessors:

- Local 876 is an IBEW outside union.
- There was never an agreed upon method for settling jurisdiction disputes for IBEW outside unions. In 1956, the IBEW reaffiliated with the Joint Board upon the express condition that it would not be bound by decisions involving line work. There is no evidence that Plan's predecessor notified the IBEW that this conditional affiliation was rejected.
- Since 1956, a 60 year period, the IBEW outside unions consistently objected to Joint Board, IJBD, and Plan jurisdiction over work assignment decisions involving IBEW outside unions.
- Over 50 years of consistent and controlling NLRB precedent has held that IBEW outside unions are not bound by the Joint Board or Plan.
- The Board has determined that its IBEW outside union decisions are not inconsistent with its prior precedent.
- Newkirk assigned the work to Local 876 under the line CBA.
- There is no evidence that Local 876 ever previously complied with decisions of the Joint Board, IJBD, or Plan.
- Local 876 is not a member of the BCTD or any local, state, or national building or construction trade union. (451, 452)

- Local 876, a party to the Section 10(k) proceedings, was **never** notified of the Plan’s arbitration hearing.¹³
- Local 876 did not attend¹⁴ or participate in the Plan’s proceedings.¹⁵
- Local 876 was denied arbitration due process: denied notice of the Plan’s arbitration, denied the right to appear at the arbitration hearing, and denied the opportunity to present witnesses, crossexamine witnesses, introduce documentary exhibits, and fully brief its position to the arbitrator. ***Good Samaritan Hospital***, 363 NLRB No. 186 *3 (2016).

¹³ Recognizing that Local 876 was not notified about the arbitration, Amicus argues that notice to the IBEW was sufficient and consistent with the Plan’s rules which systematically ignore the local union which is **the** party to the Section 10(k) proceeding. Amicus Brief at 15. This is an absurd claim. The IBEW which is not a party to the Section 10(k) proceeding was notified of the Plan’s arbitration. Local 876, which is a party, was excluded from notice of the alleged method for the voluntary adjustment of disputes. The assertion is so absurd that Amicus has not one iota of Board law to support it. Amicus cannot support its absurd claim because the Board has previously rejected similar nonsense. In *Aldridge Electric*, at 739, the Board instructed, “[T]he arbitrator’s decision cannot bind Local 196 to the Plan inasmuch as **Local 196 was not party to the arbitral proceeding** and did not agree to be bound by its results....” (Emphasis added) See also, *International Brotherhood of Electrical Workers Local 497 (Kemper Construction)*, 191 NLRB 145 (1971) (Joint Board was not effective voluntary adjustment of the dispute “since all the parties did not participate in the proceeding, did not join the submission to the Joint Board, and did not agree to be bound by the decision.”); *Local 825* at 216 (“the record indicates that it was never notified of the submission of this dispute, nor did it participate in the proceedings. Certainly, in these circumstances, it cannot be held to be bound by the decision rendered by the Joint Board.” Here, Local 876 was not even notified of the arbitration and cannot be bound by it.

¹⁴ Amicus relies on one sentence (“[c]learly a person cannot selectively agree to submit to arbitration and be rewarded by refusing to appear”) from *Local 480 v. Bowling Green Express, Inc.*, 707 F.2d 254, 257 (6th Cir. 1983). Amicus Brief at 15. This reliance is misplaced. The quotation selected by Amicus from a contract interpretation case, does not fit the facts of this Section 10(k) proceeding. First unlike the instant case where Local 876 was intentionally not notified of the arbitration by the Plan; each party in *Local 480* was given notice of the hearing. Second, selective use of the Plan’s procedures by Local 876 or the IBEW outside unions is not an issue here; there is over 50 years of evidence that the IBEW and the IBEW outside unions **did not ever** accept Plan jurisdiction. There is no evidence that Local 876, the party here, ever agreed to participate in the Plan procedures and then refused to participate or appear.

¹⁵ The Plan’s claim that Local 876 was bound to the Plan because the IBEW knew of the proceedings and participated has been rejected by the NLRB. In *Aldridge*, the Board refused to find the IBEW outside union bound to the Plan even though the IBEW participated in the Plan’s arbitration hearing. More crucial was the local business agent’s testimony that the local was an IBEW outside union. *Id.*, at 739 fn 5. In any event, Amicus ignores the fact that the IBEW did not attend the Plan’s arbitration. (OEX 19 at*6).

- The Plan can not point to any NLRB decision holding that an IBEW outside union is bound to the Plan through the international IBEW.

In the face of this mountain of law and facts, Amicus again relies on irrelevant non-IBEW decisions, claiming, “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.)*, 218 NLRB 424, 427 (1975).” Amicus Brief at 11 (Italics in original). It is disconcerting that Amicus, in its rush to claim jurisdiction over Local 876, ignored the Board’s **key** instruction in *Industrial Turf* which undermines the Plan’s entire Brief and requires a determination that Local 876 is not bound to the Plan.

In *Industrial Turf*, one union, which had been voluntarily bound to the IJBD, unsuccessfully claimed an agreement for a year moratorium on IJBD submissions. Rejecting this alleged private agreement, the Board cited *Laborers Local 423 (V & C Brick Cleaning Co.)*, 203 NLRB 1015 (1973),¹⁶ which held, “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.” (Emphasis added). *Industrial Turf* explains that “Evidence of a deliberate and formal withdrawal” is evidence that the union “**formally notified the IJDB that they will not submit to the authority** of that forum for the resolution of their jurisdictional disputes.” *Id.*, at 427 (Emphasis added). In footnote 6, the Board gave the directive ignored by Amicus, but controlling here:

¹⁶ Likewise, *V & C Brick* does not help Amicus. The union was not allowed to avoid the Joint Board because it had previously **agreed** to be bound by the Joint Plan. Unlike the instant case, there was no “deliberate and formal withdrawal from” the Joint Board. *Id.*, at 1015.

[W]ithdrawal from the Building and Construction Trades Department would constitute a **valid withdrawal from IJDB procedures....**

Id., at 427, fn 6¹⁷ (Emphasis added).

If required,¹⁸ this test has been met by the IBEW and Local 876.¹⁹

It is axiomatic that if “withdrawal from the Building and Construction Trades Department would constitute a valid withdrawal from IJDB procedures,” then Local 876’s history of non-membership in the BCTD confirms its exclusion from the Plan. And, if more is needed, the Board may look to the IBEW’s 1956 reaffiliation with the Joint Board based upon the express condition that the IBEW would not be bound by decisions involving line work and the over 50 years of NLRB decisions confirming that the IBEW’s outside unions are not covered by the Plan. The many Board decisions which hold that IBEW outside unions are not bound to the Plan or its predecessors are both evidence that an agreed-upon method for voluntary adjustment was never “formally and deliberately” and if one was created by the parties, there have been many

¹⁷ The full text of footnote 6 is:

“We see nothing inconsistent in stating that **withdrawal from the Building and Construction Trades Department would constitute a valid withdrawal from IJDB procedures** and our statement in *V & C Brick-cleaning Co.*, supra, that the question of whether withdrawal from the IJDB automatically constitutes withdrawal from the Building and Construction Trades is an internal union matter. **The former deals with the validity of a method of withdrawal** while the latter deals with the effect of a method of withdrawal on membership in the Building and Construction Trades Department.”

(Emphasis added)

¹⁸ Starting with the over 50 years of NLRB decisions rejecting the Amicus claim, there is no evidence in the record that an agreed-upon method for voluntary adjustment was ever “formally and deliberately” created by the parties.

¹⁹ *Industrial Turf* puts an end to Amicus’ oft-repeated claim that a local union is bound to the Plan as long as its parent international union is a member of the BCTD (i.e., that Local 876 is bound to the Plan as long as the IBEW is a member of the BCTD). In *Industrial Turf*, the international parents of both local unions were members of the BCTD. *Id.*, at 427. But, the Board did not use parent membership in the BCTD to limit the right of a local union to de-couple itself from the IJDB/Plan procedures. *Industrial Turf* confirms that a local union can withdraw from the BCTD by providing a “deliberate and formal withdrawal” even as its parent international union continues its BCTD membership and that Local 876 is **not** bound to the Plan based on the IBEW’s membership in the BCTD.

“deliberate and formal withdrawal[s]” from the Joint Board/Plan and evidence the Joint Board/Plan have been formally notified that the IBEW outside unions will not submit to the authority of that forum for the resolution of jurisdictional disputes. In any event, evidence of “a deliberate and formal withdrawal by the IBEW from the Plan with respect to its outside unions is documented and recognized in the Third Circuit’s *Local 825* decision that, the IBEW reaffiliated with the Joint Board in 1956 upon the express condition that it would not be bound by decisions involving line work at issue here.

At best, Amicus has helped clarify that Local 876 is not bound to the Plan. There is no agreement for a voluntary adjustment of the dispute within the meaning of Section 10(k). The instant Section 10(k) determination must proceed.

2. Newkirk Is Not Bound To The Plan

Amicus claims that Newkirk is bound to the Plan by OEX, the Local 324 short form agreement signed in May 1984. But, the short form agreement relied on by the Plan 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.

(OEX 1.) (Emphasis added)

This short form agreement may have bound Newkirk to the IJDB, but does not the bind it to the Plan.

The starting point is the Local 324 short form agreement. It was signed by Newkirk on May 3, 1984 and rendered irrelevant by the Plan's creation in June 1984. (OEX 1, 20 (cover page)). Once again, *Industrial Turf* is relevant. The employer claimed it was not bound to IJDB jurisdiction because the controlling memorandum of agreement did not refer to the IJDB. The Board found IJDB jurisdiction because the memorandum of agreement stated:

[I]n the event a jurisdictional dispute cannot be settled between the unions involved, then it is hereby agreed that such plan for settlement of jurisdictional disputes as is **or may be adopted** by the American Federation of Labor, Building and Construction Trades Department, shall be used."

Id., at 426-427 (Emphasis added).

According to the NLRB, "The new IJDB came into being on June 1, 1973. Hence we construe **the words "may be adopted"** in the aforementioned clause to refer to the new IDJB and its successors, and to bind the Employer and Local 469 to the new IJDB." *Id.*, at 427 (Emphasis added). Accord, *Sheet Metal Workers, Local 359 (Elt Piping)*, 217 NLRB 987, 989 (1975) ("All jurisdictional disputes...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...**")(Emphasis added). That or similar language is absent from the instant short form agreement.

Sheet Metal Workers Union, AFL-CIO, Local No. 4 (Tennessee Acoustics) 194 NLRB 1081 (1972) is on point and controlling. Addressing wording similar to the instant short form agreement, the NLRB rejected a claim that a newer jurisdictional plan²⁰ bound the parties, explaining:

²⁰ The relevant contract language in *Tennessee Acoustical*, at 1082 provided:

In our recent decision in [*Bricklayers, Masons and Plasterers' International Union of America, Local No. 1 (Lembke Construction Company of Colorado)*, 194 NLRB 641 (1971)] we held that a submission to the jurisdiction of the former Joint Board embodied no automatic commitment to the subsequently established National Joint Board. Accordingly, **absent evidence that the employer making the work assignment signified an intention to be bound to the new procedures, the Board will not find that an agreed upon or alternative method for the voluntary adjustment of the dispute exists.** For these reasons, and as no such evidence exists in this case, we find that the dispute is properly before us for determination.

Tennessee Acoustical, at 1082-1983 (Footnote omitted, emphasis added).

Here, the wording of the short form agreement is very specific and limited. It only identifies the IJDB. The short form agreement only binds Newkirk to the IJDB, nothing more. There is no reference to another entity or successor. There is no evidence that Newkirk signified an intention to be bound to the Plan. Missing is any automatic commitment to the subsequently established Plan. If Local 324 wanted include IJBD's successor, such as the Plan, in the short form agreement, it could easily borrowed wording form the BCTD's Constitution which

"Sub-contractor agrees to abide by decisions handed down by the National Joint Board for Jurisdictional Disputes."

* * * *

"Work Jurisdiction-The work of the Carpenters shall be all work recognized as such by the Building and Construction Trades Department, AFL-CIO, and the National Joint Board for the settlement of Jurisdictional Dispute."

In *Lembke*, at 650, the contract provided:

"If settlement cannot be reached in this manner, then the procedural rules of the National Joint Board- for the Settlement of Jurisdictional Disputes shall be initiated at once, and both the Union and the Employers agree to be bound by all decisions and awards of record as published by the National Joint Board. It is understood that this procedure includes a process for filing of appeals against adverse decisions."

* * * *

"Nothing contained herein is intended as in infringement on the recognized jurisdiction of any other building trades union, and any jurisdiction or misunderstanding will be settled in the manner prescribed by the Building and Construction Trades Department."

provides, “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.” (OEX 9 at 28). It did not! Local 324’s failure to use any successor language in its short form agreement is the death knell for Amicus’ claim that Newkirk is bound to the Plan.

The short form agreement suffers from yet another fatal defect. According to the Board, the IJDB has been inoperative since June 1, 1981, “has ceased hearing such disputes, and is not now a viable organization in a position to administer or police either the award or the agreement.” (*Construction and General Laborers, Local Union No. 449 (Modern Acoustics)*, 260 NLRB 883, 886 (1982). Local 324 used an out-of-date short form agreement with Newkirk and the IJDB is not an agreed upon or alternative method for the voluntary adjustment of the dispute. *Id.*, at 886.

Employer Newkirk is not bound to the Plan. Under this record, the Board will not find that an agreed upon or alternative method for the voluntary adjustment of the dispute exists. The Section 10(k) determination must continue.

3. Local 324 Failed To Introduce Into Evidence At The Instant Hearing The Documents Which The Arbitrator Based His Decision

As pointed out in Newkirk’s November 10 Brief, *Aldridge Electric*, at 740 requires that the documents introduced at the Plan arbitration be placed into evidence in the Section 10(k) hearing. Amicus does not deny this evidentiary failure, claiming only that the Plan document was introduced. Amicus at 16. Reliance on the introduction on the Plan alone is not sufficient and the NLRB may not bind either Local 876 or Newkirk to the Plan.

First, *Aldridge Electric* does not allow some, most, or the most important documents from the Plan arbitration; it requires that all of them be placed in evidence in the Section 10(k)

hearing. “Without those documents [placed in evidence at the arbitration], the Board will not broadly interpret the arbitrator's statement to mean that Local [876] bound itself to the Plan.” *Id.*, at 740. And, it is clear that documents were placed in evidence which were not introduced in the Section 10(k) hearing. According to the Arbitrator, “The IBEW relied on correspondence and did not appear at the hearing” (OEX 19 at *6). Since the Arbitrator did not identify the IBEW’s correspondence, we do not know what other correspondence was placed in evidence at the arbitration and therefore do not know if the same evidence was placed in evidenced in the instant case. It is certain that, “The IUOE also introduced a recent decision in another impediment to job progress dispute...” (OEX 19 at *9) which was not placed into evidence here.

Local 324’s failure to meet its *Aldridge* obligations remains another reason no method for voluntary adjustment of the dispute has been shown to exist.

Conclusion

Neither Local 876 nor Newkirk are bound to the Plan. The Board must proceed to a Section 10(k) determination on the merits.

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