

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

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

and

Case No. 07-CD-182456

NEWKIRK ELECTRIC ASSOCIATES, INC.,

and

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

**INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 324'S
MOTION FOR RECONSIDERATION**

In accordance with the National Labor Relations Board's Rules and Regulations, Local 324, International Union of Operating Engineers ("Local 324") moves for reconsideration of the Board's Decision and Determination of Dispute dated May 19, 2017 in the above captioned matter. *Electrical Workers Local 876 (Newkirk Elec. Assocs., Inc.)*, 365 NLRB No. 81 (2017) ("5/19/17 Decision"). As explained below, the Board failed to address significant record evidence that, when considered in light of established precedent, necessitates the dismissal of this case. In addition, the Board failed to make findings required by Section 10(k) of the Act, which, if made, further require the dismissal of this case.

I. PROCEDURAL HISTORY

A. Background

Newkirk Electrical Associates, Inc. ("Newkirk") filed an unfair labor practice charge on August 19, 2016, alleging that International Brotherhood of Electrical Workers, Local 876 ("Local 876") violated Section 8(b)(4)(D) of the Act by threatening to picket with the objective of forcing

Newkirk to assign certain work to Local 876-represented employees instead of Local 324-represented employees.¹ 5/19/17 Decision, slip op. at 1. The disputed work is “the use of earth moving/dirt digging equipment, cranes and other power-driven equipment in connection with the assembly, disassembly, erection, and modification of cell towers, including the hoisting of cell towers, clearing land and constructing roads.” *Id.* at 2. Newkirk is signatory to separate collective bargaining agreements with Local 876 and Local 324. *Id.* at 1-2. The agreement between Newkirk and Local 324 provides that jurisdictional disputes shall be submitted to “the Impartial Jurisdictional Disputes Board for the settlement in accord with the plan adopted by the Building Trades Department of the AFL-CIO.” *Id.* at 2.

On August 30, 2016, the Director of Jurisdiction of the International Union of Operating Engineers, AFL-CIO (“IUOE”), Terry George,² filed a notice of violation with the Plan in connection with the jurisdictional dispute. (I Ex. 15.) Director George explained the basis for the Plan’s jurisdiction over the parties:

Newkirk Electric Associates, Inc., is stipulated to the PLAN by being signatory to a collective bargaining agreement between IUOE Local Union 324 and Great Lakes Fabricators and Erectors Association which stipulates to the PLAN in Article IV Liability, Section C, Jurisdictional Procedure.... IBEW Local Union 876 and IUOE Local Union 324 are stipulated to the Plan by virtue of being affiliated with their International Unions who are affiliated with the National Building and Construction Trades [Department], AFL-CIO.

(*Id.* at 1.) Director George then requested that the Plan Administrator:

.... immediately direct Newkirk to withdraw any and all unfair labor practice charges against IBEW Local Union 876 and not to participate in any 10-K hearing

¹ References to the Transcript shall be “T” followed by page and line numbers. References to Exhibits shall be as follows: “E Ex” for Employer Exhibits, “I Ex” for Intervenor Exhibits, and “C Ex” for Charged Party Exhibits.

² The Board incorrectly refers to Terry George in the Decision and Determination of Dispute as “Operating Engineers Local 324 Director of Jurisdiction.” 5/19/17 Decision, slip op. at 2. George is not a Director of Jurisdiction for Local 324; instead, he is the Director of Jurisdiction for the IUOE. (T 271:7-9.)

where the issue is an assignment of work that is under the jurisdiction of the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry and to resolve any jurisdictional dispute in accordance with the PLAN. We also request in accordance with the PLAN that the IBEW International direct their Local Union 876 to immediately stop any threats against Newkirk and direct that they resolve any dispute that might exist in accordance with the Plan.

(Id. at 2.)

The Plan's Administrator sent a letter dated August 30, 2016 to Newkirk and to the International Brotherhood of Electrical Workers, AFL-CIO ("IBEW"), which is Local 876's parent union, directing all parties to cease the violations of the Plan and to process the jurisdictional dispute in accordance with the procedures set forth in the Plan. (I Ex. 16.) The IBEW's President, Lonnie Stephenson, sent a letter to Local 876's Business Manager, Chad Clark, on August 31, 2016. (I Ex. 17.) President Stephenson directed Business Manager Clark "to take appropriate action to cease the alleged violations...." *(Id.)* Business Manager Clark responded by letter dated September 2, 2016, in which he advised President Stephenson that "I have received your letter dated August 31, 2016 pertaining to the above-referenced matter and I have fully complied with your directive." (I Ex 18.)

However, Newkirk did not withdraw the charge, and, in accordance with the Plan's provisions, the Plan Administrator selected Arbitrator J.J. Pierson to conduct a hearing. (I Ex.19.) After the close of the hearing, the Arbitrator issued a ruling in which he found that all parties are stipulated to the Plan. *(Id.)* The Arbitrator rejected Newkirk's arguments that Local 876 was not bound to the Plan because it was an "outside" local union of the IBEW. *(Id.)* The Arbitrator further ordered that Newkirk withdraw its unfair labor practice charge and that any jurisdictional dispute be resolved in accordance with the Plan. *(Id.)*

Over a month later, an NLRB hearing officer convened a Section 10(k) hearing. 5/19/17 Decision, slip op. at 1. The hearing took place on October 13, 14 and 20, 2016. *Id.* The Hearing

Officer denied Local 324's motion to quash the notice of hearing on the basis that all of the parties were bound to the Plan, which is an agreed upon method of voluntary adjustment under Section 10(k). *Id.* The parties introduced evidence with respect to the Plan's status as an agreed upon method into the record of the 10(k) hearing and argued the issue in their post-hearing briefs. In addition, the Plan filed a brief as an amicus curiae, arguing that the Board lacked jurisdiction to determine the dispute because all of the parties – Newkirk, Local 876 and Local 324 – are bound to the Plan.

B. The Board's Decision and Determination of Dispute

The Board issued its Decision and Determination of Dispute on May 19, 2017. In its Decision, the Board found that there was no agreed upon method of voluntary adjustment because Local 876 was not bound to the Plan. 5/19/17 Decision, slip op. at 3-4.

The Board based its finding upon two (2) pieces of evidence: (1) the absence of any provision binding Local 876 to the Plan in its collective bargaining agreement with Newkirk; and (2) the testimony of Local 876 Business Manager Clark that “only ‘inside’ IBEW Locals are bound to the Plan, that IBEW Local 876 is an ‘outside’ local, and that IBEW Local 876 is not affiliated with the BCTD,” *i.e.*, the Building and Construction Trades Department. *Id.* at 3. “Consistent with this testimony,” the Board concluded, “the Board has long ‘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 the procedures for the resolution of jurisdictional disputes established by the [BCTD],’ *i.e.*, the Plan.” *Id.* at 3 (citing cases).

The Board then rejected the arguments that Local 876 is bound to the Plan. 5/19/17 Decision at 4. First, the Board found that the IBEW President's letter directing Local 876 to comply with the Plan Administrator's instructions was “insufficient, under the circumstances, to

establish that Local 876 is bound to the Plan in light of the countervailing evidence set forth above,” *viz.*, the absence of any provision in the Local 876-Newkirk contract and the Local 876 Business Manager’s testimony. *Id.* Second, the Board found that Arbitrator Pierson’s decision “cannot bind IBEW Local 876 to the Plan inasmuch as IBEW Local 876 was not a party to the arbitral proceeding and did not agree to be bound by its results.” *Id.* The Board added, “[e]ven if the arbitrator’s decision establishes that the International is bound under the Plan, it does not necessarily follow that IBEW Local 876 was so bound....” *Id.* at 4, n.5. Finally, the Board distinguished a case – *Operating Engineers Local 4 (JDC Demolition)*, 363 NLRB Nol. 17, slip op. at 2-3 (2015) – in which a local union was bound to the Plan by virtue of its parent union’s membership in the Building and Construction Trades Department. In the Board’s words, “*JDC Demolition* involved a jurisdictional dispute between an Operating Engineers local and a Laborers local; -- not, as here, between an Operating Engineers local and an ‘outside’ IBEW Local – and there was no evidence that either union in that case had established a longtime policy of excluding any of its sectors from the Plan’s coverage.” 5/19/17 Decision at 4, n.3.

II. STANDARD OF REVIEW

A party may move for reconsideration of a Board decision in “extraordinary circumstances.” 29 C.F.R. § 102.48(c). The party must state the “material error” with particularity; and, with respect to findings of material fact, the party must identify the page of the record in support of its assertions. 29 C.F.R. § 102.48(c)(1).

The Board has granted a motion for reconsideration when the “material error” involves its failure to address significant evidence in the record or to afford the proper weight to that evidence. *See Chemvet Laboratories, Inc.*, 204 NLRB 191 (1973) (granting motion for reconsideration where Board failed to note ALJ’s factual findings and other evidence that affected its conclusions in the

original decision); *Trafford Coach Lines*, 99 NLRB 399, 400 (1952) (granting motion for reconsideration where Board failed to accord sufficient weight pointing to employer’s illegal motivation). When that evidence, if accepted as accurate, would constitute a “sufficient basis” for the dismissal of a charge or complaint, the Board will grant a motion for reconsideration and dismiss the case. *Reliable Roofing Co.*, 250 NLRB 456 (1980).

III. ARGUMENT

In this case, the Board made two material errors. First, the Board failed to consider significant evidence in the record that proves Local 876 is bound to the Plan and is required to submit jurisdictional disputes to the Plan for resolution. Second, the Board failed to make the appropriate findings that Newkirk is also bound to the Plan and required to submit jurisdictional disputes to the Plan for resolution. Once these material errors are corrected, the Board must find that all of the parties to the jurisdictional dispute – Local 324, Local 876 and Newkirk – are bound to a mutually agreed upon method of voluntary adjustment. Given this single method for adjusting the dispute, the Board must dismiss the case. *Operating Engineers Local 4 (JDC Demolition Co.)*, 363 NLRB No. 17, slip op. at 2 (2015).

A. The Board Failed to Consider Significant Evidence Establishing Local 876 is Bound to the Plan by Virtue of its Affiliation with the IBEW

The record contains evidence that clearly and unambiguously establishes that Local 876 is bound to the Plan by virtue of the IBEW’s affiliation with the Building and Construction Trades Department (“BCTD”). First, Local 876 is affiliated with the IBEW. (T 451:23-25.) Second, the IBEW’s Constitution provides Article IV, Section 3(l) that the International President has the authority to enter into “agreements with any national or international labor organization or association of employers, or with any company, corporation or firm doing an interstate or interprovincial business in electrical work, to cover the entire jurisdiction of the I.B.E.W.” (C 6

at 18.) Third, the IBEW is a member of the BCTD, which is an international labor organization. (T 251:6-14.) Fourth, the BCTD Constitution provides in Article X that “[a]ll jurisdictional disputes between or among affiliated National and International Unions and their affiliated local unions shall be settled and adjusted according to the present plan established by the Building and Construction Trades Department....” (I Ex 9 at 28 (emphasis added).) Fifth, the Preamble of the current Plan provides 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” (I Ex 10 at 16 (emphasis added).) Sixth, Article IX of the Plan provides that “[e]ach Union agrees that all cases, disputes or controversies involving jurisdictional disputes or assignments of work arising under this Agreement shall be resolved as provided herein, and shall comply with the decisions and rulings of the Administrator, [Joint Administrative Committee], arbitrators or National Arbitration Panels established hereunder.” (I Ex 10 at 32.)

Taken together, the foregoing evidence – which the Board ignored or overlooked in its 5/19/17 decision – establishes that Local 876 is bound to the Plan. “[A] party may be responsible on a contract negotiated and executed by other parties....” *Blake Constr. Co. v. Laborers Int’l Union of N. Am.*, 511 F.2d 324, 329 (D.C. Cir. 1975). In this case, the obligation arises by virtue of Local 876’s affiliation with the IBEW, which, in turn, affiliated itself with the BCTD. As a member of the BCTD, the IBEW obligated not only itself, but also all of its affiliated Local Unions – including Local 876 – to use the Plan to resolve jurisdictional disputes.

The principle set forth in *Blake Constr. Co.* is reflected in the Board’s Section 10(k) precedent. For example, the Board recognizes that an international union may bind its local unions to utilize the Plan’s procedures solely by virtue of the international union’s membership in the

BCTD. *Operating Engineers Local 4*, 363 NLRB No. 17, slip op. at 2-3 (2015); *Laborers Local 60 (Mergentime Corp.)*, 305 NLRB 762, 763 (1991); *Operating Engineers Local 139 (Allied Const. Employers' Ass'n)*, 293 NLRB 604, 606 (1989); *Plumbers and Pipefitters Local 447 (Capitol Air Conditioning)*, 224 NLRB 985, 986-87 (1976). *Wood, Wire & Metal Lathers Local 46 (Jacobson & Co., Inc.)*, 119 NLRB 1658, 1663 (1958). See also *Pacific Northwest Regional Council of Carpenters (Brand Energy Svcs., LLC)*, 355 NLRB 274 (2010) (holding international union bound regional council, to utilize the Plan by executing a collective bargaining agreement requiring all jurisdictional disputes be processed pursuant to the Plan). The Local Union and/or affiliated body remains obligated to use the Plan even though its own collective bargaining agreements may contain no reference to the dispute resolution procedures. *Iron Workers Local 380 (Skoog Constr. Co.)*, 204 NLRB 353, 354 (1973) (finding local union bound to Plan even though collective bargaining agreement is silent because local union is affiliated with international union who is a member of BCTD). “[I]n absence of evidence to the contrary,” the Board simply takes administrative notice of the fact that a local union is affiliated with an international union who is a member of the BCTD, which is a signatory to the Plan, and thus, the local unions are obligated to resolve their jurisdictional dispute through the Plan. *Pipefitters Local 195 (Cleveland Wrecking Co.)*, 218 NLRB 172, 174 (1975).

The only “evidence to the contrary” in this record is the self-serving testimony of the Local 876 Business Manager, who testified that the Local Union is not bound to the Plan (T 451:5-25, 452:6-18) and an excerpt from an IBEW handbook that unilaterally declares the IBEW will not comply with the Plan with respect to jurisdictional disputes involving “outside” locals (C 15). With respect to the handbook, the IBEW recognizes that, notwithstanding its declaration, “[t]his does not prevent other trades from submitting such cases unilaterally.” (*Id.*) “However,” the

IBEW adds, “when this occurs and a decision is issued (over our standing protest) the affected [local union] will be advised not to abide by it.” (*Id.*) In other words, even the IBEW recognizes that outside local unions may be subject to the Plan, but the IBEW encourages its local unions not to abide by any decisions issued pursuant to that Plan.

Nevertheless, the Board relied upon this evidence to find that Local 876 is not bound to the Plan; and, in doing so, the Board undermined a fundamental labor policy: *viz.*, the promotion of voluntary methods of adjustment. For more than sixty years, the Board has recognized 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.

Wood, Wire and Metal Lathers Local 9 (A.W. Lee, Inc.), 113 NLRB 947, 954 (1955) (footnotes omitted). This policy also extends to a party’s unilateral declaration of its refusal to participate in the process going forward. *Sheet Metal Workers Local 1 (Refrigeration and Air Conditioning Contractors Ass’n)*, 114 NLRB 924, 930 (1955) (rejecting pipefitters’ refusal to comply with “any determination of the dispute made by the Joint Board”).

This venerable labor policy predates the Board’s “distinction” between the IBEW’s “inside” and “outside” local unions. The earliest reported case involving this distinction is *Operating Engineers Local 825 (Nichols Elec. Co.)*, 137 NLRB 1425 (1962). The Board noted that, “[t]he IBEW for many years has consistently taken the position that it will not be bound by any Joint Board determination involving line work.” *Operating Eng’rs, Local 825*, 137 NLRB at 1429. The Board relied upon that position as support for its conclusion that there is no agreed

upon method for the voluntary adjustment of the dispute.” *Id.* However, that position is irreconcilable with the Board’s decisions in *Wood, Wire and Metal Lathers Local 9* and *Sheet Metal Workers Local 1*, wherein the Board found that a union’s refusal to abide to a process under which they were bound, whether by affiliation or agreement, to be irrelevant. After *Operating Eng’rs Local 825*, the Board continued to rely upon that distinction even though the “evidence” in subsequent cases was little more than self-serving statements by parties seeking to avoid the Plan or the Board’s prior decisions noting the distinction). See *Electrical Workers Local 357 (Western Diversified Elec.)*, 344 NLRB 1239, 1240 (2005) (accepting self-serving testimony of business manager that the Plan did not bind local union);³ *Electrical Workers, Local 44 (Utility Builders)*, 122 NLRB 1099, 1100 (1977) (accepting assertion of other parties that IBEW Local Union is not subject to the Plan); *Operating Engineers Local 542 (W.V. Pangborne & Co.)*, 213 NLRB 124, 126-27 (1974) (relying upon prior decisions for conclusion that IBEW Local Union is not bound to Plan).

Such self-serving testimony and statements deserve even less weight in this case because there is record evidence of the IBEW directing Local 876 to comply with the Plan. (I Exs 16 & 17.) The Board dismissed this evidence as being insufficient by itself to establish that Local 876 is bound to the Plan. If the Board had considered the Plan’s language, along with the constitutions of both the IBEW and BCTD, then the Board would have concluded that Local 876, by virtue of

³ In *Western Diversified Electric*, the Board specifically noted that the Operating Engineers local union did not present any evidence on the merits, thereby leaving the record with only the evidence presented by Electrical Workers local union and the employer. In this case, however, Local 324 did introduce evidence into the record (*e.g.*, the BCTD Constitution and the Plan). Local 324 also introduced Arbitrator Pierson’s decision into the record. In that decision, the Arbitrator relied upon Local 324’s evidence to find that Local 876 was bound to the Plan. These facts further distinguish this case another Board decision – *Electrical Workers Local 196 (Aldridge Elec.)*, 358 NLRB 737, 740 (2012) – in which it found that an “outside local” was not bound to the Plan because the documents underlying the arbitrator’s decision were not introduced into the record.

its affiliation with the IBEW and the affiliation of the IBEW with the BCTD, was bound to the Plan. *Pipefitters Local 195*, 218 NLRB at 174.

Finally, the Board materially erred with respect to its conclusion that Arbitrator Pierson's award "cannot bind IBEW Local 876 to the Plan inasmuch as IBEW Local 876 was not party to the arbitral proceeding and did not agree to be bound by its results." 5/19/17 Decision at 4. The error is two fold. First, as explained above, Local 876 agreed to be bound by the results of this proceeding by virtue of its affiliation with the IBEW and the IBEW's membership in the BCTD. Second, the evidence establishes that Local 876 was represented by the IBEW in the arbitration proceeding. The Plan provides that jurisdictional disputes are resolved by the national or international unions on behalf of their affiliated local unions. (I Ex 9 at 8-11, 16, 21-31.) Moreover, the record establishes that the IBEW received notice of the filing of the complaint and notice of the arbitration hearing. (I Exs 15, 19 at 1.) The IBEW chose not to appear at the hearing. Nevertheless, the IBEW and Local 876 remain bound to the Plan by virtue of the BCTD Constitution and the Plan itself. *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").

In the end, the Board committed material errors by failing to consider significant evidence in the record that, in light of established precedent and policy, establish that Local 876 is bound to the Plan and required to resolve all jurisdictional disputes pursuant to the Plan's procedures. The Board compounded this error by relying upon self-serving evidence to reach a conclusion that undermines fundamental labor policy. Once the Board corrects these errors, it must find that Local 876 is bound to the Plan by virtue of its affiliation with the IBEW and the IBEW's membership in the BCTD.

B. The Board Erroneously Failed to Find that Newkirk is Bound to the Plan

Given that both Local 876 and Local 324 are bound to the Plan by virtue of their affiliation with the IBEW and IUOE respectively, Section 10(k) requires the Board to make a finding as to whether Newkirk is also bound to the Plan. The Board did not make that finding. 5/19/17 at 4, n.6. Instead, the Board found that it was “unnecessary to decide whether the Employer must be bound if an agreement is to constitute an agreed-upon method of voluntary adjustment....” *Id.* Given the two unions are bound to the Plan, the Board must resolve this issue. As the record shows, the collective bargaining agreement between Local 324 and Newkirk contains the requisite language requiring the parties to submit jurisdictional disputes to the Plan. (I Ex. 1.) Therefore, the Board should find that Newkirk is bound to the Plan.

III. CONCLUSION

Accordingly, Local 324 respectfully requests that the Board grant the motion for reconsideration, reconsider its May 19, 2017 Decision and Determination of Dispute, and quash the notice because all of the parties are bound to the Plan as an agreed upon method for the voluntary adjustment of the dispute.

Respectfully submitted,

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