

**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.,
OPPOSING THE MOTION FOR RECONSIDERATION**

Donald H. Scharg
dscharg@bodmanlaw.com
Bodman PLC
201 West Big Beaver Road, Suite 500
Troy, MI 48084
(248) 743-6024 (phone)
Attorney for Charging Party

Terry A. Morgan, Regional Director
Terry.Morgan@nlrb.gov
National Labor Relations Board, Region 7
477 Michigan Avenue, Room 300
Detroit, MI 48226

Michael J. Akins
mike@unionlaw.net
Gregory, Moore, Jeakle & Brooks, P.C.
65 Cadillac Square, Suite 3727
Detroit, MI 48226
Attorney for IUOE Local 324

Fillipe S. Iorio
fiorio@kiflaw.com
Kalniz, Iorio & Reardon Co., L.P.A.
49891 Cascade Road, S.E.
Grand Rapids, MI 49546
Attorney for IBEW Local 876

Keith R. Bolek
kbolek@odonoghuelaw.com
O'Donoghue & O'Donoghue LLP
4748 Wisconsin Avenue, NW
Washington, D.C. 20016
Attorneys for Amicus Curiae

Preliminary Statement

On May 19, 2017, the NLRB issued its decision in the instant case (*Local 876, International Brotherhood of Electrical Workers, AFL-CIO*, 365 NLRB No. 81 (2017)), finding, *inter alia*, that Intervenor, Local 324, International Union of Operating Engineers, AFL-CIO (“Local 324”) did not establish that “outside union” Local 876, International Brotherhood of Electrical Workers (“Local 876”) was bound to the AFL-CIO Building and Construction Trades Department’s Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (“Plan”). Claiming that the Board failed to address significant record evidence, Local 324 filed its Motion for Reconsideration,¹ asking the NLRB to overrule over 50 years of well established, consistent, and controlling precedent which holds that “outside”² 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.³

In its Brief, Local 324 claims two, but raises three material errors for reconsideration: 1) the Board did not consider the “significant” evidence binding Local 876 to the Plan and 2)

¹ Local 324’s Reconsideration Motion/Brief is identified as “Motion”. Citations to the transcript of the Section 10(k) hearing are identified by page number. Local 324 exhibits are identified as “IEX” and Local 876 exhibits are identified as “CEX”. All exhibit designations are followed by the applicable exhibit number.

² “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 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.” (365 NLRB No. 81 at *2)

³ In fact, no decision was found where the NLRB held an IBEW outside union was bound or stipulated to the Plan or its predecessors.

“outside” union status is not compatible with NLRB precedent.⁴ The arguments raised by Local 324 are neither novel nor new and must be rejected. Local 876 is not bound to the Plan which is not an agreed upon method for voluntary adjustment in this Section 10(k) proceeding and nothing presented warrants reconsideration of the May 19, 2017 decision or a change in NLRB precedent.

The Standard For Granting Reconsideration

A motion for reconsideration requires Local 324 to identify material error or demonstrate extraordinary circumstances warranting reconsideration.” NLRB Rule 102.48(d)(1); *Phoenix Coca-Cola Bottling Company*, 338 NLRB 498 (2002); *The Wang Theater*, 365 NLRB No. 33 at *1 (2017). Notably, *Phoenix Coca-Cola*, dismissed a reconsideration motion which “failed to present extraordinary circumstances warranting reconsideration” and did not raise “any argument not previously considered by the Board.” *Id.* at *1 (footnote omitted). That is exactly the situation here. There is no basis for granting reconsideration.⁵

The Motion For Reconsideration Must Be Denied

It is Local 324’s own Motion which undoes its claim for reconsideration. The first error alleged by Local 324 is that, “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.” Motion at 8. According to Local 324, the Board failed to consider “evidence that clearly and unambiguously establishes that Local 876 is bound to the Plan” which consists of:

⁴ Consideration of the alleged third material error, that Newkirk is bound to the Plan, is not relevant if Local 876 is not bound to the Plan.

⁵ There's an old legal aphorism that goes, "If you have the facts on your side, pound the facts. If you have the law on your side, pound the law. If you have neither on your side, pound the table." All Local 324 can do is pound the table.

- Local 876 is affiliated with the IBEW.
- the IBEW’s International President has the authority to enter into “agreements with any national or international labor organization...”
- the IBEW is a member of the Building and Construction Trades Department (“BCTD”).
- the BCTD Constitution provides that all jurisdictional disputes between affiliated International Unions and their affiliated local unions shall be settled and adjusted according to the Plan.
- the Plan’s Preamble of the 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” (IEX 10 at 16)
- 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.” (IEX 10 at 32.)

Motion at 6-7.

Local 324’s Motion claims that “the Board ignored or overlooked [this evidence] in its 5/19/17 decision...” Motion at 7.

The fatal problem Local 324 faces is that its Motion and claims listed in the bullet points are a rehash of the arguments found in its November 10, 2016 Brief and in the Amicus Brief filed the by the Plan on November 29, 2016 (“Amicus”). It is crystal clear that this Local

324/Amicus argument **was not ignored or overlooked** by the Board because in its decision, the NLRB specifically stated that it considered this argument:

Operating Engineers Local 324 moves to quash the notice of hearing, arguing that the parties have agreed upon a method for the voluntary adjustment of the dispute. It argues that both Operating Engineers Local 324 and IBEW Local 876 are stipulated to the Plan through the affiliation of their respective international unions with the Building and Construction Trades Department (BCTD), AFL-CIO...It also contends that IBEW President Stephenson's letter and IBEW Local 876's affirmative response to that letter "undermine" IBEW Local 876's claim that it is not stipulated to the Plan.***

Amicus Plan, like Operating Engineers Local 324, argues that all the relevant parties here—the Employer, IBEW Local 876, and Operating Engineers Local 324—are stipulated to the Plan pursuant to Plan procedures and the BCTD's Constitution and thus are bound to utilize the Plan, divesting the Board of jurisdiction to determine the dispute under Section 10(k).

365 NLRB No. 81 at *3.

The Board's consideration of the Local 324/Amicus arguments could not be clearer.⁶ Moreover, after considering this Local 324/Amicus argument, the Board specifically rejected it, concluding, "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." 365 NLRB No. 81 at *3.

⁶ A strong case to be made that Local 324's reconsideration motion was filed in bad faith and is frivolous. No reasonable litigant can allege the NLRB ignored or overlooked evidence or a legal theory when the Board specifically refers to the evidence in its official, published decision. In addition, Local 324 ignored and did not even try to distinguish the NLRB precedent which is counter to its claim. See for example, *Operating Engineers Local 450 (C. A. Turner Construction Company)*, 119 NLRB 339 (1957), *infra* at 11. Newkirk requests reimbursement of its legal expenses in responding to the Motion for Reconsideration. The Board has the inherent authority to control its own proceedings, including the authority to award litigation expenses through the application of the "bad-faith" exception to the American Rule. *Chino Valley Medical Center*, 363 NLRB No. 108, *1 fn 5 (2016); *HTH Corporation*, 361 NLRB No. 65, *3-4 (2014); *Camelot Terrace*, 357 NLRB 1934, 1939 (2011).

If this is not enough reason to reject Local 324's reconsideration motion, there is more! Local 324's claim is not new and does not raise extraordinary circumstances warranting reconsideration. Several NLRB decisions have specifically addressed and rejected Local 324's argument.

Most recently, *Electrical Workers, IBEW, Local 357 (Western Diversified Electric)*, 344 NLRB 1239 (2005) rejected the same argument Local 324 makes 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:

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.

Local 324's 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 931.⁷

Local 324 does not cite one contrary decision involving an IBEW outside union.

⁷ 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 Motion at 14.

In actuality, Local 324 is just seeking a second chance to argue that outside IBEW unions are not bound to the Plan. This is not allowed in a motion for reconsideration. *Phoenix Coca-Cola*, at *1. Much like the “Emperor’s new clothes,” Local 324’s assertions have no substance. Local 324 has not met its burden for reconsideration. The Motion must be rejected.

This result does not change even if reconsideration is granted. At the center of the Motion for Reconsideration is Local 324’s attack on over 50 years of well-established, consistent, and controlling NLRB precedent which establishes that IBEW “outside” locals are not bound to the Plan even though the IBEW is a signatory to it. 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 union in *Local Union 825* appealed. Local 324 has chosen to ignore the resulting appellate decision, but cannot avoid it. In *NLRB v. Local 825, International Union of Operating Engineers*, 326 F.2d 213 (3rd Cir. 1964), the Third Circuit affirmed the outside union status and 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 216.⁸ (Emphasis added).

In effect, the IBEW and the Joint Board, the Plan's predecessor, have an agreement, sanctioned by the NLRB, that IBEW outside unions are not bound to the Plan.⁹

Contrary to Local 324, the IBEW outside union status is also consistent with Board law. The many Board decisions which hold that IBEW outside unions are not bound to the Plan or its predecessors are evidence that an agreed-upon method for voluntary adjustment was never "formally and deliberately" adopted. *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

⁸ 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 (McCloskey & Co.)*, 147 NLRB 1498, 1502 fn 11 (1964). (Emphasis added). NECA membership does not bind Newkirk to the Plan.

⁹ Local 324's claim at p.8 of the Motion that 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 and an excerpt from an IBEW handbook that unilaterally declares the IBEW will not comply with respect to jurisdictional disputes involving "outside locals" (Citations omitted) is obviously rendered baseless by the IBEW's 1956 conditional affiliation with the BCTD and overwhelming mountain of case law affirming the outside union status.

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). *JRJ Excavating*, 189 NLRB at 931 (“[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 IJDB 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.”); (2012) *International Brotherhood of Electrical Workers, Local 196 (Aldridge Electric)*, 358 NLRB 737 (2012) (Rejecting the arbitration award, the Board once again affirmed the IBEW outside union’s exclusion from an agreed-upon method for voluntary adjustment).

Next, Local 324 claims that Local 876 Business Manager Chad Clark’s self-serving testimony¹⁰ on IBEW outside union status undermines *Wood, Wire and Metal Lathers Local*

¹⁰ In a last gasp effort, Local 324 has reduced itself to belittling the testimony of Local 876 Business Manager Chad Clark as “self-serving.” Clark’s testimony explaining Local 876’s IBEW outside union status was uncontroverted and unchallenged by Local 324. Now, at this late date, Local 324 seeks to treat it as self-

No. 9 (A. W. Lee), 113 NLRB 947 (1958) and *Sheet Metal Workers Local 1 (Refrigeration and Air Conditioning Contractors Association)*, 114 NLRB 924 (1955)¹¹ and undermines the fundamental labor policy of promoting voluntary methods of adjustment. This claim is misplaced. Any policy of promoting voluntary methods of adjustment is of course dependent on all of the parties voluntarily being bound to the Plan. *JRJ Excavating*, 189 NLRB at 931. The NLRB carefully scrutinizes the agreements at issue in order to determine if the parties are truly bound by the Plan. *Aldridge Electric*, 358 NLRB at 739.

Once again, Local 324 ignores the relevant NLRB decision. The NLRB long ago reconciled the IBEW outside union rulings with *Lee* and *Meyer Furnace*. Local 324 ignored *Operating Engineers Local 450 (C. A. Turner Construction Company)*, 119 NLRB 339 (1957), which 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.****

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

serving. The “self-serving” pejorative smells of panic and sends the clear signal that Local 876’s reconsideration motion is a sinking ship. That Clark’s testimony is called self-serving is irrelevant. “Important testimony of a party is usually self-serving by its nature.” *Ryan v. United States*, 657 F.3d 604, 606 n. 1 (7th Cir. 2011) (Internal quotations omitted). Local 324 found it necessary to attack Clark because he explained Local 876’s outside union status. Clark explained that Local 876 is an IBEW outside local and is not bound to the Plan and identified the relevant documentary evidence supporting the outside union status. (420, 423, 425-426; CEX 6). This attack does not detract from the fact that Clark’s testimony on the outside union status was unchallenged.

¹¹ The decision is routinely cited as *Meyer Furnace*.

There are two key points from *Turner Construction*. First, the IBEW outside union doctrine is not inconsistent with *A. W. Lee and Meyer Furnace*. Second, each local union in *A. W. Lee* and *Meyer Furnace* was bound to the Joint Board only because each had previously participated in the jurisdictional dispute resolution process. Local 324 ignores these key conclusions.

The instant case is no different from *Turner Construction*. The IBEW outside union doctrine is controlling. Local 324 offered no evidence that Local 876 ever complied with a decision of the Plan. Similarly, there is no evidence that Local 876 had any connection to the Plan or ever participated in a voluntary submission to Plan. The Board must conclude that Local 876 is not bound to the Plan.

Likewise, Local 324's reliance on *Iron Workers Local 380 (Skoog Constr. Co.)*, 204 NLRB 353 (1973), a non-IBEW outside union case, is 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. (Emphasis added) The evidence showed that the Carpenters was affiliated with the Joint Board. While the NLRB referred to Carpenters and "Carpenters Union," it made no finding that they were different entities. Notably, *Skoog* does not address the decades of well-established NLRB case law regarding IBEW outside unions, continuous non-membership by Local 876 in the BCTD, and evidence of a deliberate and formal exclusion/withdrawal by the IBEW from the Plan's predecessor with respect to "outside" construction work.

This 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 outside work.
- Since 1956, a 61 year period, the IBEW and its 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.
- Local 876's Clark testified, without contradiction, that only "inside" IBEW locals are bound under the Plan, that Local 876 is an "outside" local, and that Local 876 is not affiliated with the BCTD.
- 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)
- The Plan cannot 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, Local 324 has offered nothing but table banging.

In the final analysis, even a finding that Local 876 is not an outside union does not help Local 324's claim that the case must be dismissed because the Plan is an agreed upon method for

voluntary adjustments. In this Section 10(k) determination, "the employer controlling the work assignment as well as the rival unions involved comprise the 'parties to such dispute'...." *JRJ Excavating*, 189 NLRB at 931 (Footnote omitted, emphasis added). The "employer" is Newkirk. Local 876 is one "rival" union. The other "rival" union is Local 324. 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.

Even if Local 876, a party to the Section 10(k) proceedings, was bound to the Plan, the Plan process was fatally flawed and not a method for voluntary adjustment. It is uncontroverted that Local 876 was **never** notified of the Plan's arbitration hearing and did not attend or participate in the Plan's proceedings. Nor did the IBEW participate. 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, cross examine witnesses, introduce documentary exhibits, and fully brief its position to the arbitrator. *Good Samaritan Hospital*, 363 NLRB No. 186 *3 (2016). Because of these substantial defects, the Plan cannot be a method for voluntary adjustment. *Aldridge Electric*, at 739-740, confirms, "the arbitrator's decision cannot bind [the local union] to the Plan inasmuch as [the local union] **was not party to the arbitral proceeding** and did not agree to be bound by its results."¹² (Footnote

¹² Any reliance on the Plan's arbitration is also fatally flawed by Local 324's failure to enter the documents introduced at the Plan arbitration into evidence in the Section 10(k) hearing. Submission of the Plan and arbitration decision is not sufficient and the NLRB may not bind either Local 876 (or Newkirk) to the Plan. *Aldridge Electric* requires that all of the documents from the Plan arbitration 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" (IEX 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

omitted)(Emphasis added). See also, *Local 825*, at 326 F.2d 216, “[T]he record indicates that [the union] 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.”)

Local 324 cannot rely on the IBEW’s participation in the Plan to waive Local 876 challenge to the Plan’s arbitration procedures. Footnote 5 of *Aldridge Electric* refused to bind the local union to the Plan even though the international union participated:

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.**

Id. at 741. (Emphasis added). See also, *International Brotherhood of Electrical Workers Local 497 (Kniper Construction)*, 191 NLRB 145 (1971) (The Joint Board action was not binding because 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.)¹³ Local 876’s Clark similarly testified, without contradiction, that only “inside” IBEW locals are bound under the Plan, that Local 876 is an “outside” local, and that Local 876 is not affiliated with the BCTD. Only one

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...” (IEX 19 at *9) which was not placed into evidence in the Section 10(k) hearing. Local 324’s failure to meet its *Aldridge Electric* obligations remains another reason no method for voluntary adjustment of the dispute has been shown to exist and to deny reconsideration.

¹³ Local 324’s reliance on *Operating Engineers, Local 4 (JDC Demolitions)*, 365 NLRB No. 17 (2015) (Motion at 5) to support its claim that the IBEW bound Local 876 to the Plan is misplaced. First, the local Laborers’ union in *JDC* was not an IBEW outside union with over 50 years of exclusion from the Plan. Second, unlike Local 876, the local Laborers union in *JDC* was, itself, a member of the BCTD. *Id.* at *3. *JDC* has no bearing on the instant case.

conclusion can be reached: Local 876 was not and is not bound to the Plan. The Motion for Reconsideration must be denied.

Conclusion

Local 324's Motion for Reconsideration must be denied.

BODMAN PLC

By: /s/Donald H. Scharg_____

Donald H. Scharg

Attorneys for Charging Party

201 West Big Beaver Road, Suite 5400

Troy, MI 48084

(248) 743-6000

dscharg@bodmanlaw.com

Dated: July 12, 2017

