

Nos. 16-1800, 16-1969

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**CONSTRUCTION EMPLOYERS ASSOCIATION;
DONLEY'S INC.;;
HUNT CONSTRUCTION, (now AECOM);
PRECISION ENVIRONMENTAL COMPANY;
CLEVELAND CEMENT CONTRACTORS, INC.;;
B & B WRECKING & EXCAVATING, INC.**

Intervenors

**ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR
ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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TABLE OF CONTENTS

Headings	Page(s)
Jurisdictional statement.....	1
Oral argument statement	3
Statement of the issue presented	3
Statement of the case.....	4
Statement of facts.....	5
I. The Board’s findings of fact	5
A. The Employers, the relevant multi-employer agreements, and the conflicting work-assignment provisions	5
B. For many years, the individual employers assign forklift and skid steer work almost exclusively to laborers-represented employees.....	7
C. Local 18 requests that Donley’s assign the operation of forklifts and skid steers to its members; Donley’s continues assigning that work to laborers members on two projects; Local 18 threatens to abandon its operation of Donley’s cranes if its members do not operate the forklifts and skid steers.....	9
D. Local 18 threatens to strike and shut down Donley’s Goodyear jobsite over forklift assignments; it strikes and files pay-in-lieu-of-work grievances against Donley’s over the assignment of forklifts and skid steers	11
E. Local 18 again threatens to strike Donley’s over forklifts and skid steers; after Donley’s informs it of Local 18’s strike threat, Laborers Local 894 threatens to strike if forklift and skid steer work is switched to Local 18.....	13
F. During negotiations for a new CEA agreement, Local 18 business manager Sink says that the CEA Employers have been assigning operation of forklift and skid steers to Laborers for “far too long”	14

TABLE OF CONTENTS

Headings-Cont'd	Page(s)
G. On the last day of negotiations, Local 18 threatens to strike the CEA over the assignment of forklifts and skid steers; the CEA eventually signs conflicting agreements with Local 18 and the Laborers	15
H. Donley’s files unfair labor practice charges against Local 18 and the Laborers; Local 18 files a pay-in-lieu grievance against B&B under the CEA agreement.....	16
I. Local 18 makes more claims for forklift and skid steer work and files more pay-in-lieu grievances against individual employers under the CEA agreement.....	18
J. The CEA notifies Laborers Local 310 that Local 18 had launched an area-wide campaign to claim forklift and skid steer work; Local 18 files more pay-in-lieu grievances; Laborers Local 310 says it will strike if the CEA reassigns its work to Local 18	19
K. The CEA and individual employers file unfair labor practice charges against Local 18 and the Laborers; Local 18 continues to file pay-in-lieu grievances against individual employers.....	21
L. The Board issues a Section 10(k) Decision in <i>Donley’s I</i> awarding forklift and skid steer work at Flats East and Goodyear to Laborers members; Local 18 refuses to withdraw its grievance over the Goodyear project and files another pay-in-lieu grievance against Cleveland Cement	22
M. The Board issues a 10(k) Decision in <i>Donley’s II</i> awarding the individual Employers’ forklift and skid steer work to Laborers; Local 18 refuses to withdraw its pay-in-lieu grievances over that work and files even more	23
II. The Board’s Conclusions and Order.....	24
Standard of review	27
Summary of argument.....	28

TABLE OF CONTENTS

Headings-Cont'd	Page(s)
Argument.....	31
The Board reasonably found that Local 18 violated Section 8(b)(4)(i) and (ii)(D) of the Act by striking, threatening to strike, and filing and maintaining pay-in-lieu grievances against the employers that are inconsistent with the Board’s Section 10(k) determinations awarding the disputed work to the Laborers	31
A. The statutory scheme for resolving jurisdictional disputes.....	31
B. Local 18 violated Section 8(b)(4)(i) and (ii)(D) of the Act by engaging in a strike at Donley’s Goodyear jobsite and threatening to strike Donley’s, the CEA, and the other individual employers with an object of forcing them to reassign the disputed work to Local 18.....	33
C. Local 18 violated Section 8(b)(4)(ii)(D) by maintaining and filing pay-in-lieu grievances against the individual employers in contravention of the Board’s Section 10(k) determinations awarding the disputed work to the Laborers	36
D. The Board reasonably found that Local 18 failed to prove its work preservation and collusion defenses	40
1. Local 18 did not prove its work preservation defense	41
a. Local 18 did not historically perform forklift and skid steer work for the individual employers.....	44
b. Local 18’s legal and factual claims lack support.....	46
2. Local 18 did not prove its collusion defense and in any event, its own strike threats were sufficient to trigger the Section 10(k) jurisdictional dispute	52
Conclusion	57

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Am. Pres. Lines, Ltd. v. ILWU Local 60</i> , 611 Fed. Appx. 908 (9th Cir. 2015)	47
<i>Bill Johnson’s Restaurants, Inc. v. NLRB</i> , 461 U.S. 731 (1983).....	38-39
<i>Bricklayers (Cretex Constr. Services)</i> , 343 NLRB 1030 (2004)	52
<i>Can-Am Plumbing, Inc. v. NLRB</i> , 321 F.3d 145 (D.C. Cir. 2003).....	39
<i>Carey v. Westinghouse</i> , 375 U.S. 261 (1964).....	37
<i>Carpenters (Prate Installations, Inc.)</i> , 341 NLRB 543 (2004)	42, 49
<i>Carpenters Local 275 (Lymo Construction Co.)</i> , 334 NLRB 422 (2001)	32
<i>Chelsea Indus., Inc. v. NLRB</i> , 285 F.3d 1073 (D.C. Cir. 2002).....	50
<i>Colgate-Palmolive Co.</i> , 323 NLRB 515 (1997)	49
<i>Donley’s Inc. (Donley’s I)</i> , 360 NLRB No. 20 (2014)	2, 17, 22, 23, 25, 40, 52, 53, 55, 56
<i>Donley’s Inc. (Donley’s II)</i> , 360 NLRB No. 113 (2014)	2, 21, 23, 25, 37, 40, 44, 52, 53, 55, 56
<i>Elec. Workers Local 3 (Slattery Skanska)</i> , 342 NLRB 173 (2004)	32

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Geske & Sons Inc.</i> , 317 NLRB 28, <i>enforced</i> , 103 F.3d 1366 (7th Cir. 1007)	50
<i>ILWU (Kinder Morgan)</i> , 2014 WL 3957246 (Aug. 13, 2014)	49
<i>Int'l Longshoreman's & Warehousemen's Union, Local 14 v. NLRB</i> , 85 F.3d 646 (D.C. Cir. 1996).....	28
<i>Iron Workers Local 433 (Otis Elevator)</i> , 309 NLRB 273 (1992), <i>enforced mem.</i> , 46 F.3d 1143 (9th Cir. 1995)	39
<i>ITT v. Electrical Workers</i> , 419 U.S. 428 (1975).....	32, 33
<i>Laborers Local 265 (Henkels & McCoy)</i> , 360 NLRB 819 (2014).....	42, 43, 44, 49, 55
<i>Local 30, United Slate, Tile & Composition Roofers v. NLRB</i> , 1 F.3d 1419 (3d Cir. 1993)	27, 38, 39
<i>Local 32, Int'l Longshoremen v. NLRB</i> , 773 F.2d 1012 (9th Cir. 1985)	32, 37
<i>Local 900, IUE v. NLRB</i> , 727 F.2d 1184 (D.C. Cir. 1984).....	43
<i>Longshoremen ILWU Local 6 (Golden Grain Macaroni Co.)</i> , 289 NLRB 1 (1988).....	53
<i>Longshoremen's & Warehousemen's Union v. NLRB</i> , 884 F.2d 1407 (D.C. Cir. 1989).....	32, 38

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Machinists District 190, Local 1414 (SSA Terminal, LLC),</i> 344 NLRB 1018 (2005)	42, 48-49
<i>Newspaper and Mail Deliverers (Hudson County News Co.),</i> 298 NLRB 564 (1990)	47
<i>NLRB v. Cleveland Stereotypers' Union No. 20,</i> 402 F.2d 270 (6th Cir. 1968).....	27
<i>NLRB v. Denver Building & Construction Trades Council,</i> 341 U.S. 675 (1951).....	34
<i>NLRB v. Equitable Life Ins. Co.,</i> 395 F.2d 750 (6th Cir. 1998)	54
<i>NLRB v. ILA,</i> 447 U.S. 490 (1980).....	47
<i>NLRB v. ILWU,</i> 378 F.2d 33 (9th Cir. 1967)	28
<i>NLRB v. Local 825, Operating Eng'rs,</i> 326 F.2d 213 (3d Cir. 1964)	28
<i>NLRB v. Millwrights Local,</i> 779 F.2d 349 (6th Cir. 1985)	28
<i>NLRB v. Pipefitters Local 638,</i> 429 U.S. 507 (1977).....	47, 48
<i>NLRB v. Plumbers Local No. 741,</i> 704 F.2d 1164 (9th Cir. 1983)	27, 28
<i>NLRB v. Radio & Television Broadcast Eng'rs,</i> 364 U.S. 573 (1961).....	32

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>Nova Plumbing, Inc. v. NLRB</i> , 330 F.3d 531 (D.C. Cir. 2003).....	5
<i>Ohio Valley Coal Co. v. Pleasant Ridge Synfuels</i> , 54 Fed. Appx. 610 (6th Cir. 2002)	47
<i>Operating Engineers Local 150 (R&D Thiel)</i> , 345 NLRB 1137 (2005).....	53, 56
<i>Operating Engineers Local 17 (Arby Construction)</i> , 324 NLRB 454 (1997)	34
<i>Orrand v. Hunt Construction Group, Inc.</i> , 852 F.3d 592 (6th Cir. 2017)	37, 38
<i>Plumbers Local 669 (Lexington Fire Protection Group)</i> , 318 NLRB 347 (1995).....	6
<i>Recon Refractory & Construction Inc. v. NLRB</i> , 424 F.3d 980 (9th Cir. 2005)	42
<i>Seafarers (Recon Refractory & Construction)</i> , 339 NLRB 825 (2003).....	43, 48
<i>Stage Employees IATSE Local 39 (Shepard Exposition Services)</i> , 337 NLRB 721 (2002).....	42, 43, 49
<i>Standard Drywall</i> , 357 NLRB 1921 (2011), <i>enforced</i> , 547 Fed. Appx. 809 (9th Cir. 2013)	53
<i>Stanford Hospitals & Clinics v. NLRB</i> , 325 F.3d 334 (D.C. Cir. 2003)	49

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>SW Reg. Council of Carpenters and Standard Drywall, Inc., and Operative Plasterers and Cement Masons,</i> 348 NLRB 1250 (2006).....	52
<i>Teamsters Local 107 (Safeway Stores),</i> 134 NLRB 1320 (1961).....	43, 48
<i>Teamsters Local 282 (D. Fortunato, Inc.),</i> 197 NLRB 673 (1967).....	47
<i>Teamsters Local 578 (USCP-WESCO),</i> 280 NLRB 818 (1986), <i>enforced,</i> <i>USCP-WESCO v. NLRB</i> , 827 F.2d 581 (9th Cir. 1987).....	43, 48
<i>Teamsters Local 776,</i> 305 NLRB 832 (1991), <i>enforced,</i> 973 F.2d 230 (3d Cir. 1992)	39
<i>Teamsters Local 776,</i> 973 F.2d 230 (3d Cir. 1992)	38
<i>UAW v. Rockwell Int’l Corp.,</i> 619 F.2d 580 (6th Cir. 1980)	37
<i>United Mine Workers (Coal Operators),</i> 179 NLRB 479 (1969).....	47
<i>United Mine Workers (Dixie Mining Co.),</i> 188 NLRB 753 (1971).....	47
<i>United States v. Johnson,</i> 440 F.3d 832 (6th Cir. 2006)	56

TABLE OF AUTHORITIES

Cases -Cont'd	Page(s)
<i>United States v. L.A. Tucker Truck Lines, Inc.</i> , 344 U.S. 33 (1952).....	45
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	27
Statutes:	
Section 8(b)(4)(D) (29 U.S.C. § 158(b)(4)(D))	28, 31, 32, 33, 48, 49, 53, 54, 56
Section 8(b)(4)(i) (29 U.S.C. § 158(b)(4)(i)).....	3, 4, 24, 27, 28, 31, 33, 34
Section 8(b)(4)(i)(D) (29 U.S.C. § 158(b)(4)(i)(D)).....	36
Section 8(b)(4)(ii)(B) (29 U.S.C. § 158(b)(4)(ii)(B)).....	47, 49
Section 8(b)(4)(ii)(D) (29 U.S.C. § 158(b)(4)(ii)(D))	3, 4, 16, 17, 21, 24, 27, 28, 31, 33-35, 37, 38, 40, 41, 47, 51, 53
Section 8(e) (29 U.S.C. § 158(e))	47
Section 8(f) (29 U.S.C. § 158(f))	5
Section 10(a) (29 U.S.C. § 160(a))	3
Section 10(e) (29 U.S.C. § 160(e))	3, 45
Section 10(f) (29 U.S.C. § 160(f))	3
Section 10(k) (29 U.S.C. § 160(k)).....	4, 17, 21-23, 26-33, 36-42, 47, 48, 52-56
Rules:	
Fed. R. App. P. 28(a)(8)(A)	36, 56
Regulations:	
29 C.F.R. § 102.91	33

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JURISDICTIONAL STATEMENT

This case is before the Court on a petition for review of the International Operating Engineers (“Local 18”), and the cross-application for enforcement of the

National Labor Relations Board, of the same Board Decision and Order, which issued on May 6, 2016, and is reported at 363 NLRB No. 184.

(Dec.3,Vol.III,pp.9209-9239.)¹ Donley's Inc. ("Donley's"), Hunt Construction Group, Inc., recently changed to AECOM ("Hunt"), Precision Environmental Co. ("Precision"), B&B Wrecking and Excavating, Inc. ("B&B"), and Cleveland Cement Contractors ("Cleveland Cement") (collectively, "individual employers"); and the multi-employer bargaining association Construction Employers Association ("CEA"), have intervened on the side of the Board.² The petition and the cross-application are timely because the Act imposes no time limitation for such filings.

¹ "Dec.3" refers to the Board's Decision and Order. Record cites also refer to "Dec.1" and "Dec.2." These references are to two earlier Board decisions, incorporated by the Board in this decision. "Dec.1" refers to 360 NLRB No. 20 (2014) (*Donley's I*). "Dec.2" refers to 360 NLRB No. 113 (2014) (*Donley's II*). The Board provided the Court with the record in all three of these cases.

Record cites begin with the case identifier (Dec.1, Dec.2 or Dec.3). They are followed by the Volume Number of that case identifier from the Board's certified list (Vol. _), an abbreviated description of the item (e.g., "Tr."=Transcript; "GX" = General Counsel Exhibit, "L18-X" = Local 18 Exhibit) and a page number (using appellate-record pagination). References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

² Before the Board, Local 18 was the Respondent; the CEA and the individual employers were the Charging Parties; and the Laborers Local 894, associated with Laborers International Union of North America, AFL-CIO; and Laborers' Local 310, associated with Laborers International Union of North America, AFL-CIO (collectively, "the Laborers") were parties-in-interest.

The Board had jurisdiction over this unfair labor practice case pursuant to Section 10(a) of the National Labor Relations Act, as amended (“the Act”) (29 U.S.C. §§ 151, 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction under Section 10(e) and (f) of the Act (29 U.S.C. §§ 160(e) and (f)), because the Order is final and the unfair labor practices took place in Ohio.

ORAL ARGUMENT STATEMENT

The Board believes that this case involves the straightforward application of well-settled law to the facts. However, to the extent the Court believes that oral argument would be helpful or grants Local 18’s s request for oral argument, the Board requests the opportunity to participate.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board reasonably found that Local 18 violated Section 8(b)(4)(i) and (ii)(D) of the Act by:

- threatening to strike and engaging in a strike at Donley’s, and threatening to strike the CEA and other individual employers, with an object of forcing them to assign work to Local 18-represented employees rather than to Laborers-represented employees, and

- filing and pursuing grievances that were inconsistent with the Board's "Section 10(k) determinations" awarding the work in dispute to employees represented by the Laborers.

STATEMENT OF THE CASE

Acting on unfair labor practice charges filed by the CEA and the individual employers, the General Counsel filed a complaint alleging that Local 18 violated Section 8(b)(4)(i) and (ii)(D) of the Act (29 U.S.C. § 158(b)(4)(i) and (ii)(D)) by striking and threatening to strike the CEA and individual employers; and filing and pursuing grievances against the individual employers that were inconsistent with Board Decisions and Determinations under Section 10(k) of the Act (29 U.S.C. § 160(k)). (Dec.3,Vol.III,p.9211;Dec.3,Vol.II,GX1,p.2878-87.)

In November 2014, a Board administrative law judge conducted a hearing on the complaint allegations. On April 9, 2015, he issued a decision and recommended order finding the violations alleged in the General Counsel's complaint. He also recommended that the Board direct Local 18 to withdraw the pending grievances. (Dec.3,Vol.III,p.9212-39.)

On review, the Board adopted the judge's rulings, findings, and conclusions with slight modification, and adopted his recommended order.

(Dec.3,Vol.III,pp.9209-12.) The facts supporting the Board's findings are outlined below, followed by a summary of the Board's Conclusions and Order.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. The Employers, the Relevant Multi-Employer Agreements, and the Conflicting Work-Assignment Provisions

The CEA is a multi-employer construction trade association whose members include Donley's, Hunt, Precision, and Cleveland Cement.

(Dec.3,Vol.III,p.9209,9213-16,9220;Dec.3,Vol.I,Tr.pp.51-54,69,71-72,75-

77,Vol.II,GX19,p. 3172,L18-X53(a),pp.3404,Dec.2,Vol.I,Tr.pp.36-37.) The

CEA's members assign their bargaining rights to the CEA, which then negotiates

and administers collective-bargaining agreements ("agreements") with various

trade unions, including separate agreements with Local 18 and Laborers Union

Local 310. (Dec.3,Vol.III,pp.9215-16; Dec.3, Vol.I,Tr.pp.54,69,GX6,p.2985,

Dec.2,Vol.I,Tr.pp.36-37.)³ B&B is a construction business that is not a member of

the CEA, but has signed agreements to adhere to the terms of the relevant CEA

agreements. (Dec.3,Vol.III,p.9221,9221,n.27,9233;Dec.3,Vol.II,L18-

X61,pp.3415,171(D),p.4276, Dec.2,Vol.II,JX2,pp.1019-88.))⁴

³ Under Section 8(f) of the Act (29 U.S.C. § 158(f)), construction-industry employers can enter into such collective-bargaining agreements even if the Union has not shown that it has support from a majority of the unit employees. *See Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531, 534 (D.C. Cir. 2003).

⁴ Agreements by non-member employees to adopt a multi-employer bargaining association agreement are called "me-too" agreements. (Dec.3,Vol.III,p.9218,n.

The CEA's separate agreements with Laborers Local 310 and Local 18 cover construction work at jobsites in northeastern Ohio, including the city of Cleveland. The CEA's agreements with Laborers Local 310 specify that forklift and skid steer work shall be assigned to its employee-members. (Dec.3,Vol.III,p.9216;Dec.3,Vol.II,GX6,p.2990.)⁵

The CEA-Laborers agreements before the most recent 2012-2015 contract did not use the terms "forklift" and "skid steer" work, but did state that the Laborers would be assigned work "[w]here power is used in the moving, loading, or unloading of concrete forms" and other materials as an adjunct to contract work. (Dec.3,Vol.III,p.9216;Dec.3,Vol.II,L18-X2(d),p.3334(pp. 8-9.) The CEA's agreements with Local 18 specify that forklift and skid steer work shall be assigned to Local 18-represented employees. (Dec.2,Vol.III,p.2183, Dec.3,Vol.III,p.9215; Dec.3,Vol.II,GX5,pp.2936-76, L18-X178(B),pp.4899-5302.)

Since at least 1990, Donley's has also intermittently signed agreements with another multi-employer trade association, the Associated General Contractors ("AGC"). The AGC, like the CEA, negotiates and administers separate

17, citing *Plumbers Local 669 (Lexington Fire Protection Group)*, 318 NLRB 347, 348 (1995).)

⁵ A skid steer is a motorized piece of equipment that either uses four rubber tires or a tracked wheel system. A "bobcat" is one example of a skid steer. (Dec.3,Vol.III,p.9215,Dec.2,Vol.III,p.2179.)

agreements with various trade unions, including Laborers Local 894 and Local 18. The language in the AGC agreements with each union covers building construction work in Akron. The agreements that AGC has with Laborers Local 894 provide a list of covered work classifications that should be assigned to Laborers Local 894, including forklifts and skid steers. (Dec.3,Vol.III,p.9215; Dec.3,Vol.II, GX7,pp.3033-90,Dec.1,Vol.III,p.2725.) The agreements that AGC has with Local 18 state that forklift and skid steer work should be assigned to Local 18. (Dec.3,Vol.III,p.9215;Dec.3,Vol.II,GX8,p.3091-3139,L18-X179,p.5303-57.)

B. For Many Years, the Individual Employers Assign Forklift and Skid Steer Work Almost Exclusively to Laborers-Represented Employees

Since the 1990s, Donley's, Cleveland Cement, and B&B have assigned the operation of forklifts and skid steers to employees represented by Laborers Local 310 or Laborers Local 894, and not to employees represented by Local 18. At times, Donley's has also assigned forklift and skid steer work to employees represented by the Ohio and Vicinity Council of Carpenters ("Carpenters"). (Dec.3,Vol.III,p.9233,9234;Dec.3,Vol.I,Tr.pp.290-91, 308-09,338-39,352-61,366,393,403-04,468-69,472,538-43,676,723-36,1073,1100-02,1116-18,1137-39,1147,2511-20,2545,Dec.2,Vol.I,Tr.pp.37-38,199-202,244-45, 324,390,468-69,532,569,704,708.)

Since Precision started in 1991, it has typically assigned the operation of forklift and skid steers to Laborers Local 310-represented employees. During 2011-2013, Precision assigned most of its work to Laborers Local 310-represented employees, but on occasion assigned two Local 18-represented employees to a forklift and skid steer. (Dec.3,Vol.III,p.9223,9233-34; Dec.3,Vol.I, Tr.pp.404,446-53,602,610-11, 2165-66, 2170;Dec.3,Vol.II,pp.8978-9027.)

As noted above, B&B assigned its forklift and skid steer work to the Laborers. In 2001, B&B's President, Brian Bauman, spoke to Local 18 representative Don Taggart. Bauman and Taggart discussed that Laborers Local 310 "had always operated the skid steers" for B&B, and Taggart indicated that it was a "fight that Local 18 was not willing to engage in at the time." (Dec.3,Vol.III,p.9236;Dec.3,Vol.I,Tr.p.565-67.)

Prior to 2011, Hunt had no jobs with the CEA. Once it joined the CEA, however, it assigned the operation of forklifts and skid steers to Laborers' Local 310-represented employees and not to Local 18-represented employees. (Dec.3,Vol.III,p.9233;Dec.3,Vol.I,Tr.pp.638,642.)

C. Local 18 Requests That Donley's Assign the Operation of Forklifts and Skid Steers to Its Members; Donley's Continues Assigning That Work to Laborers Members on Two Projects; Local 18 Threatens To Abandon Its Operation of Donley's Cranes if Its Members Do Not Operate the Forklifts and Skid Steers

In March 2010, at Local 18's request, Donley's general superintendent and concrete operations manager, Greg Przepiora, and its vice president for concrete operations, Mike Dilley, met with Local 18 representatives David Russell and Steve DeLong. Russell and DeLong requested that Donley's assign the operation of forklifts and skid steers on its projects to employees represented by Local 18. Dilley responded that Donley's had not previously utilized Local 18 members for that work and that there would be a substantial increase in labor costs if the work was assigned to them. Russell said that Local 18 could adjust their rates, and said he would send some proposed rates. Russell eventually did so but Dilley took no action. (Dec.3,Vol.III,p.9216;Dec.3,Vol.I,Tr.pp.273-77,1114-21.)

In May 2011, Donley's began work on the Flats East Bank Development Project ("Flats East") in Cleveland, covered by the relevant CEA agreements. Donley's assigned forklift work for Flats East to employees represented by Laborers Local 310, as was its longstanding practice. (Dec.3,Vol.III,p.9216; Dec.3,Vol.I,Tr.pp.291,296-304,Vol.II,GX52A&B,pp.3184-85.)

In October 2011, Donley's began construction of a new parking garage for Goodyear in Akron, covered by the relevant AGC agreements. On November

2011, Przepiora met with Russell and another Local 18 representative, Joe Lucas, in a pre-job conference for the Goodyear project. They discussed work assignments and whether Donley's had a signed agreement with the AGC. (Dec.3,Vol.III,p.9217;Dec.3,Vol.I,Tr.p.294.)⁶ Russell also asked who would be assigned the forklifts on the project. Przepiora responded, "Carpenters and Laborers [Local 894]." Przepiora indicated that the operation of tower cranes would be assigned to Local 18-represented employees. Lucas then stated, "let's see if these other crafts can run your tower cranes." Przepiora did not agree and Lucas walked out of the meeting. (Dec.3,Vol.III,pp.9216-17; Dec.3,Vol.I,Tr.pp.291-94.)

In December 2011, Donley's began its concrete work at the Goodyear project. Donley's assigned forklift and skid steers to Laborers Local 894 and the Carpenters under the relevant AGC agreement. Donley's also assigned two cranes to be operated by Local 18-represented employees. (Dec.3,Vol.III,p.9216; Dec.3,Vol.I,Tr.pp.308-09.)

⁶ The record showed that Donley's was bound to the AGC agreement. (Dec.3,Vol.III,p.9217, n.16;Dec.3,Vol.II,L18-X173(d),pp.4288.)

D. Local 18 Threatens to Strike and Shut Down Donley's Goodyear Jobsite Over Forklift Assignments; It Strikes and Files Pay-in-Lieu-of-Work Grievances Against Donley's Over the Assignment of Forklifts and Skid Steers

In early February 2012, Przepiora received a call at the Goodyear jobsite that Local 18 representatives were there “causing problems.” (Dec.3,Vol.III,p. 9218;Dec.3,Vol.I,Tr.,p.305.) Przepiora saw Russell and asked him what was going on. Russell stated that “he wanted operators [Local 18 members] on the forklifts right now.” (Dec.3,Vol.III,p. 9218;Dec.3,Vol.I,Tr.p.306.) After Przepiora responded that Donley's had never done that, Russell stated, “You are going to do this, or I am going to shut this motherfucker down.” (Dec.3,Vol.III,p. 9218;Dec.3,Vol.I,Tr.p.306.) Russell also stated, “[w]e're just trying to get back what we gave away a long time ago, you guys have been fucking us for 30 years.” Russell left the job site shortly thereafter. (Dec.3,Vol.III,p.9218,9229-30;Dec.3,Vol.I,Tr.p.306.)

On February 22, Local 18 picketed Donley's jobsite at Goodyear. The two Local 18 members who had been working on the tower cranes stopped work, and the site was shut down. (Dec.3,Vol.III,p.9230; Dec.3,Vol.I, Tr.p.312,410-12,674.)

The next day, Donley's representatives, including its executive vice president Donald Dreier, met with Local 18's general counsel, William Fadel. (Dec.3,Vol.III,p.9230;Dec.3,Vol.I,Tr.p.671-73.) They discussed Local 18's claim, which Donley's disputed, that Donley's did not have a signed agreement with the

AGC. (Dec.3,Vol.III,p.9218;Dec.3,Vol.I,Tr.p.669-71.) They also discussed the dispute between Donley's and Local 18 involving the assignment of forklifts and skid steers. Fadel stated that that work was Local 18's to perform.

(Dec.3,Vol.III,p.9218; Dec.3,Vol.I,Tr.p.671.)

Dreier later signed a one-page "me-too" agreement reflecting that Donley's adopted the AGC agreement with Local 18. (Dec.3,Vol.III,p.9218; Dec.3,Vol.II,GX54,pp.3225.) After Dreier signed it, Fadel indicated that the parties needed to have another pre-job conference. (Dec.3,Vol.III,p.9218; Dec.3,Vol.I,Tr.p.312,320-25.)

On February 23, the strike ended. That same day, Dreier went to the Goodyear jobsite and conducted the requested pre-job conference with Russell and Lucas. He told them again that the forklifts would be assigned to Laborers Local 894 or the Carpenters and the skid steers would be assigned to employees represented by Laborers Local 894. (Dec.3,Vol.III,p.9218;Dec.3,Vol.I,Tr.pp.312-17,320-25,676-77,Vol.II,GX 54,p.3225.)

On February 27, Local 18 filed a grievance against Donley's under Local 18's AGC agreement. The grievance was a "pay-in-lieu" grievance requesting that, instead of assigning the operation of forklifts and skid steers to Local 18-represented employees at the Goodyear project, Donley's pay a penalty for failing to assign it. (Dec.3,Vol.III,p.9218;Dec.3,Vol.I,Tr.pp.326-27,Vol.II,GX

55,p.3326.) That same day, Donley's filed a similar pay-in-lieu grievance against Donley's under the CEA agreement that covered the Flats East project in Cleveland. (Dec.3,Vol.III,p.9218;Dec.3,Vol.I,Tr.pp. 334-35,Vol.II,GX 56,p.3227.)

E. Local 18 Again Threatens to Strike Donley's Over Forklifts and Skid Steers; After Donley's Informs It of Local 18's Strike Threat, Laborers Local 894 Threatens to Strike If Forklift and Skid Steer Work is Switched to Local 18

On April 20, 2012, representatives from Local 18 and Donley's met at the AGC office to discuss the grievance at the Goodyear project in Akron. Local 18 was represented by its president, Richard Dalton, and business representative, Mark Totman. They met with Donley's General Counsel Mary Reid, Senior Vice President of Concrete Operations Michael Dilley, and Przepiora. During the discussions, Totman stated that he was looking forward to coming to Cleveland "to battle" with Terry Joyce [the business manager for Laborers' Local 310] "on this forklift and skid steer issue." (Dec.3,Vol.III,pp.9219,9230;Dec.3,Vol.I,Tr. 331-32, 1131-32.) Totman and Dalton also warned Donley's it "would be sorry" it had sided with the Laborers because it would need Local 18 on May 1 for negotiations over any new CEA agreement to which Donley's was also signatory. The old CEA agreement was scheduled to expire on April 30. (Dec.3,Vol.III,p.9219,9231; Dec.3,Vol.I,Tr.pp.331-32,1131-32.)

After the April 20 meeting, Dilley informed Laborers Local 894 business manager Bill Orr that if the grievance was decided in favor of Local 18, Donley's would have to reassign the Goodyear project work to Local 18-represented employees. On April 23, Orr responded that Laborers Local 894 adamantly opposed any transfer of its work on the project. He stated that Laborers Local 894 would picket and/or strike if necessary to protect its work assignments.

(Dec.1,Vol.III,p.2722-23;Dec.1,Vol.II,LX4,p.2580-81.)

F. During Negotiations for a New CEA Agreement, Local 18 Business Manager Sink Says That the CEA Employers Have Been Assigning Operation of Forklift and Skid Steers to Laborers For "Far Too Long"

In the meantime, starting on April 4, 2012, the CEA and Local 18 were negotiating a new agreement. The CEA's executive vice president Timothy Linville was present along with the CEA's bargaining committee, which included Rob and Victor DiGeronimo from Independence Excavating, and other employer-members of the CEA. Local 18's bargaining committee included business manager Patrick Sink and Dalton. (Dec.3,Vol.III,p.9219;Dec.3,Vol.I,Tr.pp.87-89,1061-62.)

During these April negotiations, Local 18 proposed a provision quadrupling damages for an improper assignment of work. (Dec.3,Vol.III,p.9219; Dec.1,Vol.III,p.2723,Dec.1,Vol.I,Tr.p.244,Dec.2,Vol.I,Tr.pp.53-54.) Local 18's representatives stated that the change was necessary in order to address the

individual employers' longstanding practice of using employees represented by Laborers and other unions to perform forklift work claimed by Local 18. Sink stated that for "far too long" they had seen forklift and skid steer work go to employees not represented by Local 18. Linville rejected the proposed change. (Dec.3,Vol.III,p.9212,9219;Dec.3,Vol.I,Tr.pp. 92-94.)

G. On the Last Day of Negotiations, Local 18 Threatens To Strike the CEA Over the Assignment of Forklifts and Skid Steers; the CEA Eventually Signs Conflicting Agreements with Local 18 and the Laborers

On April 30, 2012, Local 18 maintained its proposal for quadruple damages for breach of work assignment provisions. During the negotiations that day, Sink maintained that the operation of forklifts and skid steers was "their" work and that they wanted to use the penalty clause to make sure that Local 18-represented employees performed that work. Sink also stated that Local 18's executive committee had met and was ready to strike over the jurisdictional issue. Sink also separately told Victor DiGeronimo the same thing. (Dec.3,Vol.III,p.9219; Dec.3,Vol.I,Tr.pp.119-24,1063-72, Dec.1,Vol.I,Tr.p.250,Dec.2,Vol.I, Tr.pp.55-56,184-91.)

Ultimately, on April 30, Local 18 withdrew its proposal regarding quadruple damages as part of its final package and the parties reached a tentative agreement that day. This agreement was ultimately ratified by each party and was effective

from May 1, 2012 through April 30, 2015. (Dec.3,Vol.III,p.9220;
Dec.3,Vol.II,GX5,pp.2936-76.)

During the same timeframe, the CEA negotiated its new 2012-2015 agreement with the Laborers. (Dec.3,Vol.III,p.9211n.4; Dec.2,Vol.I,Tr.p582, Dec.1,Vol.I,Tr.p.404.) As noted above at p.6, the CEA agreements with the Laborers until then did not specify “forklift” and “skid steer” work, but assigned to the Laborers work “[w]here power is used in the moving, loading, or unloading of concrete forms” and other materials as an adjunct to contract work.

Dec.3,Vol.III,p.9216;Dec.3,Vol.II,L18-X2(d),p.3334 (pp. 8-9). During negotiations, the Laborers proposed, and the CEA agreed to, a revised work jurisdiction clause expressly including the operation of forklifts and skid steers.

The parties included this language to clarify that the Laborers used those pieces of equipment to perform those duties, as they had for many years.

(Dec.3,Vol.III,p.9211n.4;Dec.3,Vol.I,Tr.pp.187-88.)

H. Donley’s Files Unfair Labor Practice Charges Against Local 18 and the Laborers; Local 18 Files a Pay-In-Lieu Grievance Against B&B Under the CEA Agreement

In May 2012, Donley’s filed unfair labor practice charges with the Board’s regional office in Cleveland alleging that both Local 18 and the Laborers violated Section 8(b)(4)(ii)(D) of the Act (29 U.S.C. § 158(b)(4)(ii)(D)) by engaging in proscribed activity—by threatening strikes—with an object of forcing Donley’s to

assign work to employees represented by it instead of employees represented by the other union on the Flats East and Goodyear projects. (*Donley's I*, 360 NLRB No. 20 at 1.)⁷ Pursuant to Section 10(k) of the Act (29 U.S.C. § 160(k)), the Regional Office held the charges in abeyance while the Board convened proceedings to determine if the two unions had a bona fide jurisdictional dispute and, if so, to whom to assign the disputed work.⁸ (Dec.1, Vol.II, BdX1(g), Ntce of Hrg., pp.1271-72.)

While the Donley's Section 10(k) proceeding was pending, Local 18 filed pay-in-lieu grievances over other individual employers' assignments of forklift and skid steers at various other projects. In June 2012, B&B was working on the Cleveland Browns Stadium project. B&B used Laborers Local 310-represented employees on four forklifts, and Local 18-represented employees on an excavator and mini-excavator. On June 5, 2012, Local 18 filed a pay-in-lieu grievance against B&B under the CEA agreement for failing to employ Local 18-represented

⁷ Section 8(b)(4)(ii)(D) prohibits unions from using threats, coercion, or restraint with an object of forcing or requiring an employer to assign certain work to employees in one labor organization instead of another.

⁸ Section 10(k) of the Act provides that, “[w]henver it is charged that any person has engaged in an unfair labor practice within the meaning of [Section 8(b)(4)(ii)(D)], the Board is empowered to hear and determine the dispute out of which such unfair labor practice has arisen”

employees on the forklifts. (Dec.3,Vol.III,p.9221;Dec.3,Vol.I,Tr.pp.542-44, Vol.II,GX31,p.3195.)

In late June 2012, B&B President Baumann met with Russell and Taggart about this grievance. Taggart stated that Local 18 was claiming the right to have its employees operate the forklifts used by B&B. Bauman said that B&B had traditionally assigned the operation of the forklifts and skid steers to employees represented by Local 310 in Cleveland and the surrounding areas.

(Dec.3,Vol.III,p.9221;Dec.3,Vol.I,Tr.pp.539-42.) Baumann asked Taggart why the Respondent was now seeking to have the work of operating forklifts and skid steers assigned to employees it represented and Taggart indicated that was how Local 18 intended to proceed at this time. This meeting did not resolve the grievance. (Dec.3,Vol.III,pp.9221-22;Dec.3,Vol.I,Tr.pp. 539-40.)

I. Local 18 Makes More Claims for Forklift and Skid Steer Work and Files More Pay-In-Lieu Grievances Against Individual Employers Under the CEA Agreement

In August 2012, John Simonetti, President of Cleveland Cement, met with Russell and Taggart about a project at the Tri-C campus in Cleveland. Russell requested that Cleveland Cement assign the operation of forklifts and skid steers on the project to Local 18 members. Simonetti responded that he was going to continue to assign the work to Laborers Local 310. (Dec.3,Vol.III,p.9221; Dec.3,Vol.I,Tr.p.722.)

Local 18 then filed more pay-in-lieu grievances:

- On August 12, Local 18 filed a pay-in-lieu grievance against Cleveland Cement over the assignment of forklifts and skid steers at Metro Health Medical Center. (Dec.3,Vol.III,p.13;Dec.3,Vol.I,Tr.pp.723-33,Vol.II,GX32,p.3196.)
- On August 31, Local 18 filed a second pay-in-lieu grievance over the assignment of forklifts and skid steers against B&B, this time at a jobsite in Highland Hills. (Dec.3,Vol.III,p.9222;Dec.3,Vol.II,GX33,p.3197.)
- On September 21, Local 18 filed a pay-in-lieu grievance over the assignment of forklifts and skid steers against Precision for work at a building located on West 25th Street in Cleveland. (Dec.3,Vol.III,p.9223; Dec.3,Vol.II,GX34,p.3198.)
- On September 26, Local 18 filed a pay-in-lieu grievance against Hunt over the assignment of a forklift at Cleveland Hopkins International Airport. (Dec.3,Vol.III,p.9221;Dec.3,Vol.II,GX35,p.3199.)

J. The CEA Notifies Laborers Local 310 That Local 18 Had Launched an Area-Wide Campaign To Claim Forklift and Skid Steer Work; Local 18 Files More Pay-in-Lieu Grievances; Laborers Local 310 Says It Will Strike If the CEA Reassigns Its Work to Local 18

On October 11, 2012, the CEA's executive vice president Linville notified Laborers Local 310 business manager Joyce by letter that Local 18 had launched

an area-wide campaign to claim forklift and skid steer work from the Laborers by filing grievances against B&B, Cleveland Cement, Precision, and Hunt. Linville's letter stated that, as a result, it might become necessary to reassign the forklift and skid steers work to Local 18-represented employees. (Dec.3,Vol.III,p.9210; Dec.2,Vol.III,p.2180,Vol.II,JX4,p.1488.)

Local 18 continued to file more pay-in-lieu grievances:

- On October 12, Local 18 filed a second pay-in-lieu grievance against Cleveland Cement for the assignment of forklift and skid steer work at the Tri-C jobsite. (Dec.3,Vol.III,p.9221;Dec.3,Vol.I,Tr.pp.729-30,Vol.II,GX36,p.3200.)
- On October 16, 2012, Local 18 filed a third pay-in-lieu grievance against Donley's for the assignment of a forklift at Case Western Reserve University. (Dec.3,Vol.III,p.9220;Dec.3,Vol.II,GX37,p.3201.)

Also on October 16, Joyce responded to Linville's October 12 letter by stating that Laborers Local 310 would picket and strike "any and all projects" if the CEA employers were to reassign forklift and skid steer work from them to Local 18. (Dec.2,Vol.III,p. 2180;Dec.2,Vol.II,JX5,p.1489.)

K. The CEA and Individual Employers File Unfair Labor Practice Charges Against Local 18 and the Laborers; Local 18 Continues to File Pay-In-Lieu Grievances Against Individual Employers

On October 18 and 19, 2012, the CEA and the individual employers filed unfair labor practice charges alleging that both Local 18 and Laborers Local 310 violated Section 8(b)(4)(ii)(D) of the Act (29 U.S.C. § 158(b)(4)(ii)(D)) by engaging in proscribed activity—namely, threatening to strike—with an object of forcing the individual employers to assign work to employees represented by them instead of employees represented by the other union. (*Donley's II*, 360 NLRB No. 113 at 1.) Again pursuant to Section 10(k) of the Act (29 U.S.C. § 160(k)), the Regional Office held the charges in abeyance while the Board convened proceedings to determine if the two unions had a bona fide jurisdictional dispute and, if so, to whom to assign the disputed work. (Dec.2, Vol.II, BdX1(jj), Ntce of Hrg., pp.945-52.)

Thereafter, Local 18 continued to file pay-in-lieu grievances over the assignment of forklifts and skid steer under the CEA agreement:

- on November 1, 2012, it filed a second pay-in-lieu grievance against Precision;
- on January 7, 2013, it filed a third pay-in-lieu grievance against B&B;
- on January 14, it filed a fourth pay-in-lieu grievance against Donley's and a third and fourth pay-in-lieu grievance against Precision;

- on April 26, it filed a fifth pay-in-lieu grievance against Donley's; and
- on July 24,, it filed a fourth pay-in-lieu grievance against B&B.

(Dec.3,Vol.III,pp.12,14,15;Dec.3,Vol.II,GX39-44,pp.3203-08.)

L. The Board Issues a Section 10(k) Decision in *Donley's I Awarding Forklift And Skid Steer Work at Flats East and Goodyear to Laborers Members; Local 18 Refuses to Withdraw Its Grievance Over the Goodyear Project and Files Another Pay-In-Lieu Grievance Against Cleveland Cement*

On January 10, 2014, the Board (Chairman Pearce, Members Hirozawa and Johnson) issued a Section 10(k) Decision and Determination of Dispute regarding the forklift and skid steer work at Donley's Flats East and Goodyear projects.

(Dec.1,Vol.III,pp.2721-28.) First, the Board made the required threshold finding that reasonable cause existed to believe that: (1) Local 18 and the Laborers had competing claims to the disputed work; (2) at least one party (and here, both Local 18 and the Laborers) used proscribed means by threatening to strike to enforce their claims to the work; and (3) the parties did not have an agreed-upon method for voluntary adjustment of the dispute. (Dec.1,Vol.III,pp.2721-25.) The Board also rejected Local 18's defenses that it acted lawfully to preserve its own work, and that the employers colluded with the Laborers to manufacture the jurisdictional dispute. The Board then considered the relevant factors and awarded the disputed forklifts at Donley's Flats East project to the employees represented by Laborers Local 310, and the disputed forklift and skid steer work at Donley's Goodyear

project to the employees represented by Laborers Local 894.⁹

(Dec.1,Vol.III,p.2728.) Ignoring the Board's Decision and Determination, Local 18 refused to withdraw its grievance over the forklifts and skid steers at the Goodyear project.¹⁰

On March 7, 2014, Local 18 filed a third pay-in-lieu grievance against Cleveland Cement. (Dec.3,Vol.III,p.9221; Dec.3,Vol.II,GX45,p.3209.)

M. The Board Issues a 10(k) Decision in *Donley's II* Awarding the Individual Employers' Forklift and Skid Steer Work to Laborers; Local 18 Refuses to Withdraw Its Pay-In-Lieu Grievances Over That Work and Files Even More

On May 15, 2014, the Board (Chairman Pearce, Members Miscimarra¹¹ and Johnson) issued a Section 10(k) Decision and Determination regarding the individual employers' forklift and skid steer work under the CEA agreement. (Dec.2,Vol.III,pp. 2178-85.) The Board made the same required threshold findings that it did in *Donley's I*, again rejected Local 18's work preservation and collusion defenses, and again awarded the disputed work to the Laborers. (Dec.2,Vol.III,pp. 2178-85.) The Board additionally found that Local 18 had a proclivity to engage

⁹ The relevant factors are: certification and collective-bargaining agreements; employer preference and past practice; area and industry practice; relative skills; and economy and efficiency of operations. (Dec.1,Vol.III,pp.2725-28.)

¹⁰ Local 18 previously withdrew its grievance over Flats East as untimely filed. (Dec.3,Vol.III,p.9214n.10.)

¹¹ On April 24, 2017, Member Miscimarra was named Chairman.

in widespread, proscribed conduct, and therefore ordered a broad area-wide award, co-extensive with the employer's operations where the two unions' jurisdictions overlap. (Dec.2,Vol.III,p.2185.) Local 18 again refused to withdraw its grievances over the forklifts and skid steers at the individual employers' jobsites. Moreover, Local 18 proceeded to file more pay-in-lieu grievances:

- on July 14, it filed a sixth pay-in-lieu grievance against Donley's;
- on August 12, it filed a seventh pay-in-lieu grievance against Donley's;
- on October 1, it filed a fourth pay-in-lieu grievance against Cleveland Cement.

(Dec.3,Vol.III,pp.2,12,13; Dec.3,Vol.II,GX46,47,60(a)&(b),pp.3210-11,3235-36.)

II. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts, the Board (Chairman Pearce, Members Hirozawa and McFerran), in agreement with the administrative law judge, found that Local 18 violated Section 8(b)(4)(i) and (ii)(D) of the Act by threatening to strike and engaging in a strike at Donley's, and threatening to strike the CEA and other individual employers, with an object of forcing them to assign work to Local 18-represented employees rather than to Laborers-represented employees. In addition, the Board agreed with the judge's findings that Local 18 violated Section 8(b)(4)(ii)(D) of the Act by filing and pursuing grievances that were inconsistent with the Board's Section 10(k) determinations awarding the work in dispute to

employees represented by the Laborers. (Dec.3,Vol.III,p.9209,9209n.2,9209-12.)

The Board found that all of Local 18's actions had an unlawful object of improperly coercing Donley's and the other individual employers to assign work to, or pay in-lieu-of work, Local 18-represented employees, despite the Board's contrary award of the work to Laborers-represented employees in *Donley's I and II*. (Dec.3,Vol.III,pp.9209-38.)

In so finding, the Board again rejected Local 18's work preservation and collusion defenses. (Dec.3,Vol.III,pp.9210-12.) In rejecting Local 18's work preservation defense, the Board relied on well-settled precedent and Local 18's own actions and statements to conclude that Local 18 did not make the requisite showing that it was attempting to lawfully preserve its own work. To the contrary, the Board found that Local 18 "could not reasonably dispute" that its objective was, instead, work acquisition, given that the individual employers' forklift and skid steer work had rarely been performed by Local 18 members. (Dec.3,Vol.III, p.9212.) The Board also found that Local 18's assertion that its employees performed some of the disputed work for other employers in the CEA and AGC units did not change the analysis. The Board held that "regardless of what unit was appropriate, and whether Local 18-represented employees in those [other] units have ever performed the disputed forklift and skid steer work, the relevant inquiry under well-settled precedent is whether [Local 18] was attempting to expand its

work jurisdiction to employers whose [Local 18]-represented employees had never performed the disputed work.” (Dec.3,Vol.III,p.9212.)¹²

In rejecting Local 18’s collusion defense, the Board cited well-established precedent that Local 18 could not relitigate that defense after it had already been rejected in the Section 10(k) proceedings. (Dec.3,Vol.III,p.9210.) Nonetheless, the Board went on to consider the evidence presented by Local 18 and determined that, in any event, it “falls well short” of establishing collusion between the employers and the Laborers. (Dec.3,Vol.III,p.9210-11.) Moreover, the Board found, in the alterative, that even if Local 18 had been able to establish such collusion, its own actions—threatening to strike, and engaging in a strike over the disputed work—were sufficient to trigger the Section 10(k) proceedings. (Dec.3,Vol.III,p.9211.)

The Board’s Order affirmatively requires Local 18 to withdraw all of its pending pay-in-lieu grievances against the individual employers. It also requires Local 18 to cease and desist from all of the unfair labor practices found, and in any like or related manner restraining or coercing employees in their rights under the

¹² In rejecting Local 18’s work preservation defense, the judge had also considered work done by Local 18 members in the AGC- and CEA-wide bargaining units. (Dec.3,Vol.III,pp.9231-36.) However, the Board found that it was “unnecessary to rely on [the judge’s] bargaining unit analysis.” (Dec.3,Vol.III,pp.9211-9212.)

Act. Finally, the Board's Order requires Local 18 to physically post and electronically distribute a notice. (Dec.3, Vol.III, p.p.9238-39.)

STANDARD OF REVIEW

The Board's determination that a union violated Section 8(b)(4)(i) and (ii)(D) of the Act is subject to limited review, and must be affirmed if the Board's underlying factual findings are supported by substantial evidence and its legal conclusions are not "unreasonable" or "unprincipled." *Local 30, United Slate, Tile & Composition Roofers v. NLRB* ("Local 30"), 1 F.3d 1419, 1422-23 (3d Cir. 1993); *see also NLRB v. Plumbers Local No. 741*, 704 F.2d 1164, 1166 (9th Cir. 1983) (Board's legal findings under Section 8(b)(4)(ii)(D) must be affirmed unless arbitrary or capricious); *accord NLRB v. Cleveland Stereotypers' Union No. 20*, 402 F.2d 270, 271 (6th Cir. 1968) (reviewing Board decision for "balanced consideration of all factors;" ensuring that it is "neither arbitrary nor capricious;" and "a reasonable decision supported by substantial evidence"). Thus, a reviewing court may not displace the Board's choice between conflicting views, even if it could justifiably have made a different choice de novo. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

Because the Act does not provide for independent judicial review of a Section 10(k) determination, the only stage at which the losing party in that proceeding can challenge the award is in conjunction with judicial review of the

Board's subsequent Section 8(b)(4)(ii)(D) unfair labor practice finding. *NLRB v. ILWU*, 378 F.2d 33, 35-36 (9th Cir. 1967). Judicial review of a Section 10(k) determination is narrowly circumscribed. *NLRB v. Local 825, Operating Eng'rs*, 326 F.2d 213, 218 (3d Cir. 1964). The court must sustain the Section 10(k) determination so long as substantial evidence supports the Board's findings of fact and the Board has not acted arbitrarily or capriciously in making the award. *Plumbers Local 741*, 704 F.2d at 1166; *Int'l Longshoreman's & Warehousemen's Union, Local 14 v. NLRB*, 85 F.3d 646, 651 (D.C. Cir. 1996); accord *NLRB v. Millwrights Local 1102*, 779 F.2d 349, 350 (6th Cir. 1985) (recognizing that courts of appeal give great deference to Board Section 10(k) determinations).

SUMMARY OF ARGUMENT

The Board reasonably found that Local 18 violated Section 8(b)(4)(i) and (ii)(D) of the Act by threatening to strike, striking, and maintaining and pursuing grievances against the CEA and the individual employers in an effort to obtain forklift and skid steer work that the Board had awarded under Section 10(k) of the Act to Laborers-represented employees. Under well-settled law, a union's actions in contravention of such awards have an illegal objective and therefore may be enjoined under the Act.

Local 18 devotes most of its brief to attacking the Section 10(k) proceedings, without contesting the elements of the Board's Section 8(b)(4)(D) findings. Local

18 primarily argues that the dispute was not a jurisdictional one between itself and the Laborers, but rather, a contractual dispute between itself and the employers to preserve work that had been historically performed by Local 18 members. But this assertion—for which Local 18 has the burden of proof—flies in the face of the ample record evidence that Local 18 members had almost never performed the disputed work for the employers at issue. As it has in similar cases, the Board reasonably found that Local 18 was attempting to acquire new work, rather than preserve its previous work. Local 18 has provided neither legal nor factual grounds to disturb this finding.

The Board also reasonably rejected Local 18's unproven assertion that the employers colluded with the Laborers to create sham strike threats to precipitate both Section 10(k) proceedings. The Board relied on well-settled precedent to find that it had already determined that Local 18 failed to prove its collusion defense in the Section 10(k) proceedings, and the issue was not subject to re-litigation here. Moreover, the Board reviewed the evidence in all three proceedings—including the evidence proffered by Local 18 in the unfair-labor-practice proceedings—to conclude that Local 18 had not established this defense. Thus, Local 18 cannot establish that the Board's rule against re-litigation of this threshold issue caused it any prejudice. Finally, Local 18 has waived any challenge to the Board's alternative finding that even setting aside the Laborers' strike threats, the strike

threats by Local 18 itself were sufficient to trigger the Section 10(k) proceedings.

Accordingly, the Board's Order is entitled to enforcement in full.

ARGUMENT

THE BOARD REASONABLY FOUND THAT LOCAL 18 VIOLATED SECTION 8(b)(4)(i) AND (ii)(D) OF THE ACT BY STRIKING, THREATENING TO STRIKE, AND FILING AND MAINTAINING PAY-IN-LIEU GRIEVANCES AGAINST THE EMPLOYERS THAT ARE INCONSISTENT WITH THE BOARD'S SECTION 10(k) DETERMINATIONS AWARDING THE DISPUTED WORK TO THE LABORERS

A. The Statutory Scheme for Resolving Jurisdictional Disputes

Section 8(b)(4)(i) and (ii)(D) of the Act (29 U.S.C. §158(b)(4)(ii)(D)) generally prohibits unions from using threats, coercion, or restraint with an object of forcing or requiring an employer to assign certain work to employees in a particular union rather than to employees in another union. As discussed above at p. 17, where there is reasonable cause to believe that a Section 8(b)(4)(i) or (ii)(D) violation has occurred, the Board is authorized to suspend proceedings on a charge filed under that section, and to resolve, pursuant to Section 10(k) of the Act (29 U.S.C. §160(k)), the underlying dispute between the unions.

Before the Board may make a work award under Section 10(k) and eventually adjudicate charges under Section 8(b)(4)(ii)(D) against a non-compliant union, it must make three threshold findings to determine that the dispute is a jurisdictional one. The Board must find reasonable cause to believe that (1) there are competing claims for the disputed work; (2) a party used proscribed means (such as a strike threat) to enforce its claim to the work; and (3) the parties have no

agreed-upon method for the voluntary adjustment of the dispute. *See Elec. Workers Local 3 (Slattery Skanska)*, 342 NLRB 173, 174 (2004) (competing claims and proscribed means); *Carpenters Local 275 (Lymo Construction Co.)*, 334 NLRB 422, 423 (2001) (no agreed-upon method for voluntary adjustment of the dispute).

Taken together, Sections 8(b)(4)(i) and (ii)(D) and 10(k) of the Act establish the statutory scheme for resolving jurisdictional disputes. They protect interstate commerce by relieving employers trapped between the claims of rival unions from costly disruptions of their businesses occasioned by such disputes. *NLRB v. Radio & Television Broad. Eng'rs*, 364 U.S. 573, 574-75, 579-82 (1961); *accord Longshoremen's & Warehousemen's Union v. NLRB*, 884 F.2d 1407, 1413-14 (D.C. Cir. 1989) ("*Longshoremen's*"). Indeed, "Congress intended to make the Section 10(k) proceeding the 'peaceful and binding' final determination of a disputed work assignment." *Local 32, Int'l Longshoremen v. NLRB*, 773 F.2d 1012, 1020-21 (9th Cir. 1985) ("*Local 32*") (quoting *Radio & Television Broad. Eng'rs*, 364 U.S. at 580).

Procedurally, no Section 8(b)(4)(D) violation will be found against a union whose members have been awarded the disputed work (like the Laborers here); the pending charges against that union will be dismissed. *ITT v. Elec. Workers*, 419 U.S. 428, 446 (1975); NLRB Rules and Regulations, Series 8, as amended, Section

102.91 (29 C.F.R. § 102.91). If the Section 10(k) award is adverse to the charged union, and that union complies with the award, the charge is also dismissed. *Id.*

Where a union fails to accede to the award (like Local 18 here), however, a complaint will issue and the unfair labor practice proceeding under Section 8(b)(4)(D) that has been held in abeyance then continues.

In the instant case, Local 18 does not challenge the elements and supporting evidence of the Board's Section 8(b)(4)(D) findings regarding its threats to strike, actual strike, and numerous grievances maintained contrary to the Section 10(k) award. Instead, it raises two affirmative defenses asserting that the dispute was not a jurisdictional one that should have been subject to Section 10(k) proceedings in the first place. Following a discussion of the Board's Section 8(b)(4)(D) findings (Sections B & C, below), we address Local 18's failure to establish its defenses (Section D, below).

B. Local 18 Violated Section 8(b)(4)(i) and (ii)(D) of the Act By Engaging In a Strike at Donley's Goodyear Jobsite and Threatening to Strike Donley's, the CEA, and the Other Individual Employers With an Object of Forcing Them To Reassign the Disputed Work To Local 18

As shown below, substantial evidence supports the Board's findings that Local 18 violated the Act by threatening to strike, and striking, over the assignment of the disputed work to the Laborers-represented employees instead of to its own

members. (Dec.3,Vol.III,p.9209n.2,9229-30,9231.) Local 18 has not challenged the elements of these violations.

Section 8(b)(4)(i) and (ii)(D) of the Act (29 U.S.C. § 158(b)(4)(i) and (ii)(D)) makes it an unfair labor practice for a union “(i) to engage in, or to induce or encourage . . . , a strike or a refusal . . .to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce . . . where . . . an object thereof is:

- (D) forcing or requiring an employer to assign particular work to employees in a particular labor organization . . . rather than to employees in another labor organization . . .unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing the work.”

29 U.S.C. § 158(b)(4)(i) and (ii)(D). A union violates Section 8(b)(4) if it threatens or coerces with an unlawful object; the unlawful object need not be the union’s sole object. *NLRB v. Denver Building & Constr. Trades Council*, 341 U.S. 675, 689 (1951); *accord Operating Eng’s Local 17 (Arby Construction)*, 324 NLRB 454 n. 2 (1997).

Substantial evidence supports the Board’s findings that Local 18 repeatedly threatened to strike to force the reassignment of the forklift and skid steer work to its members. Russell threatened to strike Donley’s in February 2012 by stating that “he wanted operators on the forklifts right now” at Donley’s, and would “shut the jobsite down” if Donley’s did not acquiesce. (Dec.3,Vol.III,p.9230.) See

above, p. 11. The Board observed that these statements came on the heels of Lucas' December 2011 statement "let's see if these other crafts can run your tower cranes," which signaled that Local 18 members would stop crane work if the Laborers were assigned the forklifts. (Dec.3,Vol.III,p.9230.) See above, p. 10. Accordingly, the Board reasonably determined that "when considered in the context of the background evidence, Russell's February 2012 statements constituted a threat to picket or strike in order to require Donley's to assign the operation of forklifts to employees represented by [Local 18] rather than to employees represented by [the Laborers] or the Carpenters in violation of Section 8(b)(4)(ii)(D)." (Dec.3,Vol.III,p.9230.)

The Board also reasonably found—and Local 18 does not contest—that Totman's April 20, 2012 statement that he was looking forward to coming to Cleveland "to battle" with the Laborers over the forklift and skid steer issue, and Dalton's statement that same day that Donley's "would be sorry" the day after the CEA agreement expired for siding with the Laborers, constituted implied threats to strike Donley's over the disputed work. (Dec.3,Vol.III,p.9231.) See above, p. 13. Moreover, on April 30, 2012, Sink made direct strike threats against the CEA and individual employers, telling the negotiating committee and DiGeronimo, that Local 18 was "ready to strike" over the disputed work. (Dec.3,Vol.III,p.9231.)

See above, p.15. Accordingly, the Board reasonably found that Local 18 violated Sections 8(b)(4)(ii)(D) by these actions.

Moreover, given Local 18's repeated threats to strike over the disputed work, the Board also reasonably found that at least one object of Local 18's actual picketing and strike at the Goodyear site on February 22 and 23 was to require Donley's to assign that work to Local 18 members. (Dec.3,Vol.III, p.9230.) See above, p. 11.¹³ The strike thus violated Section 8(b)(4)(i)(D), which precludes such actions. 29 U.S.C. §158(b)(4)(i)(D).

C. Local 18 Violated Section 8(b)(4)(ii)(D) By Maintaining and Filing Pay-In-Lieu Grievances Against the Individual Employers in Contravention of the Board's Section 10(k) Determinations Awarding the Disputed Work to the Laborers

It is also uncontested that Local 18 has maintained and continued to file numerous pay-in-lieu grievances against the individual employers seeking payment for forklift and skid steer work after the Board awarded that work to the Laborers

¹³ In its Statement of Facts (Br. 24), Local 18 asserts that it struck for a recognitional objective to get Donley's to sign an agreement with AGC. It, however, wholly ignores the ample evidence that another object was to have Donley's reassign the disputed work to Local 18. In addition to the evidence set forth above, the Board specifically noted that the parties discussed the assignment of the forklift work at the February 23, 2012 meeting to resolve the strike. (Dec.3,Vol.III,p.9230.) See above, p. 12. In any event, Local 18 did not sufficiently raise a claim challenging this finding in the Argument section of its brief and has thus waived any such claim. *See* Fed. R. App. P. 28(a)(8)(A) (argument in brief before court must contain party's contention with citations to authority and record).

in two Section 10(k) determinations. The Board reasonably applied well-settled law to conclude that Local 18's actions in this regard violate Section 8(b)(4)(ii)(D) of the Act.

While parties may initially use other forums, such as arbitration or the courts, to resolve a work dispute, the Board's Section 10(k) determination of that dispute takes precedence over, and precludes enforcement of, any contrary decision. *See Carey v. Westinghouse*, 375 U.S. 261, 272 (1964) (Board's ruling takes precedence over contrary arbitration award). Hence, a lawsuit attacking a Section 10(k) decision "is barred by the supremacy doctrine." *Local 32*, 773 F.2d at 1016-18, 1021; *accord UAW v. Rockwell Int'l Corp.*, 619 F.2d 580, 583 (6th Cir. 1980) (holding that "[o]nce the [Board] decides a work assignment dispute, its determination takes precedence over a contrary arbitrator's award [of the work]"). Indeed, the Court recently barred an ERISA claim for recovery of contractual damages under a collective-bargaining agreement because it conflicted with the Board's Section 10(k) determination in *Donley's II*. *See Orrand v. Hunt Construction Group, Inc.*, 852 F.3d 592, 595 (6th Cir. 2017) (recognizing that "[e]very court to consider conflicts between § 10(k) determinations and other labor

laws has held that jurisdictional awards prevail, and may preclude inconsistent claims”).¹⁴

It is equally well-settled that a grievance or other action to obtain monetary damages in lieu of the work assigned to another union, has an illegal objective and violates Section 8(b)(4)(ii)(D) of the Act. *Local 30*, 1 F.3d at 1426-29; *Longshoremen’s*, 884 F.2d at 1414; *Local 32*, 773 F.2d at 1020 (9th Cir. 1985). Indeed, the Court in *Orrand* stated that it agrees with the Third Circuit’s view that “[t]he opportunity sought to perform labor is significant only as a means of obtaining compensation,’ and any difference between performing the work and being paid for the work is thus “ephemeral.”” *Orrand*, 852 F.3d at 596, citing *Local 30*, 1 F.3d at 1427.¹⁵

Moreover, the Supreme Court recognizes that a lawsuit having an objective that is illegal under federal law may be enjoined without violating the First Amendment or infringing on state law. *Bill Johnson’s Restaurants, Inc. v. NLRB*,

¹⁴ Thus, Local 18’s arguments regarding national labor policy encouraging arbitration (Br. 38-43) are irrelevant in this context. As shown above, the Supreme Court has decided that in the context of disputes between two unions, such as this one, national labor policy is best served by Board resolution pursuant to Section 10(k), which trumps arbitration proceedings.

¹⁵ Local 18’s weak attempt (Br. 42) to draw a distinction between a claim for the work and a claim for compensation is thus unavailing.

461 U.S. 731, 738 n.5, 743 (1983).¹⁶ “Thus, where the Board has previously ruled on a given matter, and where the lawsuit is aimed at achieving a result that is incompatible with the Board’s ruling, the lawsuit falls within the ‘illegal objective’ exception to *Bill Johnson’s*.” *Teamsters Local 776*, 305 NLRB 832, 835 (1991), *enforced*, 973 F.2d 230 (3d Cir. 1992); *accord Local 30*, 1 F.3d at 1426-29.

Accordingly, a plaintiff pursuing a claim “for an illegal objective . . . simply [can]not obtain the relief it [seeks] regardless of the evidence it produce[s]” and “regardless of . . . motivation.” *Teamsters Local 776*, 973 F.2d at 236. Whatever a union’s motive in pursuing legal action, and “no matter how persuasive” its case, it “cannot force an employer” to ignore a Section 10(k) award. *Iron Workers Local 433 (Otis Elevator)*, 309 NLRB 273, 274, 283-85 (1992), *enforced mem.*, 46 F.3d 1143 (9th Cir. 1995); *see also Can-Am Plumbing, Inc. v. NLRB*, 321 F.3d 145, 151 (D.C. Cir. 2003).

¹⁶ In what is now commonly referred to simply as “footnote 5,” the Court in *Bill Johnson’s* set forth an exception to its holding restricting the Board from enjoining certain kinds of lawsuits:

We are not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption, or a suit that has an objective that is illegal under federal law. Petitioner concedes that the Board may enjoin these latter types of suits Nor could it be successfully argued otherwise, for we have upheld Board orders enjoining unions from prosecuting court suits for enforcement of fines that could not be imposed under the Act

461 U.S. at 738 n.5 (citation omitted).

Applying these principles, the Board reasonably concluded that Local 18's conduct in maintaining the Goodyear pay-in-lieu grievance after the Board issued *Donley's I*, maintaining numerous pay-in-lieu grievances against the individual employers after the Board issued *Donley's II*; and filing new pay-in-lieu grievances thereafter, violated Section 8(b)(4)(ii)(D) of the Act. As the Board explained, all of the pending pay-in-lieu grievances "seek to coerce the [individual] employers into paying damages for the work awarded to Laborers-represented employees in *Donley's I* and *Donley's II* and thus act to undercut the Board's Section 10(k) determinations, as the [individual] employers assigned the work consistent with the Board's awards." (Dec.3,Vol.III,p.9232.)

D. The Board Reasonably Found That Local 18 Failed To Prove Its Work Preservation and Collusion Defenses

As noted, Local 18 does not challenge the elements or supporting evidence of the above violations. Instead, it devotes the entire Argument section of its brief (Br. 38-64) to making two assertions that the dispute is not a jurisdictional one subject to Sections 10(k) and 8(b)(4)(ii)(D) of the Act. First, Local 18 asserts that it has a valid "work preservation" claim to the forklift and skid steer work. Second, Local 18 asserts that the CEA, the employers, and the Laborers colluded to create a sham jurisdictional dispute. As shown below, Local 18 has failed to meet its burden of establishing both defenses.

1. Local 18 did not prove its work preservation defense

The evidence is overwhelming and largely undisputed that for many years, Local 18-represented employees performed almost no forklift or skid steer work for the individual employers, who mainly assigned that work to Laborers members. Then, beginning in 2012, Local 18 conducted an area-wide campaign to force the individual employers to re-assign the disputed work to it. As discussed below, the Board applied its well-settled test in the context of Section 10(k) and 8(b)(4)(ii)(D) proceedings to reasonably reject Local 18's assertion that it was merely trying to preserve its own work rather than expand its work jurisdiction. Local 18 has also failed to demonstrate that the Board was required to find that work assigned to it by other employers in the multi-employer bargaining association required awarding it the work with the individual employers here. Local 18's argument rests on a theory, developed and applied in analyzing different sections of the Act, that the disputed work was "fairly claimable." It offers no Board precedent or persuasive reason to support application of that test instead of the established analysis of Sections 10(k) and 8(b)(4)(ii)(D) applied by the Board here. Indeed, Local 18's defense—that it may claim the forklift and skid steer work of the individual employers here simply because it did that work for *other* association employers—only reinforces the Board's conclusion that Local 18 was engaging in work acquisition or expansion not work preservation.

The principles applicable to a work preservation defense are well established. Essentially, the union asserting this defense in the Sections 10(k) and 8(b)(4)(D) context must show it is attempting to preserve, versus acquire or expand, its work such that no true jurisdictional dispute exists to warrant a Section 10(k) proceeding. A work preservation defense can be raised even if the three threshold findings for a Section 10(k) determination—see pp. 31-32 above—have technically been met. The Board may quash Section 10(k) proceedings if a union is able to demonstrate that its members had previously performed the work in dispute and “the union was not attempting to expand its work jurisdiction.” *Recon Refractory & Constr. Inc. v. NLRB*, 424 F.3d 980, 988-89 (9th Cir. 2005); *see also Laborers Local 265 (Henkels & McCoy)*, 360 NLRB 819, 822-23 (2014); *Stage Employees IATSE Local 39 (Shepard Exposition Servs.)*, 337 NLRB 721, 723 (2002). As the Board noted here, it has consistently held that an important factor in determining whether a union seeks to preserve, rather than expand, its work jurisdiction is whether the union’s members have ever exclusively performed the work in question. (Dec.3, Vol.III, p.9212n.5, 9234 (citing *Carpenters (Prate Installations, Inc.)*, 341 NLRB 543 (2004)). The Board explained that if a union claims all of the disputed work, including work that was previously performed by another

union, its objective is not work preservation, but work acquisition.

(Dec.3,Vol.III,p.9212n.5.) *Accord Henkels & McCoy*, 360 NLRB at 823.

On the other hand, where an objecting union can show that an employer has unilaterally transferred work that has been historically performed by employees that the objecting union had represented, the Board has recognized that the actions taken by such a union “presented a true work preservation argument that was not appropriate for resolution under Sections 10(k) and 8(b)(4)(D).” (D&O 28-29, citing *Teamsters Local 107 (Safeway Stores)*, 134 NLRB 1320, 1321 (1961); *Teamsters Local 578 (USCP-WESCO)*, 280 NLRB 818, 821 (1986), *enforced*, *USCP-WESCO v. NLRB*, 827 F.2d 581 (9th Cir. 1987); *Seafarers (Recon Refractory & Construction)*, 339 NLRB 825, 827 (2003); and *Machinists District 190, Local 1414 (SSA Terminal, LLC)*, 344 NLRB 1018,1020-21 (2005).) The objecting union has the burden of establishing a work preservation defense. *Henkels & McCoy*, 360 NLRB at 822. Moreover, it is insufficient for a union to demonstrate that it has performed the disputed work on merely isolated occasions. *See Shepard Exposition Services*, 337 NLRB at 723 (isolated work assignments insufficient to establish a work preservation defense).

a. Local 18 did not historically perform forklift and skid steer work for the individual employers

Using the above guidelines, the Board was eminently reasonable in rejecting Local 18's work preservation defense and finding instead that Local 18 "cannot reasonably dispute" that it was "attempting to expand its work jurisdiction to employers whose [Local 18]-represented employees had never performed the disputed work." (Dec.3,Vol.III,p.9212.) The record amply supports this finding. As the Board recognized, the employers' forklift and skid steer work had rarely been performed by Local 18 members. (Dec.3,Vol.III,p.9212.) None of the individual employers—with the limited exception of Precision on isolated occasions—had used Local 18 members on forklifts or skid steers for many years. *See* above at pp. 7-8 . Accordingly, the Board reasonably found that when Local 18 began its campaign seeking all of the work in dispute from the individual employers, it was seeking to acquire work, not to preserve its own. *See Henkels & McCoy*, 360 NLRB at 823 (finding no valid work preservation claim where union sought all of the work in dispute, which included work it had not previously performed).¹⁷

¹⁷ Local 18 asserts (Br. 22, 56) that, in a few circumstances, B&B also assigned Local 18-represented employees to perform the disputed work. It, however, abandoned that claim before the Board. In *Donley's II*, the Board found that there was no evidence that Local 18 members were assigned to operate B&B's disputed equipment. (Dec.2,Vol.III,p.2182.) Local 18 filed a motion for reconsideration

Indeed, as the Board found, Local 18's representatives themselves "openly acknowledged" that its objective was to acquire work it did not perform in the past. (Dec.3,Vol.III,p.9212.) Examples of this abound:

- In 2001, B&B's President Bauman and Local 18 representative Don Taggart discussed that Laborers Local 310 had always operated the skid steers for B&B;
- In February 2012, when threatening to strike Donley's Goodyear project, Local 18 representative Russell stated, "[w]e're just trying to get back what we gave away a long time ago, you guys have been fucking us for 30 years;"

challenging that finding, which the Board substantively rejected. (Dec.2,Vol.III,Bd.OrderDenying MfR,pp.2196-98.) Then, in the instant case, the administrative law judge made a similar factual finding that B&B had not assigned such work to Local 18 members. (Dec.3,Vol.III,p.9234.) But Local 18 did not except to the judge's factual finding before the Board in the instant case. Having dropped that argument before the Board, it is questionable whether it is properly before the Court. *See* Section 10(e) of the Act (29 U.S.C. § 160(e)) ("No objection that has not been urged before the Board . . . shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) ("[s]imple fairness . . . requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice"). In any event, Local 18 cites to only isolated instances of its employees allegedly performing the disputed work, which are insufficient to establish a work preservation defense and, as Local 18 admits in its brief (Br.22), "not dispositive."

- In April 2012, Local 18 representative Sink stated to the CEA negotiators that for “far too long” the employers had been assigning their forklift and skid steer to employees other than those whom Local 18 represented and that it was prepared to strike if such assignments continued.

(D&O 4, 28). See above at pp., 8, 11, 15.

Moreover, the Board recognized this was not a case where the employers had unilaterally reassigned the operation of forklifts and skid steers that had been historically operated by Local 18 members to other unions.

(Dec.3,Vol.III,p.9237.) To the contrary, the employers here had been following the practice for years of rarely, if ever, assigning the work in dispute to Local 18. The instant case thus stands in stark contrast to the cases, cited above at p.43, in which the Board has found a valid work preservation claim due to the unilateral actions of an employer re-assigning work to spark the dispute. Accordingly, the Board reasonably found that Local 18 failed to establish this defense. (Dec.3,Vol.III,p.9212.)

b. Local 18’s legal and factual claims lack support

In the face of the overwhelming evidence, Local 18 claims (Br. 46-49) that the Board should have gone beyond assessing the work performed for the charging party employers, and considered work that *other* employers within the

multi-employer associations had assigned to Local 18's members. Local 18 further asserts that, in that context, it need only show that forklift and skid steer work is "fairly claimable," meaning that it "is identical or very similar to [work] already performed by the bargaining unit and that bargaining unit members have the necessary skill and are otherwise able to perform." (Br. 47-48, 54-56). As shown below, the Board's failure to adopt this novel analysis is not reversible error.

For starters, Local 18 does not point to any Board precedent applying a "fairly claimable" analysis to Section 8(b)(4)(ii)(D) and 10(k) cases. All of the Board cases that Local 18 cites (Br. 45-47)¹⁸ involve work preservation defenses arising under different sections of the Act—namely, Sections 8(b)(4)(ii)(B) and 8(e) of the Act (29 U.S.C. § 158(b)(4)(ii)(B) and 158(e)).¹⁹ Those sections preclude secondary boycotts (union actions that are not directed

¹⁸ *NLRB v. Pipefitters Local 638*, 429 U.S. 507, 510-11 (1977) (8(b)(4)(B)); *NLRB v. ILA*, 447 U.S. 490, 493 (1980) (8(b)(4)(B)&(e)); *Newspaper & Mail Deliverers (Hudson County News Co.)*, 298 NLRB 564, 568 (1990) (8(e)); *Teamsters Local 282 (D. Fortunato, Inc.)*, 197 NLRB 673, 677 (1967) (8(b)(4)(B)&(e)); *United Mine Workers (Dixie Mining Co.)*, 188 NLRB 753, 753 (1971)(8(e)); *United Mine Workers (Coal Operators)*, 179 NLRB 479, 483-84 (1969)(same).

¹⁹ Local 18's citations (Br. 46, 48, 56) to two arbitration decisions are inapposite because they do not involve court review of Board Orders, and, in any event, only involve 8(b)(4)(ii)(B) and 8(e) of the Act rather than 8(b)(4)(ii)(D). *See Am. Pres. Lines, Ltd. v. ILWU Local 60*, 611 Fed. Appx. 908 (9th Cir. 2015); *Ohio Valley Coal Co. v. Pleasant Ridge Synfuels*, 54 Fed. Appx. 610 (6th Cir. 2002).

at the primary employer with whom it has a dispute) and enforcement of “hot cargo” clauses (contract clauses that require an employer to cease doing business with another person) not at issue here. *See e.g., Pipefitters Local 638*, 429 U.S. at 516-17 (1977) (discussing Section Sections 8(b)(4)(ii)(B) and 8(e) of the Act). In those contexts, the “fairly claimable” test, and its consideration of the scope of a multi-employer bargaining unit, is relevant to a union’s defense that it is acting with the objective to preserve its own bargaining unit work vis-a-vis a primary employer. However, it does not address claims of competing jurisdictions of two unions, the type of dispute here. While the fairly claimable test may be less demanding for Local 18 to meet here because it would not need to show that it had historically performed the work for the individual employers, it has offered no principled reason to supplant the Board’s established analysis used in Section 10(k) and 8(b)(4)(D) cases.

In the 8(b)(4)(ii)(D) context, under which the instant case arises, it is a given that the primary employer has two competing contractual obligations with different unions. Therefore, the Board is appropriately concerned with whether the origin of the dispute is between a union and the employer over work previously performed by that union for that employer—work preservation as in *Safeway Stores* 134 NLRB at 1321; *USCP-WESCO*, 280 NLRB at 821; *Recon Refractory & Constr.*, 339 NLRB at 827; and *SSA*

Terminal, LLC, 344 NLRB at 1020-21, discussed above at p.43, or instead between two unions seeking to expand their work jurisdiction to include work that they have not performed for that employer in the past—work acquisition as in *Henkels & McCoy*, 360 NLRB at 822-23; *Shepard Exposition Servs.*, 337 NLRB at 723; and *Prate Installations, Inc.*, 341 NLRB at 544-45.

Local 18’s assertion (Br. 48) that the “fairly claimable” test is applicable to “all Section 8(b)(4) actions, regardless of whether they involve allegations of Subsection 8(B) or (D),” lacks the support of any Board precedent. It is premised on an administrative law judge’s decision which the Board has not reviewed. *See ILWU (Kinder Morgan)*, 2014 WL 3957246 (Aug. 13, 2014) (pending before the Board). Because the Board has not reviewed that decision, it lacks precedential value. *Stanford Hospitals & Clinics v. NLRB*, 325 F.3d 334, 345 (D.C. Cir. 2003); *Colgate-Palmolive Co.*, 323 NLRB 515, 515 n.1 (1997).²⁰

²⁰ In any event, the judge’s decision in *Kinder Morgan* is off point. Unlike here, where the employers’ assignment to the Laborers-represented employees constituted the status quo of established work, a “massive technological change” changed the nature of the work there and precipitated the events in *Kinder Morgan*. 2014 WL 3957246 at *17. Moreover, that case was not a pure Section 8(b)(4)(D) case; it also involved a Section 8(b)(4)(B) claim. As such, even if the case was precedential, it still did not apply a fairly claimable analysis where, as here, the dispute is between two unions with competing claims to the work.

Local 18 likewise errs in relying (Br.46,47,48,54,56) on purportedly inconsistent advice memoranda issued by the Board's General Counsel. Such memoranda are issued by the General Counsel in its prosecutorial role to advise Regional Offices whether to issue complaints to litigate before the Board. Such memoranda do not constitute Board law or precedent. *Geske & Sons Inc.*, 317 NLRB 28, 56 (1995), *enforced*, 103 F.3d 1366 (7th Cir. 1007); *accord Chelsea Indus., Inc. v. NLRB*, 285 F.3d 1073, 1077 (D.C. Cir. 2002 (rejecting as "rather silly" employer's argument that the Board's decision was unreasonable because it conflicted with a General Counsel advice memorandum).

In any event, even if the Board had considered the work done by Local 18 for other employers in the multi-employer association, Local 18 has failed to show that it performed that work exclusively for all of the other employers in that multi-employer unit. By Local 18's own account, the forklift and skid steer work it did within a multi-employer unit was for employers other than those involved here. At most, it can only claim an inconsistent practice of assignment among the employers within the associations. Yet, it asks the Court to convert that inconsistent practice into one that requires the consistent and exclusive assignment of that work to Local 18 and elimination of assignment to the Laborers. Thus, Local 18 is necessarily seeking to acquire,

not preserve, work within a multi-employer unit. There was accordingly no need for the Board to determine the scope of the multi-employer unit insofar as how each employer was or was not bound to the various agreements, as urged by Local 18 (Br. 53-55.) In this context, the Board reasonably found that, “regardless of what units are appropriate, and whether [Local 18]-represented employees in those units have ever performed the disputed forklift and skid steer work, the relevant inquiry under settled precedent is whether [Local 18] was attempting to expand its work jurisdiction to employers whose [Local 18]-represented employees had never performed the disputed work.” (Dec.3, Vol.III,p.9212.) The record amply supports the Board’s conclusion that Local 18 “cannot reasonably dispute that this was its objective.” (Dec.3,Vol.III,p.9212.)

Finally, Local 18’s observation (Br. 51-52) that typical Section 8(b)(4)(ii)(D) cases, unlike this one, involve only a single employer, does not change the analysis. Simply put, the relevant consideration is whether the union is seeking to add work, regardless of how much work it has done before, or for how many employers. Indeed, as shown, whether the analysis examines the practice of individual employers or across a multi-employer unit, Local 18 seeks to expand its jurisdiction, not preserve the status quo. Accordingly, Local 18 has failed to establish that the Board acted arbitrarily or capriciously

by determining that Local 18 failed to establish its work preservation test under the relevant precedent.

2. Local 18 did not prove its collusion defense and in any event, its own strike threats were sufficient to trigger the Section 10(k) jurisdictional dispute

Local 18's assertion (Br. 56-63) that the CEA and the individual employers "colluded" with the Laborers to create a sham jurisdictional dispute via fake strike threats is without merit. As shown below, Local 18 has no evidence to support its claim.

The party asserting that a strike threat is a product of collusion must come forward with affirmative evidence in order to successfully establish this defense. *See SW Reg. Council of Carpenters*, 348 NLRB 1250, 1254 (2006). It is well-settled that absent direct evidence that a threat is a sham, where a party has used language on its face that threatens economic action, the Board will find reasonable cause to believe the Act has been violated. *See Bricklayers (Cretex Constr. Servs.)*, 343 NLRB 1030, 1032 (2004).

Under these standards, the Board previously rejected Local 18's collusion defense in *Donley's I* and *Donley's II*. (Dec.1, Vol.III, p.2725 n.6, Dec.2, Vol.III, pp.2182-83.) As the Board observed, although Local 18 asserted that the Laborers' threats to strike were a sham designed to trigger a Section 10(k) award in favor of the Laborers, Local 18 "proffered no such supporting evidence"

in *Donley's I* or *Donley's II*. (Dec.3, Vol.III, p.9211 , citing *Operating Eng'rs, Local 150 (R&D Thiel)*, 345 NLRB 1137, 1140 (2005) (finding no evidence of collusion where Teamsters told employer's president that it wanted him "to file a 10(k)" because of claims for disputed work made by Operating Engineers). The Board also relied on its well-established precedent that this defense was a "threshold issue" decided in the Section 10(k) proceedings and was not subject to re-litigation in this subsequent Section 8(b)(4)(ii)(D) proceeding.

(Dec.3, Vol.III, p.9210.) See *Standard Drywall*, 357 NLRB 1921, 1923 n.12 (2011), *enforced*, 547 Fed. Appx. 809 (9th Cir. 2013).

Local 18 acknowledges (Br. 56-57) that *Standard Drywall* stands for the proposition that collusion is a threshold issue not subject to re-litigation, but complains that this principle is unsupported by any rationale. To the contrary, in *Standard Drywall*, 357 NLRB at 1923 n.12, the Board relied on its earlier decision in *Longshoremen ILWU Local 6 (Golden Grain Macaroni Co.)*, 289 NLRB 1,2n.4 (1988), which explained that additional evidence may be presented in a Section 8(b)(4)(D) proceeding when the issue goes to "an element of the 8(b)(4)(D) violation." 289 NLRB at 2n.4. However, it distinguished issues such as the collusion defense here, which are resolved in order make a threshold finding in the Section 10(k) determination. *Id.*

Moreover, Local 18 shows no prejudice to support its due process argument. Local 18 discusses (Br. 56-61) the differences between Section 10(k) and 8(b)(4)(D) proceedings generally, but makes no showing of how it was harmed, or any credibility issues that the Board did not resolve with regard to its collusion defense. Indeed, Local 18 utterly ignores that the Board in the unfair-labor-practice case did not rest on the collusion findings in the Section 10(k) proceedings, but instead re-considered Local 18's evidence in those proceedings as well as the evidence proffered by Local 18 in the unfair labor practice case. (Dec.3, Vol.III, pp.9210-11, 9211n.4.) Accordingly, where it identified no harm from the Board's application of its no-relitigation rule and where the Board considered anew the collusion claim, its due process concerns (Br. 57-61) ring hollow. *See NLRB v. Equitable Life Ins. Co.*, 395 F.2d 750, 750-51 (6th Cir. 1998) (no due process violation without showing of prejudice).

After reviewing the record of all three previous proceedings, the Board reasonably concluded that Local 18 failed to establish that either Donley's or the CEA's discussions with the Laborers constituted collusion. (Dec.3, Vol.III, pp.9210-11, 9211n.4.) Both Donley's and the CEA discussed Local 18's actions seeking work historically performed by Laborers-represented employees. As described above (p. 16), the Laborers' prior agreement covered the work in question and the CEA and Laborers agreed to more explicit language in its 2012-

2015 collective-bargaining agreement to clarify that the Laborers operated the disputed equipment. Mere cooperation between an employer and union during Section 10(k) proceeding does not demonstrate that threat was product of collusion. *Henkels & McCoy*, 360 NLRB at 823.

Specifically, the Board explained why it rejected Local 18's assertions (Br. 61-63) that the CEA, the employers, and Laborers Local 310 engaged in collusion by negotiating for more specific forklift and skid steer language in the work jurisdiction clause of their 2012-2015 agreement. As the Board found, "[c]ontrary to [Local 18], we see nothing nefarious or collusive in the CEA and [Laborers] Local 310 negotiating this revised jurisdictional language." (Dec.3, Vol.III,p.9211n.4.) The Board noted that, at the time of those negotiations, Local 18 had "commenced a campaign in both *Donley's I* and *Donley's II* to have forklift and skid steer work assigned to their represented employees," and that this was work that Russell and Sink admitted had been given away "a long time ago." (Dec.3,Vol.III,p.9218,9229-30;Dec.3,Vol.I,Tr.p.306.) In that context, the Board found that the revised agreement "in response to [Local 18's] attempts to obtain the dispute work was not improper," but instead was to "simply clarify" that the earlier language covered that equipment. (Dec.3,Vol.III,p.9211.) (See above at p. 16.) Local 18 has not demonstrated otherwise.

In any event, Local 18 has failed to challenge the Board's alternative finding that, even if Local 18 had established collusion between the Laborers and the employers, it would not have precluded the 10(k) proceedings below because "[Local 18's] own threats to strike in *Donley's I* and *II*, and its threat to strike in *Donley's I*, were sufficient to establish reasonable cause to believe that Section 8(b)(4)(D) of the Act had been violated." (Dec.3, Vol.III,p.9211; Dec.2, Vol.III,p.2183, Dec.1, Vol.III,p.2725.) *See R&D Thiel*, 345 NLRB at 1139 (one party's strike threat is sufficient to establish threshold issue of whether proscribed means were used to trigger a jurisdictional proceeding). By failing to challenge this finding in its opening brief, Local 18 has waived any such challenge. *See Fed. R. App. P. 28(a)(8)(A)* (argument in brief before the court must contain party's contention with citations to authority and record); *United States v. Johnson*, 440 F.3d 832, 845-46 (6th Cir. 2006) (party abandons all issues not raised and argued in initial brief on appeal). Accordingly, the Board's alternative finding demonstrates that the Board made the requisite threshold finding of proscribed conduct—regardless of the validity of the Laborers' strike threats—before proceeding to determine the merits of the dispute under Section 10(k) of the Act.

CONCLUSION

The Board requests that the Court enter judgment denying the petition for review and enforcing the Board's Order in full.

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National Labor Relations Board

June 2017

ADDENDUM: DESIGNATION OF RELEVANT ADMINISTRATIVE DOCUMENTS

Donley's III - 363 NLRB No. 184 – Dec. 3
International Union of Operating Engineers, Local 18
Board Case Nos. 08-CD-081840, 08-CD-091637, 08-CD-133957,
08-CD-091683, 08-CD-091684, 08-CD-091686, 08-CD-091770, 08-CD-091773
& 08-CD-130178

Volume I - Transcript of Unfair Labor Practice Hearing before ALJ Mark Carissimi - Pages 1-2689

pp. 51-54, 69, 71-72, 75-77, 54, 69, 290-291, 308-309, 338-339, 352-361, 366, 393, 403-404, 468-469, 472, 538-543, 676, 723-736, 1073, 1100-1102, 1116-1118, 1137-1139, 1147, 2511-20, 2545, 404, 446-53, 602, 610-11, 2165-66, 2170 565-567, 638, 642, 273-77, 1114-21, 291, 296-304, 294, 291-94, 308-309, 305, 306, 312, 410-412, 674, 671-73, 669-671, 671, 312, 320-25, 312-317, 320-25, 676-77, 326-27, 334-35, 331-32, 1131-32, 331-32, 1131-32, .87-89, 1061-62, 92-94, 119-24 ,1063-72, 187-88, 542-44, 539-42, 539-40, 722, 723-33, 729-30, 306

Volume II - Exhibits

General Counsel's Exhibits

pp. 2878-2887 - GX1, Complaint and Notice of Hearing
pp. 3172 - GX19– Assignment of Bargaining Rights for William D. Mott, dated 6/17/16
pp. 2990 - GX6 – Building Laborers Agreement 2012-2015 (p. 9)
pp. 2985 - GX6 - Building Laborers Agreement 2012-2015 (p. 4)
pp. 2936-2976 - GX5 – Construction Employers Association Building Agreement 2012-2015
pp. 3033-3090 - GX7–Building Agreement between Laborers' Local 894 and Akron Division Associated General Contractors of America, Inc. 2012-2016
pp. 3091-3139 - GX8 AGC of Ohio Building Agreement between IUOE, Local 18 and Labor Relations Div. of the AGC of Ohio– 2010 – 2013
pp. 3184-85 - GX52 (A&B)– Pictures of a construction site
pp. 3225 - GX54– Donley's Acceptance of Agreement dated 2/23/12
pp.3326 - GX 55 – Grievance Form for Joseph Lucas dated 2/27/12
pp.3227 - GX 56 – Grievance Form for Ken McGlaahan dated 2/27/12

pp.3195 - GX31 – Grievance Form for David N. Russell, Jr. dated 6/5/12
pp.3196 - GX32 - Grievance Form for David N. Russell, Jr. dated 8/21/12
pp.3197 - GX33 - Grievance Form for David N. Russell, Jr. dated 8/31/12
pp.3198 -GX34 - Grievance Form for David N. Russell, Jr. dated 9/21/12
pp.3199- GX35 - Grievance Form for David N. Russell, Jr. dated 9/26/12
pp .3200.-.GX36 - Grievance Form for David N. Russell, Jr. dated 10/12/12
pp.3201 - GX37 - Grievance Form for David N. Russell, Jr. dated 8/31/12
pp.3203-08 - GX39-44 – Grievance Form for David N. Russell, Jr. dated 6/5/12,
1/14/13, 4/26/13 , 7/24/13
pp.3209 - GX45 - Grievance Form for David N. Russell, Jr. dated 3/7/14
pp.3210-11,3235-36 - GX46,47,60(a)&(b) - - Grievance Form for David N.
Russell, Jr. dated 10/1/14, 7./14/14, Fax dated 8/12/14 to Greg??? And Scott
Sherman from David N. Russell Jr., Grievance Form dated 8.12.14

Respondent's Exhibits

pp. 3404 - Local 18X 53(a) – Interim Construction Employers Association
Agreement dated 6/1/12
pp. 3415 - L18 X61– B&B Wrecking & Excavating's Acceptance of Agreement
dated 2/18/10
pp. 4276 - L18 X171(D)– Master Contractor List dated 10/29/14
pp. 3334 - L18 X2(d) – Building Laborers' Agreement 2009-2012 (pp8-9)
pp. 4899-5302 - L18 X178(B)– Construction Employers Association Building
Agreements (Tab B)
pp. 5303-5357 - L18 X179 - AGC of Ohio Building Agreement IUOE, Local 18
and Labor Relations Div. of the AGC of Ohio 2013 - 2017
pp. 8978-9027 –L18 211X - Precision Environmental Co. Time Edit Report
pp. 4288 - L18 X173(d)– Master Contractor List dated 11/14/14

Volume III - Pleadings

pp. 9209-9239 - Decision and Order (pgs. 1-31)

Donley's I - 360 NLRB No. 20 - Dec. 1
Laborers' Local 894
Board Case Nos. 08-CD-081837 & 08-CD-081840

Volume I – Transcript Pages 1-1261
Pages 244, 250, 404

Volume II - Exhibits

pp.2580-81, LX4 - email from Bill Orr to Mike Dilley, dated 4/23/12
pp.1271-72 - BdX1(g), Notice of Hearing

Volume III - Pleadings

pp. 2722-28, Decision and Determination of Dispute (pp. 1-8)

Donley's II - 360 NLRB No. 113 – Dec. 2

International Union of Operating Engineers, Local 18 (Donley's II)
Board Case Nos. 08-CD-091637, 08-CD-091683, 08-CD-091684,
08-CD-091686, 08-CD-091770, 08-CD-091773, 08-CD-091643, 08-CD-091677,
08-CD-091678, 08-CD-091682, 08-CD-091687 & 08-CD-091689

Volume I – Transcript Pages 1-920

pp 36-37, 199-202, 244-45, 324, 390, 468-69, 532, 569, 704, 708, 53-54,
55-56, 184-91, 582

Volume II - Exhibits

pp. 1018, JX1 - Building Laborers' Local Union No. 310 Agreement 2012-2015
pp. 1019 – 1088 - JX2 – Construction Employers Association Building Agreement
2012-2015
pp. 1488, JX4 – Letter dated 10/11/12 to Terence P. Joyce from Tim Linville
pp.1489, JX5 – Letter dated 10/16/12 to Tim Linville from Terence P. Joyce

pp.945-52, BdX1(jj), - Notice of Hearing

Volume III - Pleadings

pp. 2178-85 - Decision and Determination of Dispute dated 5/15/14 (p. 1-8)

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

INTERNATIONAL UNION OF OPERATING)	
ENGINEERS, LOCAL 18)	
)	
Petitioner/Cross-Respondent)	
)	Nos. 16-1800, 16-1969
v.)	
)	Board Case Nos.
NATIONAL LABOR RELATIONS BOARD)	08-CD-081840 et al.
)	
Respondent/Cross-Petitioner)	
)	
and)	
)	
CONSTRUCTION EMPLOYERS)	
ASSOCIATION; DONLEY’S INC.; HUNT)	
CONSTRUCTION, (now AECOM);)	
PRECISION ENVIRONMENTAL COMPANY;)	
CLEVELAND CEMENT CONTRACTORS,)	
INC.; B&B WRECKING & EXCAVATING, INC.))	
)	
Intervenors)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its brief contains 12,062 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010.

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Dated at Washington, DC
this 5th day of June, 2017

**UNITED STATES COURT OF APPEALS
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ASSOCIATION; DONLEY'S INC.; HUNT)
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PRECISION ENVIRONMENTAL COMPANY;)
CLEVELAND CEMENT CONTRACTORS,)
INC.; B&B WRECKING & EXCAVATING, INC.)
)
Intervenors)

CERTIFICATE OF SERVICE

I hereby certify that on June 5, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I further certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by

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