Final Brief Oral Argument Not Yet Scheduled

Nos. 17-1122, 17-1131

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18
Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD
Respondent/Cross-Petitioner

and

21ST CENTURY CONCRETE CONSTRUCTION, INC.;
INDEPENDENCE EXCAVATING, INC.;
KMU TRUCKING AND EXCAVATING, INC.;
NERONE & SONS, INC.;
PLATFORM CEMENT, INC.;
RG SMITH COMPANY, INC.;
SCHIRMER CONSTRUCTION CO.
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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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner/Cross-Respondent	)	
v.	)	Nos. 17-1122, 17-1131
NATIONAL LABOR RELATIONS BOARD	)	
Respondent/Cross-Petitioner	)	

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), counsel for the National Labor Relations Board ("the Board") certify the following:

A. Parties

International Union of Operating Engineers Local 18 ("Local 18") was the respondent before the Board and is the petitioner/cross-respondent before the Court. The Board is the respondent/cross-petitioner before the Court. 21st Century Concrete Construction, Inc., Independence Excavating, Inc., KMU Trucking and Excavating, Inc., Nerone and Sons, Inc., Platform Cement, Inc., RG Smith Company, Inc., and Schirmer Construction Co. were the charging parties before

the Board and are the Intervenors in the instant case. The Board's General Counsel was also a party before the Board. The Laborers Local 310, associated with Laborers International Union of North America, AFL-CIO, was a party-in-interest before the Board. There are no amici.

B. Rulings Under Review

This case is before the Court on Local 18's petition for review and the Board's cross-application for enforcement of a Decision and Order issued by the Board (Acting Chairman Miscimarra and Members Pearce and McFerran) in *International Union of Operating Engineers Local 18 and Nerone & Sons, Inc., International Union of Operating Engineers Local 18 and RG Smith Company, Inc., and International Union of Operating Engineers Local 18 and KMU Trucking & Excavating, Inc., Schirmer Construction Co., Platform Cement, Inc., 21st Century Concrete Construction, Inc., and Independence Excavating, Inc*, Case Nos. 08-CD-135243, 08-CD-143412, and 08-CD-147696 issued on January 25, 2017, and reported at 365 NLRB No. 18.

C. Related Cases

A related case, *Int'l Union of Operating Engineers, Local 18 v. NLRB*, Sixth Cir. Nos. 16-1800 & 16-1969 (oral argument held October 12, 2017), which was pending on petition for review and cross-application for enforcement in the U.S. Court of Appeals for the Sixth Circuit when Board filed its Certificate of Related

Cases with the proof brief in this case, has since been decided by the Sixth Circuit Court of Appeals and is reported at *International Union of Operating Engineers, Local 18 v. NLRB*, __ Fed. App'x __ , 2017 WL 4900460.

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

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GLOSSARY

"The Act"	The National Labor Relations Act
"Board"	The National Labor Relations Board
"CEA"	Construction Employers Association
"D&O"	Board Decision and Order
"D&D"	Board Decision & Determination
"JA"	Joint Appendix
"Local 18"	International Union of Operating Engineers Local 18
"SA"	Supplemental Appendix

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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

JURISDICTIONAL STATEMENT

This case is before the Court on a petition for review of the International Union of Operating Engineers, Local 18 ("Local 18"), and the cross-application for enforcement of the National Labor Relations Board, of the same Board Decision and Order, which issued on January 25, 2017, and is reported at 365 NLRB No. 18. (JA6581.)[1] 21st Century Concrete Construction, Inc., Independence Excavating, Inc., KMU Trucking and Excavating, Inc., Nerone & Sons, Inc., Platform Cement, Inc., RG Smith and Company, Inc., and Schirmer Construction Company (collectively, "the Charging Party employers"), have intervened on the side of the Board.[2] The petition and the cross-application are timely because the National Labor Relations Act, as amended ("the Act") (29 U.S.C. § 151) imposes no time limitation for such filings.

The Board had jurisdiction over this unfair-labor-practice case pursuant to Section 10(a) of the Act (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. This Court has jurisdiction

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[1] In this final brief, "JA" refers to the Joint Appendix. "SA" refers to the Supplemental Appendix the Board is filing with this final brief. "Br." refers to Local 18's opening brief. 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 Charging Party employers were the Charging Parties; and the Laborers Local 310, associated with Laborers International Union of North America, AFL-CIO, was a Party-in-Interest.

because the Board's Order is final and Sections 10(e) and (f) of the Act (29 U.S.C. §§ 160(e) and (f)) provide that petitions for review and cross-applications for enforcement may be filed in this Court.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board reasonably found that Local 18 violated Section 8(b)(4)(ii)(D) of the Act (29 U.S.C. § 158(b)(4)(ii)(D)) by maintaining and filing grievances against the Charging Party employers that are inconsistent with Board Section 10(k) determinations awarding the work in dispute to employees represented by the Laborers.

RELEVANT STATUTES AND REGULATIONS

The relevant statutory provisions are contained in an addendum to this brief.

STATEMENT OF THE CASE

I. OVERVIEW

This case involves a dispute between Local 18 and the Laborers over which union's members would operate forklifts and skid steers for particular employers in northeastern Ohio. Local 18's efforts to take over that work have prompted extensive litigation; it has been unsuccessful in each case. The Board has awarded that work to the Laborers four separate times, in proceedings pursuant to Section 10(k) of the Act, which governs disputes between unions over work jurisdiction.[3] Local 18 has flouted all of those determinations, continually threatening to strike in order to coerce employers to reassign the work to its members instead of to the Laborers, and filing numerous grievances seeking damages from the employers for assigning work to the Laborers instead of to Local 18.

Its coercive acts against a first group of employers was found unlawful in *Donley's IV*, 363 NLRB No. 184 (2016) (pending petition for review and application for enforcement in Sixth Cir. Case Nos. 16-1800 & 16-1969, oral

[3] Section 10(k) of the Act provides that, "[w]henever 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 . . . ."

argument held 10/12/17).[4] Its continued coercive acts against additional employers are now at issue before this Court. The facts in the instant case are largely undisputed. The primary contested issues are Local 18's repeatedly-rejected affirmative defenses: that it was seeking to preserve its own work rather than acquire the Laborers' work, and that the Laborers and employers colluded to create sham Section 10(k) proceedings resulting in the awards to the Laborers.

The following chart summarizes the Board's prior relevant decisions:

Decision	**Employers Involved**	**Case Type (10(k) or unfair-labor-practice decision)**	**10(k) Award or Violations Found**	**Local 18 Defenses and Bases for Rejection**
Donley's I, 360 NLRB No. 20 (2014)	Donley's	10(k)	Work awarded to Laborers	1. Work preservation—unproven 2. Collusion between Laborers and employers—unproven
Donley's II, 360 NLRB No. 113 (2014)	Construction Employers Association ("CEA," a multi-employer	10(k)	Work awarded to Laborers	1. Work preservation—unproven 2. Collusion between Laborers and

[4] As discussed below, Section 8(b)(4)(ii)(D) of the Act 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. Any action taken in contravention of a Section 10(k) award violates Section 8(b)(4)(ii)(D) of the Act.

	association), Donley's, Hunt, Precision, Cleveland Cement, B&B			employers—unproven
Donley's III, 361 NLRB No. 37 (2014)	KMU, 21st Century, Schirmer, Platform, Independence	10(k)	Work awarded to Laborers	1. Work preservation—unproven 2. Collusion between Laborers and employers—unproven
Donley's IV, 363 NLRB No. 184 (2016)	CEA, Donley's, Hunt, Precision, Cleveland Cement, B&B	Unfair-Labor-Practice Decision	Local 18 violated Section 8(b)(4)(i) and (ii)(D) of the Act by threatening to strike, striking, and maintaining and filing pay-in-lieu grievances that were contrary to the Section 10(k) determinations in *Donley's I* and *II* awarding the work to the Laborers	1. Work preservation—unproven 2. Collusion between Laborers and employers—unproven and no re-litigation after Section 10(k) decisions, and in any event, Local 18 also had a strike threat giving rise to the Section 10(k) proceedings
Nerone, 363 NLRB No. 19 (2015)	Nerone, RG Smith	10(k)	Work awarded to Laborers	1. Work preservation—unproven 2. Collusion between Laborers and

				employers—unproven

II. PROCEDURAL HISTORY OF THE INSTANT CASE

Acting on unfair-labor-practice charges filed by the Charging Party-employers, the General Counsel filed a complaint alleging that Local 18 violated Section 8(b)(4)(ii)(D) of the Act (29 U.S.C. § 158(b)(4)(ii)(D)) by filing and pursuing grievances against 21st Century, Independence, KMU, Nerone, Schirmer, Platform, RG Smith, and Schirmer that were inconsistent with Board Decisions and Determinations under Section 10(k) of the Act (29 U.S.C. § 160(k)). (JA6582.)

On August 1, 2016, following a hearing, administrative law judge David Goldman 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. (JA6589.) On review, the Board adopted Judge Goldman's rulings, findings, and conclusions with slight modification, and adopted his recommended order. (JA6581.)

The Board's findings, including those it adopted from *Donley's I*, *Donley's II*, and *Donley's IV*, are set forth below. The Board's recent findings regarding the Section 10(k) determinations in *Donley's III* and *Nerone*, the two Section 10(k) proceedings which triggered the unfair-labor-practice case here, are set forth next.

III. THE BOARD'S FINDINGS OF FACT

A. Background

1. The CEA, the Employers, the Relevant Multi-Employer Agreement, and the Conflicting Work-Assignment Provisions

The CEA is a multi-employer construction trade association whose members include Donley's, Inc., Hunt Construction (now AECOM), Precision Environmental Co., Cleveland Cement Contractors, Inc., the Charging Party employers, and over 100 additional employers in the construction industry.[5] (JA5882,5871,5875-78, 6582-83; JA97-98, 270,283,299,310,317,373-76, 377, 378-79,380-82,1017,5904,5912.) The CEA's members assign their bargaining rights to the CEA, which then negotiates and administers collective-bargaining agreements with various trade unions, including separate agreements with Local 18 and the Laborers. (JA5877-78; JA97-98, 376,377,903.)

The CEA's separate agreements with Laborers Local 310 and Local 18 cover construction work at jobsites in northeastern Ohio, including Cleveland. The CEA's two most recent agreements with Laborers Local 310—agreements

[5] B&B Wrecking & Excavating, Inc. is not a member of the CEA, but has signed "me-too" agreements to adhere to the terms of the relevant CEA agreements. (JA5883,5883n.27;JA1018, 1077,5895.)

effective from 2012-2015 and then from 2015-2019—specify that forklift and skid steer work shall be assigned to its employee-members. (JA5878; JA903.)[6]

The CEA-Laborers agreements prior to 2012 covered work where power was used to move concrete and other materials, thus including forklift and skid steer work without specifically naming that equipment. As described below (p. 12), the agreements were later revised to name the equipment. (JA5878; JA994.) The CEA's agreements with Local 18 specify that forklift and skid steer work shall be assigned to Local 18-represented employees. (JA264, JA5877; JA862,1781.)

2. For Many Years, Donley's, Precision, Cleveland Cement, B&B, and the Charging Party Employers Assigned Forklift and Skid Steer Work Almost Exclusively to the Laborers

Since the 1990s, Donley's, Precision, Cleveland Cement, and B&B assigned the operation of forklifts and skid steers to the Laborers or other unions, and not to Local 18, except on rare occasions. (JA5895,5896; JA98-99,124-27,137-38, 154,161,169-70,181,184,190,192,409-10,419-420,430-31, 432-441, 442- 459, 515-530,705-08, 711-12,724-27,851-61.)[7]

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[6] 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. (JA5877; JA260.)

[7] 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 the Laborers and not to Local 18. (JA5895; JA502,503.)

Since the 1980s, the Charging Party employers regularly assigned skid steer and forklift work to the Laborers, but rarely, if ever, to Local 18. Specifically, Laborers-represented employees regularly operated the skid steers and the forklifts for Schirmer, 21st Century, Platform, KMU, and Independence. (JA361,362, 363,363nn.9,10, 6588; JA98-99,186-87,284-85,292-94, 300-302, 311,317-19.) Independence also assigned forklift and skid steer work to Local 18 on rare occasions. (JA361,JA362-363,363 nn.9,10, 364,6588; JA318-19.) Laborers-represented employees—and not Local 18-represented employees—consistently operated the forklifts and skid steers for Nerone and RG Smith except in rare instances. (JA6036,6036n.6,6038; JA5905-06,5910-11,5913-15.)

B. Facts and Findings in *Donley's I, II,* and *IV*

1. Local 18's campaign to obtain the work assigned to the Laborers; both unions threaten to strike to protect their work; Local 18 files a pay-in-lieu grievance against Donley's; Local 18 and the Laborers reach new agreements again both covering the same work

In March 2010, Local 18 requested that Donley's assign the operation of forklifts and skid steers to employees represented by Local 18. Donley's replied that it had not previously utilized Local 18 members for that work and that there would be a substantial increase in labor costs to do so. (JA5878; JA404-08,709-16.)

Beginning in early 2012, after Donley's refused to assign the forklift and skid steer work to it, Local 18 took action to obtain that work. As one of its representatives explained to Donley's, "[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." (JA5880; JA417.) In February 2012, it threatened to strike, then actually picketed and shut down a Donley's job site for a day, and filed "pay-in-lieu" grievances to seek damages in lieu of the actual assignments for the work it claimed should have gone to Local 18 instead of the Laborers. In April, Local 18 stated to Donley's that it wanted "to battle" with the Laborers, warning that Donley's "would be sorry" if it sided with the Laborers. (JA5880,5881,5891-93; JA417,421,426-27, 429, 446-48,514,722-23,984,985.)

The Laborers reacted similarly to Local 18's claims. When Donley's advised the Laborers that Local 18's grievances may force it to reassign the work, the Laborers responded that it would picket and/or strike if necessary to protect its work assignments. (JA88-89;SA1.)

In negotiating a new 2012-2015 agreement with the CEA, Local 18 proposed a provision quadrupling damages for an improper assignment of work. Local 18's business manager stated that for "far too long" they had seen forklift and skid steer work go to employees of other unions. (JA5874; JA384-86.) Local 18 also twice warned that that it was ready to strike over the jurisdictional issue.

The CEA and Local 18 reached agreement—without Local 18's quadruple-damages provision. (JA89,5874,5881,5882;JA384-86,862-902.)

During the same timeframe, the CEA negotiated its new 2012-2015 agreement with the Laborers. (JA5873n.4;JA58,185.) The parties revised the language in their earlier agreements that had, by description, covered forklifts and skid steers. The new language explicitly named that equipment in order to clarify that the Laborers operated it, as they had for many years. (JA5873n.4; SA2-3.)

2. Various employers file unfair-labor-practice charges against Local 18 and the Laborers; the first Section 10(k) hearings; Local 18 files more pay-in-lieu grievances; the Laborers again threaten to strike

In May 2012, Donley's filed unfair-labor-practice charges with the Board alleging that both Local 18 and the Laborers violated Section 8(b)(4)(i) and (ii)(D) of the Act (29 U.S.C. § 158(b)(4)(i) and (ii)(D)) by engaging in proscribed activity—threatening strikes—with an object of forcing Donley's to assign work to its members instead of the other union. (*Donley's I*, 360 NLRB No. 20 at 1.) Pursuant to Section 10(k) of the Act (29 U.S.C. § 160(k)), the Board's Regional Office for Region 8 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. (SA4-5.)

While the Donley's Section 10(k) proceeding was pending, Local 18 filed even more pay-in-lieu grievances over assignments of forklift and skid steers by

B&B, Cleveland Cement, Precision, Hunt, and Donley's. (JA5883-85; JA458-60,517-27,967-973.) In October 2012, the CEA advised the Laborers that, as a result of Local 18's grievances, it might become necessary to reassign the work to Local 18. (JA5872; JA221,261.) The Laborers responded by warning that they would picket and strike "any and all projects" if the CEA employers were to reassign the work. (JA261;JA222.)

Also in October, the CEA, Donley's, Hunt, Precision, Cleveland Cement, and B&B 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—threatening to strike—with an object of forcing the 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 the Board convened Section 10(k) proceedings to determine if the two unions had a bona fide jurisdictional dispute and, if so, to whom to assign the disputed work. (JA213-220.) Thereafter, Local 18 continued to file pay-in-lieu grievances over the assignment of forklifts and skid steer under the CEA agreement against Precision, B&B, and Donley's. (JA5882,5884,5885; JA975-80.)

3. The Board's Section 10(k) decision in *Donley's I* awards the work to the Laborers; Local 18 refuses to withdraw its grievance over one such project and files more pay-in-lieu grievances

On January 10, 2014, the Board (Chairman Pearce,[8] 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. (JA87-94.) 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 (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. (JA87-91.) The Board also rejected Local 18's defenses that it acted lawfully to preserve its own work, and that the employers improperly colluded with the Laborers by negotiating for more specific forklift and skid steer language in the work jurisdiction clause of their 2012-2015 agreement. The Board then considered the relevant factors and awarded the disputed forklifts and skid steer

[8] On January 26, 2017, Member Miscimarra was named Acting Chairman. On April 24, 2017, he was named Chairman.

work represented by the Laborers.[9] (JA94.) Ignoring the Board's Decision, Local 18 refused to withdraw its grievance over the forklifts and skid steers at the Goodyear project and, on March 7, 2014, filed another pay-in-lieu grievance against Cleveland Cement. (JA5883; JA981.)

4. The Board's 10(k) Determination in *Donley's II* awards further disputed work to the Laborers; Local 18 again refuses to withdraw its pay-in-lieu grievances and files additional ones

On May 15, 2014, the Board (Chairman Pearce, Members Miscimarra and Johnson) issued a Section 10(k) Decision and Determination (*Donley's II*) regarding the relevant forklift and skid steer work at Donley's, Hunt, Precision, Cleveland Cement, and B&B. (JA259-267.) 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. (JA259-66.) The Board additionally found that Local 18 had a proclivity to engage 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. (JA266.) Local 18 again refused to withdraw its grievances over the forklifts and skid steers at the individual employers' jobsites,

[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. (JA91-94.)

and filed even more pay-in-lieu grievances against Donley's and Cleveland Cement. (JA5872,5882,5883;JA982,983,986-87.)

5. The Board's unfair-labor-practice Decision in *Donley's IV* finds that Local 18 used proscribed means to force employers to reassign work to it instead of the Laborers

In late September 2014, the Board's General Counsel issued complaint alleging that Local 18 violated Section 8(b)(4)(i) and (ii)(D) of the Act by threatening to strike, striking, and maintaining and pursuing pay-in-lieu grievances against Donley's, Hunt, Precision, Cleveland Cement, and B&B despite the Board 10(k) awards of the disputed work to the Laborers in *Donley's I* and *II*. On April 9, 2015, after an 11-day hearing, Administrative Law Judge Mark Carissimi issued a recommended decision and order, finding that Local 18 violated the Act as alleged.

On May 16, 2016, the Board (Chairman Pearce, Members Hirozawa and McFerran), in agreement with Judge Carissimi, found that Local 18 violated Section 8(b)(4)(i) and (ii)(D) of the Act by striking and threatening to strike Donley's, Precision, Hunt, Cleveland Cement, and B&B with an object of forcing them to assign work to Local 18 rather than to the Laborers. 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 in *Donley's I* and *II*. (JA5871,5871n.2,5871-74.)

In so finding, the Board in *Donley's IV*—like the Board in *Donley's I* and *II*—rejected Local 18's work preservation and collusion defenses. (JA5872-74.) In rejecting the work preservation defense, the Board relied on well-settled precedent and Local 18's own actions to conclude that it 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. (JA5874.) The Board also found that Local 18's assertion that its members performed some of the disputed work for other employers in the multi-employer associations 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." (JA5874.)

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 two earlier Section 10(k) proceedings. (JA5872.) 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. (JA5872-73.) Moreover, the Board found, in the alterative, that even if Local 18 had been able to establish such collusion, its own actions (aside from those of the Laborers)—threatening to strike, and engaging in a strike over the disputed work—were sufficient to trigger the Section 10(k) proceedings. (JA5873.)

The Board ordered Local 18 to withdraw all of its pending pay-in-lieu grievances. (JA5900-01.) As noted above, the Board's decision in *Donley's IV* is currently pending on petition for review and cross-application for enforcement in the Sixth Circuit. *See Int'l Union of Operating Engineers, Local 18 v. NLRB*, Sixth Cir. Nos. 16-1800 & 16-1969 (oral argument held October 12, 2017).

C. Findings in the *Donley's III* and *Nerone* 10(k) Decisions

In the meantime, Local 18 filed more pay-in-lieu grievances over forklift and skid steer work, this time, at projects run by the Charging Party employers. As discussed below, this resulted in two more Section 10(k) determinations—*Donley's III* and *Nerone*—that Local 18 once again flouted.

1. Local 18 files pay-in-lieu grievances against five employers; the Laborers threaten to strike if such work is reassigned; the employers file unfair-labor-practice charges against the Laborers; Local 18 files more grievances

From February through June 3, 2013, Local 18 filed pay-in-lieu grievances against 21st Century, Independence, Schirmer, KMU, and Platform over forklift

and skid steer work for various projects. (JA6584;JA6238-6240.) Following the filing of each grievance, the recipient employer sent a letter to the Laborers' business manager, stating if it were to lose the grievance, it would need to reassign the forklift and skid steer work to employees represented by Local 18. Each time, the Laborers responded that if the disputed work was reassigned to Local 18, the Laborers would "picket and strike and all projects where such assignments took place." (JA361;JA340-359.)

On July 23, 2013, 21st Century, Independence, Schirmer, KMU, Platform, and Donley's filed unfair-labor-practice charges alleging that 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—threatening to strike—with an object of forcing the employers to assign work to employees represented by them instead of employees represented by Local 18. (JA360.)[10] Again, the Regional Office held the charges in abeyance while the Board convened Section 10(k) proceedings. (JA360.)

Local 18 continued to file more pay-in-lieu grievances—including multiple ones against Independence for various projects, and one against Nerone. (JA6585,6586; JA 6341-6242-46.) After receiving the grievance against it, Nerone sent a letter to the Laborers stating that if it were to lose the grievance it would

[10] Donley's is not a Charging Party in the instant case although it also filed a charge in *Donley's III*. Its charge was eventually resolved and is not at issue here. (JA6583n.2.)

need to reassign the forklift and skid steer work to Local 18. The Laborers responded, stating that if the work was reassigned to Local 18, the Laborers would picket and strike any and all projects where such assignments took place. (JA6036; SA6.)

2. The Board issues 10(k) decisions in *Donley's III* and *Nerone* again awarding the disputed work to the Laborers; Local 18 files more grievances; employers file unfair-labor-practice charges against the Laborers

On September 3, 2014, the Board (Chairman Pearce, Members Hirozawa and Johnson) issued a Section 10(k) Decision and Determination regarding the relevant 21st Century, Independence, Schirmer, KMU, Platform, and Donley's forklift and skid steer work. The Board made the same required threshold findings that it did in *Donley's I* and *II*, again rejected Local 18's work preservation and collusion defenses, and again awarded the disputed work to the Laborers. (JA360-65.) The Board again ordered a broad area-wide award, co-extensive with the employer's operations where the two unions' jurisdictions overlap. (JA365.) Unbowed, on September 12, 2014, Local 18 filed another pay-in-lieu grievance against Independence. (JA6585.)

Local 18 continued filing pay-in-lieu grievances against the Charging Party employers, including one against RG Smith. (JA6585,JA6586; JA6242-43,6246.) RG Smith advised the Laborers that it was possible the grievances could result in

an assignment of the relevant work to Local 18. The Laborers responded with a strike threat. (JA6036;6134-37,SA7-8.)

Soon thereafter, Nerone and RG Smith filed unfair-labor-practice charges alleging that the Laborers violated Section 8(b)(4)(ii)(D) of the Act by threatening to strike with an object of forcing them to assign work to it instead of Local 18. (JA6035.) Again, the Board convened Section 10(k) proceedings to resolve the dispute. (JA6035-40.)

On October 1, 2015, the Board (Chairman Pearce, Members Hirozawa and McFerran) issued a Section 10(k) Determination regarding the relevant Nerone and RG Smith forklift and skid steer work. (JA6035-40.) The Board made the same required threshold findings that it did in *Donley's I*, *II*, and *III*, again rejected Local 18's work preservation and collusion defenses, and again awarded the disputed work to the Laborers. (JA6035-40.) For the third time, the Board ordered a broad area-wide award, co-extensive with the employer's operations where the two unions' jurisdictions overlap. (JA6040.)

From January through March 2016, Local 18 continued to file pay-in-lieu grievances against Independence, Nerone, KMU, and Platform. (JA6585;JA6243, 6244,6247.)

IV. THE BOARD'S CONCLUSIONS AND ORDER

Based on the foregoing facts and consistent with its findings in *Donley's IV*, the Board (Acting Chairman Miscimarra and Members Pearce and McFerran) found, in agreement with a recommended decision and order by Administrative Law Judge Goldman, that Local 18 had again violated Section 8(b)(4)(ii)(D) of the Act by maintaining and filing pay-in-lieu grievances, this time against the Charging Party employers. The Board found that these grievances violated the Act because they were inconsistent with the Board's Section 10(k) decisions in *Donley's III* and *Nerone* awarding the work in dispute to employees represented by the Laborers. (JA6581-89.)

In so finding, the Board adopted Judge Goldman's evidentiary rulings, which, in turn, were based mostly on the parties' stipulations. (JA6581-84.) The stipulations included admission of the records from the Board's earlier Section 10(k) determinations in *Donley's I*, *II*, *III*, and *Nerone*, and the Board's unfair-labor-practice decision in *Donley's IV*. (JA6581,JA6584,JA6584n.3.) Judge Goldman granted the Charging Party-employers' motion in limine to preclude Local 18 from introducing additional evidence related to its two affirmative defenses—work preservation and collusion—that had been previously litigated and rejected in the prior proceedings. (JA6582.) Judge Goldman allowed Local 18 to provide an offer of proof as to the evidence it would have put on if given the

opportunity, but found that the proffered evidence did not advance Local 18's position. (JA6589,JA6589n.5.)

After the hearing before Judge Goldman closed, Local 18 filed a motion to re-open the record, arguing that an alleged comment by a CEA director constituted a basis to reassert the rejected collusion contention. Judge Goldman denied the motion, finding that the proposed evidence was of no import. (JA6587,JA6587n.4.)

In adopting Judge Goldman's findings, the Board specifically noted that it previously considered and rejected Local 18's work preservation and collusion defenses in its unfair-labor-practice decision in *Donley's IV*, as well as in its 10(k) determinations in *Donley's III* and *Nerone*. (JA6581n.1.) The Board also stated that it found no merit in Local 18's argument that the judge did not use the appropriate "preponderance of the evidence standard," finding that the parties' stipulations "plainly establish by a preponderance of the evidence [Local 18's] violation of the Act." (JA6581n.1.)

The Board issued a broad cease-and-desist order, which requires Local 18 to cease and desist from all unfair labor practices found, including threatening, coercing, or restraining any of the Charging Party-employers, or any other person or employer engaged in commerce or in an industry affecting commerce, where an object of its actions is to force or required the employer to assign forklift and/or

skid steer work to Local 18-represented employees. The Board's Order affirmatively requires Local 18 to withdraw all of its pending, and cease filing, pay-in-lieu grievances against the Charging Party-employers. Finally, the Board's Order requires Local 18 to physically post and electronically distribute a notice. (JA6589-90.)

STANDARD OF REVIEW

A court reviewing the Board's determination that a union has violated Section 8(b)(4)(D) of the Act may perform only a "limited inquiry[,]" as the determination is entitled to affirmance if its underlying factual findings are supported by substantial evidence and its legal conclusions are not arbitrary or capricious. *ILWU, Local 62-B v. NLRB*, 781 F.2d 919, 923 (D.C. Cir. 1986); *see also Local 30, United Slate, Tile & Composition Roofers v. NLRB* ("*Local 30*"), 1 F.3d 1419, 1422-23 (3d Cir. 1993); *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). 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. *Int'l Longshoreman's & Warehousemen's Union, Local 14 v. NLRB*, 85 F.3d 646, 651 (D.C. Cir. 1996).

SUMMARY OF ARGUMENT

The Board reasonably found that Local 18 violated Section 8(b)(4)(ii)(D) of the Act by maintaining and pursuing grievances against the Charging Party 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, including the Board's decision in an earlier case involving almost identical conduct by Local 18, a union's actions in contravention of such awards violate 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, as it has in the past, 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 repeated 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, nor has it shown that the Board abused its discretion in excluding additional evidence related to this defense from these proceedings.

The Board also again 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 reviewed the evidence in all of the previous proceedings—including the evidence proffered by Local 18 in the unfair-labor-practice proceedings—to conclude that Local 18 had not established this defense. In addition, the Board considered the evidence Local 18 proffered after close of the hearing in the instant case, and reasonably concluded that it would not change the result. Local 18 has failed to demonstrate that the Board abused its discretion by precluding it from re-litigating its collusion defense

here, let alone that it suffered the requisite prejudice from this determination.

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

ARGUMENT

THE BOARD REASONABLY FOUND THAT LOCAL 18 VIOLATED SECTION 8(b)(4)(ii)(D) OF THE ACT BY MAINTAINING AND FILING PAY-IN-LIEU GRIEVANCES AGAINST THE CHARGING PARTY EMPLOYERS THAT ARE INCONSISTENT WITH THE BOARD'S SECTION 10(k) AWARDS

A. The Statutory Scheme for Resolving Jurisdictional Disputes

Section 8(b)(4)(ii)(D) of the Act (29 U.S.C. §158(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 a particular union rather than to employees in another union. As discussed above at p. 12, where there is reasonable cause to believe that a Section 8(b)(4)(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)(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 (Sea-Land) v. NLRB*, 884 F.2d 1407, 1413-14 (D.C. Cir. 1989) ("*Sea-Land*"). 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); those pending charges 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). Where a union fails to accede to the award (like Local 18 here),

however, a complaint against that union will issue and an unfair-labor-practice proceeding under Section 8(b)(4)(D) will commence.

In the instant case, Local 18 does not challenge the elements and supporting evidence of the Board's Section 8(b)(4)(ii)(D) findings regarding the numerous grievances it has maintained and filed against the Charging Party employers contrary to the *Donley's III* and *Nerone* Section 10(k) awards. Instead, Local 18 re-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, and argues that the Board erred by precluding them from re-litigating those defenses. Following a brief summary of the Board's Section 8(b)(4)(ii)(D) findings (Section B, below), we address Local 18's failure to establish its defenses and challenges to the Board's evidentiary rulings (Section C, below).

B. Local 18 Violated Section 8(b)(4)(ii)(D) by Maintaining and Filing Pay-In-Lieu Grievances Against the Charging Party Employers in Contravention of the Board's Section 10(k) Awards

As shown below, substantial evidence supports the Board's findings that Local 18 violated the Act by maintaining and continuing to file numerous pay-in-lieu grievances against the Charging Party employers seeking payment for forklift and skid steer work after the Board awarded that work to the Laborers 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. Local 18 has not challenged the elements of these violations.

Section 8(b)(4)(ii)(D) of the Act makes it an unfair labor practice for a union "(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)(ii)(D).

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); *Accord Sea-Land*, 884 F.2d at 1414 (Section 10(k) award trumps collective-bargaining agreement). Hence, a lawsuit attacking a Section 10(k) decision "is barred by the supremacy doctrine." *Local 32*, 773 F.2d at 1016-18, 1021. *See also 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").[11]

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; *Sea-Land*, 884 F.2d at 1414*; Local 32*, 773 F.2d at 1020. Indeed, the court in *Orrand* stated 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 (citations omitted). 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. *Sea-Land*, 884 F.2d at 1414.

Applying these principles, the Board reasonably concluded that Local 18 violated Section 8(b)(4)(ii)(D) of the Act by maintaining and filing multiple pay-in-lieu grievances against 21st Century, Independence, Schirmer, KMU, and Platform after the Board issued *Donley's III*, and maintaining and filing additional

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[11] Thus, Local 18's arguments regarding national labor policy encouraging arbitration (Br. 55-58) are irrelevant in this context. As shown above, the Supreme Court has decided that in the context of work disputes between two unions, national labor policy is best served by Board resolution pursuant to Section 10(k), which trumps arbitration proceedings.

pay-in-lieu grievances against Nerone and RG Smith after the Board issued *Nerone*. (JA6586.) The Board found that the pay-in-lieu grievances against the Charging Party employers here—like the almost identical pay-in-lieu grievances against the employers in *Donley's IV*—"directly conflict with the Board's 10(k) awards in *Donley's III* and *Nerone*," and thereby unlawfully "seek to coerce the [individual] employers into paying damages for the work awarded to Laborers-represented employees." (JA6586 (citing JA5894).)

C. 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.31-68) to raising two defenses, already rejected by the Board in previous litigation, both aimed at showing 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 repeats its well-worn assertion that, instead of seeking to acquire new work, it has a valid "work preservation" claim to the forklift and skid steer work, and relatedly that the Board improperly prevented it from re-litigating that defense in this proceeding. Second, Local 18 again asserts that the CEA, the employers, and the Laborers colluded to create a sham jurisdictional dispute. Local 18 also argues that the Board improperly prevented it from re-litigating its collusion defense. As shown below, Local 18 has failed to establish its defenses.

1. Local 18 failed to prove its work preservation defense

Beginning in 2012, Local 18 conducted an area-wide campaign to force the Charging Party employers to re-assign the disputed work being done almost entirely by Laborers-represented employees to Local 18. The Board applied the well-settled work preservation test for jurisdictional disputes in rejecting Local 18's affirmative defense that it was attempting to preserve its own work rather than to acquire more. Local 18 has not demonstrated that the Board erred in declining to apply a different test. Nor has Local 18 established that the Board abused its discretion by precluding it from re-litigating this repeatedly-rejected defense, particularly given the lack of any prejudice. The Board properly relied on *Donley's IV* and applied its well-settled test in the context of Section 10(k) and 8(b)(4)(ii)(D) proceedings to reject Local 18's identical assertion here.

The principles applicable to a work preservation defense are well established. The union asserting this defense in the Sections 10(k) and 8(b)(4)(D) context must show it is attempting to preserve, not acquire or expand, its work such that no true jurisdictional dispute exists to warrant a Section 10(k) proceeding. 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 in *Donley's IV*, 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. (JA5874n.5,5897) (citing *Carpenters (Prate Installations, Inc.*), 341 NLRB 543 (2004)). The Board explained in *Donley's IV* 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. (JA5874n.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)." (JA5898-99) (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 Charging Party employers

Applying the above principles, the Board properly relied on its decision in *Donley's IV* to reject Local 18's work preservation defense as "wrong as a matter of precedent." (JA6588.) Here, as in *Donley's IV*, 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." (JA5874.) The record amply supports this finding. As the Board recognized, Local 18 members had rarely performed forklift and skid steer work for the Charging Party employers. (JA6588.) None of the employers—with the limited exception of Independence and RG Smith on isolated occasions—had used Local 18 members on forklifts or skid steers for many years. *See* above at p. 10. Accordingly, the Board reasonably found that Local 18 was seeking to acquire, not to preserve, work. *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).[12]

Indeed, as the Board found in *Donley's IV*, Local 18's representatives themselves "openly acknowledged" that Local 18's objective was to acquire work it did not perform in the past. (JA5874.) For example, in April 2012, Local 18 stated to the CEA that for "far too long" the CEA 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. (JA5898). See above at pp. 11-12.

Moreover, in *Donley's IV*, the Board recognized that the employers had not unilaterally reassigned the operation of forklifts and skid steers that had been historically operated by Local 18 members to other unions. (JA6588;

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[12] In contrast to Local 18's selected testimony (Br. 50-53, 55) from a few employees doing isolated work on forklifts and skid steers, the record as a whole demonstrates that the Charging Party employers consistently assigned the disputed work to the Laborers and only rarely to Local 18. For example, Rob diGeronimo, Vice President of Independence, testified that Independence consistently assigns forklifts and skid steer to Laborers and only rarely to Local 18, for "less than five percent" of the time. (JA363; JA318-19.) In addition, Local 18 incorrectly asserts (Br. 51) that KMU and 21st Century "admitted" that they had "consistently" utilized Local 18-represented employees to operate forklifts and skid steers. To the contrary, KMU's owner, Kevin Urig, and 21st Century's President, Patrick Butler, testified that they assigned their forklift and skid steer work almost exclusively to Laborers-represented employees. (JA363,JA363n.9;JA307-09, JA316).

JA5899.) The evidence is the same here regarding the Charging Party employers—they 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 pp.35-36, 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, relying on *Donley's IV*, the Board reasonably found that Local 18 failed to establish this defense here. (JA6582, JA6588, JA6589.)

b. The Board was not required to consider all work in the multi-employer association or to apply Local 18's "fairly claimable" test

In the face of the overwhelming evidence, Local 18 claims (Br. 36-55)—as it did in *Donley's IV*—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 association 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.36, 40-41, 43-55). As shown below, the Board rejected

this novel analysis "root and branch" in *Donley's IV*, and properly did so again here. (JA6588.)

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. 38-42, 45, 48) 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)).[13] Those sections preclude secondary boycotts (union actions that are not directed 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*,

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[13] *NLRB v. Pipefitters Local 638*, 429 U.S. 507, 510-11 (1977) (8(b)(4)(B)); *Honolulu Typographical Union v. NLRB*, 401 F.2d 952, 957 (D.C. Cir. 1968)…. (8(b)(4)(b)); *Meat & Highway Drivers Local 710 v. NLRB*, 335 F.2d 709, 714 (D.C. Cir. 1964) (8(b)(4)(B) & (e)); *Carpenters Local 742 v. NLRB*, 533 F.2d 683, 690 (D.C. Cir. 1976) (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)(8(e)).

Local 18's citations (Br. 41, 42) to an arbitration decision are inapposite because it does not involve court review of a Board Order, and, in any event, only involves 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).

429 U.S. at 516-17 (1977) (discussing Sections 8(b)(4)(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-à-vis a primary employer. However, that standard does not address the type of dispute here, where the issue is not whether the union has a secondary object vis-à-vis another employer, but whether two unions have competing claims for the work of the primary employer. 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 Charging Party 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. *See Sea-Land*, 884 F.2d at 1412-13 (discussing difference between charges under Section 8(b)(4)(B) and Section 8(b)(4)(D), recognizing that "theoretical bases for each charge are different").[14]

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

[14] Accordingly, Local 18's assertion (Br. 44-45) that the Board is treating analogous cases differently is without merit; cases brought under these different provisions of Section 8(b) are not analogous.

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. 35, 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 reliance (Br. 44) on *ILWU (Kinder Morgan)*, 2014 WL 3957246 (Aug. 13, 2014) (pending before the Board), a case in which Local 18 claims that a fairly claimable analysis was applied to an 8(b)(4)(D) claim, is misplaced. That administrative law judge decision has not been reviewed and, therefore, 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).[15]

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[15] 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) secondary boycott 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 on (Br. 43-44, 46-47, 48-49) purportedly inconsistent advice memoranda issued by the Board's General Counsel. Such memoranda are prosecutorial documents to advise Regional Offices whether to issue complaints to litigate before the Board. They 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 association.[16] By Local 18's own account, the forklift and skid steer work it did within the association was for employers other than those involved here. At most, it can only claim an inconsistent practice of assignment among some of the employers within the association. Yet, it asks the Court to convert that inconsistent practice into one that requires the

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[16] As the Board explained in *Donley's IV*, exclusivity of performance is an important factor to establish a work preservation defense. (JA5874n.5.) As between two unions, if one does not exclusively perform the work in dispute, then it necessarily seeks to acquire work done by another union.

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 association. There was accordingly no need for the Board to determine the scope of the multi-employer unit, as urged by Local 18 (Br. 36, 40-43).

Thus, the Board properly focused on the acquisitional nature of Local 18's claim to the disputed work. In this context, the Board reasonably adopted the analysis from *Donley's IV* 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." (JA6588, JA5874.) The record amply supports the Board's conclusion that, as in *Donley's IV*, "there is no basis in the record for any claim by [Local 18] that its demonstrated efforts to obtain all of the employers' forklift and skid steer work represents work preservation and not work acquisition." (JA6589.) *See also* JA5874 (Local 18 "cannot reasonably dispute that this was its objective").

Indeed, Local 18 overlooks that its preferred standard would not resolve the dispute between the two unions; the ensuing disruption would continue

because each union would assert a fair claim to the work with no method of resolution. This result is antithetical to the statutory scheme under Sections 8(b)(4)(D) and 10(k) of the Act that seeks to protect interstate commerce by relieving employers trapped between the claims of rival unions from costly disruptions. *See Radio & Television Broad. Eng'rs*, 364 U.S. at 574-75, 579-82.

Finally, Local 18's observation (Br. 37-38) 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 the Charging Party 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 here, as in *Donley's IV*, Local 18 failed to establish its work preservation test under the relevant precedent.

c. Local 18 failed to demonstrate that the Board abused its discretion in precluding it from re-litigating its repeatedly-rejected work preservation defense

Local 18 wrongly contends (Br. 58-64, 66, 67-68) that the Board erred in granting the Charging Party employers' motion in limine to bar additional

work preservation evidence, thereby precluding re-litigation of that issue. As shown below, the Board did not abuse its discretion with its ruling.

The Board's adoption of an administrative law judge's evidentiary rulings is reviewed for abuse of discretion. *See Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1285 n.10 (D.C. Cir. 1999) (reviewing judge's refusal to admit evidence for abuse of discretion); *Canadian Am. Oil Co. v. NLRB*, 82 F.3d 469, 475 (D.C. Cir. 1996) (same). The party challenging such rulings must prove prejudice. *Salem Hosp. Corp. v. NLRB*, 808 F.3d 59, 67, 70-74 (D.C. Cir. 2015) (alleged procedural missteps did not result in prejudice); *Exxon Chem. Co. v. NLRB*, 386 F.3d 1160, 1166 (D.C. Cir. 2004) (employer failed to demonstrate prejudice from judge's exclusion of evidence); *Desert Hosp. v. NLRB*, 91 F.3d 187, 190 (D.C. Cir. 1996) (employer "failed to show that any prejudice resulted from its inability to present the additional evidence at the hearing"). *See also Bricklayers, Masons, & Plasterers Int'l Union of Am. v. NLRB*, 475 F.2d 1316, 1323 (D.C. Cir. 1973) (even if Board had erred in refusing to supplement the record with letter party asserted was relevant to Section 8(b)(4)(ii)(D) proceeding, the Court "d[id] not feel justified in overruling" the Board because the error was not prejudicial). In claiming (Br. 58-64, 66, 67-68) the Board improperly precluded it from re-litigating its

work preservation defense, Local 18 has shown neither abuse of discretion nor prejudice.

To begin, as the Board noted in adopting Judge Goldman's findings in this case, the Board "has previously considered and rejected" Local 18's work preservation defense in *Donley's IV*." (JA6581n.1.) Moreover, the Board noted, as did Judge Goldman, that the Board also rejected that defense in the two Section 10(k) determinations relevant here: *Donley's III* and *Nerone*. (JA6581n.1, JA6587-88.) In the face of Board precedent in both an unfair-labor-practice decision and two 10(k) determinations, it was not arbitrary for the Board to hold that the work preservation defense could not again be litigated in the instant case. (*See* JA6587-88 (citing Local *1332, ILA (Philadelphia Marine Trade Assn.)*, 219 NLRB 1229, 1229 n.1 (1975), *enforced*, 542 F.2d 1167 (3d Cir. 1976) (no re-litigation of work preservation defense, which is often the "very essence" of a jurisdictional dispute, after Section 10(k) hearing))).

Local 18's assertion (Br. 60-61) that *Philadelphia Marine* is not good law in light of the Board's later decision in *Longshoremen ILWU Local 6 (Golden Grain Macaroni Co.)*, 289 NLRB 1, 2 n.4 (1988), is unavailing. In *Golden Grain*, the Board 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," and denied a summary judgment motion by the Board's General Counsel following a Section 10(k) determination that had rejected a work preservation defense that a union was trying to raise again. 289 NLRB at 2 n.4. However, in *Golden Grain*, unlike here, there had not also been an unfair-labor-practice determination such as *Donley's IV* —complete with the credibility determinations and preponderance of evidence standard urged by Local 19 (Br. 61-64)—on the very same work preservation issue. *See also* JA6581n.1 (stating in light of stipulations and *Donley's IV*, Local 18's violations were established by "a preponderance of the evidence"). In addition, *Golden Grain* was decided on summary judgment. Here, in contrast, the parties had a hearing before Judge Goldman based primarily on stipulations and the record in the previous proceedings. They argued the Charging Party employer's motion in limine to exclude evidence on the work preservation defense orally and in writing, and Local 18 took a special appeal to the Board. (July 12, 2016 Board decision.) Thus, *Golden Grain* does not provide Local 18 with grounds to re-litigate its work preservation defense.

In any event, Local 18's claim (Br. 61-68) that the Board denied it due process rings hollow. Local 18 has utterly failed to establish, as it must, that the Board's exclusion of work preservation evidence was prejudicial to Local 18. *Desert Hosp.*, 91 F.3d at 190 (due process violation required showing of

prejudice). As the judge stated, he "solicited and [Local 18] provided an offer of proof as to the evidence it would put on if given the opportunity." (JA6589,JA6589n.5; SA 9-18.) However, as the Board found, the offer of proof merely reflects "an intent to adduce evidence of the kind argued in its brief, and argued, (but rejected by the Board) in *Donley's IV*," which was evidence that "its represented employees performed the disputed work for other employers allegedly part of a multi-employer bargaining unit." (JA6589.) As discussed above, given the Board's precedent in *Donley's IV*, such evidence is not sufficient to advance Local 18's position. *Salem Hosp*., 808 F.3d at 68 (no showing of prejudice where record does not indicate that employer sought to introduce relevant, non-cumulative evidence).[17]

[17] Local 18's citation to out-of-circuit law (Br. 67-68) is unavailing because the Court, unlike in those cases, requires a showing of prejudice for due process challenges. Indeed, in *George Banta Co. v. NLRB*, 686 F.2d 10, 23 (D.C. Cir. 1982), an in-circuit case cited by Local 18 (Br. 68), the Court required a showing of prejudice, but found it wanting.

2. Local 18 did not prove its collusion defense

Local 18 asserts (Br. 32-33, 65-66), as it did in *Donley's I*, *II*, *III*, *IV*, and *Nerone*, that the CEA and the individual employers "colluded" with the Laborers to "jumpstart" a "sham jurisdictional dispute" with a fake strike threat. Specifically, Local 18 asserts that the CEA and the Laborers negotiated for more specific forklift and skid steer language in the work jurisdiction clause of their 2012-2015 agreement to pave the way for the Laborers to claim that they would strike over the work. Local 18 also argues that the Board erred by granting the Charging Party employers' motion in limine to exclude evidence regarding collusion, and in denying Local 18's post-hearing motion to re-open the record. (Br. 58-61.) As shown below, Local 18's claims are without merit.

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). Moreover, mere cooperation between an employer and union during Section 10(k) proceeding does not demonstrate that a threat was the product of collusion. *Henkels & McCoy*, 360 NLRB at 823.

Under these standards, the Board previously rejected Local 18's collusion defense in *Donley's I*, *II*, *III*, *Nerone*, and *Donley's IV*. (JA91n.6,263-64, 362, JA5872-73,n.4,6038,6588.) As the Board observed in *Donley's IV*, although Local 18 asserts that the Laborers' initial 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." (JA5873 (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)).)

Indeed, in *Donley's IV*, after reviewing the record of all three previous proceedings, the Board reasonably concluded that Local 18 failed to establish any conduct constituting collusion. (JA5872-73,JA5873n.4.) Prior to negotiations for a new agreement, the CEA and its employer-representatives discussed Local 18's recent actions seeking work historically performed by Laborers-represented employees. As described above (p.12), 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 simply to clarify that the Laborers operated the disputed equipment by using the terms "forklift" and "skid steer" rather than just describing them. Specifically, the Board in *Donley's IV* explained why it rejected Local 18's assertions, repeated here (Br. 65-66) that the CEA, the

employers, and the Laborers engaged in collusion by negotiating for more specific forklift and skid steer language in 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." (JA5873n.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 Local 18 representatives admitted had been given away "a long time ago." (JA5881,JA5891-92; JA417.) In that context, the Board found that the revised agreement "in response to [Local 18's] attempts to obtain the disputed work was not improper," but instead was to "simply clarify" that the earlier language covered that equipment. (JA5873.) (See above at p. 12.) Local 18 has not demonstrated otherwise.

Local 18 has also failed to establish that the Board abused its discretion by precluding Local 18 from re-litigating its collusion defense in the instant proceeding. *See Reno Hilton*, 196 F.3d at 1285 n.10 (reviewing judge's refusal to admit evidence for abuse of discretion). In doing so, the Board relied on its well-established precedent that Local 18's collusion defense was a "threshold issue" decided in the Section 10(k) proceedings, and therefore was not subject to re-litigation in this subsequent Section 8(b)(4)(ii)(D) proceeding. (JA5872, JA6587.)

See Standard Drywall, 357 NLRB 1921, 1923 n.12 (2011), *enforced*, 547 Fed. Appx. 809 (9th Cir. 2013) (collusion is a threshold issue in a 10(k) proceeding rather than an element of an 8(b)(4)(D) violation, citing *Golden Grain*, 289 NLRB at 2, n.4). Local 18 further ignores the Board's finding that in addition to this issue being fully litigated twice in the Section 10(k) determinations, it was also fully considered in the *Donley's IV* unfair-labor-practice decision. (JA6581n.1).

Moreover, Local 18 has not, as it must, pointed to any prejudice that it suffered prejudice from the Board's no-relitigation determination. *See Salem Hosp. Corp. v. NLRB*, 808 F.3d at 67, 70-74. As the Board explained, even taking the "new evidence" raised in Local 18's motion to re-open the record as true, it "is simply more of the same argument." (JA6587n.4.) Local 18 points (Br. 66) to the recent statement of CEA officer Don Drier that the picket at Donley's Goodyear site set the tone for the CEA's subsequent negotiations with the Laborers. But as the Board explained, it already held that there was "nothing nefarious or collusive" in the CEA and Laborers negotiating its revised contractual language in response to Local 18's campaign to take the forklift and skid steer work from the Laborers." (JA6587n.4.) Thus, the Board did not abuse its discretion in denying Local 18's motion to re-open the record. *See Reno Hilton*, 196 F.3d at 1285 n.10 (requiring a showing of prejudice to reverse a denial of a motion to re-open the record). In sum, despite numerous bites at the apple, spanning all five previous decisions and

even “new evidence” raised post-hearing here, Local 18 has not established that the Board’s rulings with regard to its collusion defense should be disturbed.

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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December 2017

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18	)	
Petitioner/Cross-Respondent	)	
v.	)	
NATIONAL LABOR RELATIONS BOARD	)	Nos. 17-1122, 17-1131
Respondent/Cross-Petitioner	)	
and	)	Board Case No. 08-CD-135243
21ST CENTURY CONCRETE CONSTRUCTION, INC.; INDEPENDENCE EXCAVATING, INC.; KMU TRUCKING AND EXCAVATING, INC.; NERONE & SONS, INC.; PLATFORM CEMENT, INC.; RG SMITH COMPANY, INC.; SCHIRMER CONSTRUCTION CO.	)	
Intervenors	)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its final brief contains 11,336 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 December, 2017

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Respondent/Cross-Petitioner	)	
and	)	Board Case No. 08-CD-135243
21ST CENTURY CONCRETE CONSTRUCTION, INC.; INDEPENDENCE EXCAVATING, INC.; KMU TRUCKING AND EXCAVATING, INC.; NERONE & SONS, INC.; PLATFORM CEMENT, INC.; RG SMITH COMPANY, INC.; SCHIRMER CONSTRUCTION CO.	)	
Intervenors	)	

CERTIFICATE OF SERVICE

I hereby certify that on December 5, 2017, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the District of Columbia 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 serving a true and correct copy at the addresses listed below:

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

STATUTORY ADDENDUM

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Relevant provisions of the National Labor Relations Act (29 U.S.C. § 151, et seq.) are as follows:

Section 8(b)(4) (29 U.S.C. § 158(b)(4)):

(b) Unfair labor practices by labor organization. It shall be an unfair labor practice for a labor organization or its agents—

(4) **(i)** to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or **(ii)** to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is…

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e);
(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;
……
(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(e) Enforceability of contract or agreement to boycott any other employer; exception

It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible[1] and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection and subsection (b)(4)(B) the terms “any employer”, “any person engaged in commerce or an industry affecting commerce”, and “any person” when used in relation to the terms “any other producer, processor, or manufacturer”, “any other employer”, or “any other person” shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this subchapter shall prohibit the enforcement of any agreement which is within the foregoing exception.

Section 10(a) (29 U.S.C § 160(a)):

(a) Powers of Board generally. The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominately local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act [subchapter] or has received a construction inconsistent therewith.

Section 10(e) (29 U.S.C. § 160(e)):

(e) Petition to court for enforcement of order; proceedings; review of judgment. The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to

the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

Section 10(f) (29 U.S.C. § 160(f)):

(f) Review of final order of Board on petition to court. Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

Section 10(k) (29 U.S.C. § 160(k)):

(k) Hearings on jurisdictional strikes

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 158(b) of this title, the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

Regulations

29 C.F.R. 102.91

§ 102.91 Compliance with determination; further proceedings.

If, after issuance of the determination by the Board, the parties submit to the Regional Director satisfactory evidence that they have complied with the determination, the Regional Director will dismiss the charge. If no satisfactory evidence of compliance is submitted, the Regional Director will proceed with the charge under Section 8(b)(4)(D) and Section 10 of the Act and the procedure prescribed in §§ 102.9 through 102.51 will, insofar as applicable, govern. However, if the Board determination is that employees represented by a Charged Union are entitled to perform the work in dispute, the Regional Director will dismiss the charge as to that union irrespective of whether the employer has complied with that determination.