

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

SKANSKA BUILDING SERVICES USA,

Employer,

WASHINGTON AND NORTHERN IDAHO
DISTRICT COUNCIL OF LABORERS,

Charged party,

and

OPERATIVE PLASTERERS AND CEMENT
MASONS INTERNATIONAL ASSOCIATION,
LOCAL 528

Interested party,

Case 19-CD-211263

**OPERATIVE PLASTERERS AND CEMENT MASONS INTERNATIONAL
ASSOCIATION, LOCAL 528'S POST-HEARING BRIEF**

Submitted by:

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I. INTRODUCTION

On Thursday, March 21, 2018, Region 19 of the National Labor Relations Board conducted a hearing in Seattle, Washington, to resolve a purported 10(k) dispute between the Washington and Northern Idaho District Council of Laborers (“Laborers”) and Operative Plasterers and Cement Masons International Association, Local 528 (“Local 528”) regarding certain epoxy work performed on the University of Washington Life Sciences Project (“Life Sciences Project”). Daniel Hutzenbiler appeared on behalf of Local 528, Danielle Franco-Malone on behalf of the Laborers, and Christopher Hilgenfeld on behalf of the Charging Party, Skanska Building Services USA (“Skanska”).

II. ISSUE

Whether Local 528 made a claim for the epoxy/resinous work performed by Leewens Corporation (“Leewens”) employees at the UW Life Sciences Building?

III. SUMMARY OF LOCAL 528's ARGUMENT

This hearing should be quashed because the Board has no jurisdiction over the matter, as there is no dispute under 10(k) of the Act. The Board can only proceed with a determination of a dispute under Section 10(k) if there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, which requires a finding that there is reasonable cause to believe there are competing claims for the disputed work between rival unions and that a party has used proscribed means to enforce its claim.

This matter fails to meet that basic threshold because Local 528 has not made a claim for the work in question. Local 528 filed only a subcontracting grievance with Skanska, its signatory contractor, which the Board has repeatedly held does not constitute a competing claim for work. Local 528 has not pursued a grievance with the subcontractor, Leewens, nor has it threatened Leewens or otherwise made a direct claim to Leewens for the work at issue. The only communications it had with Leewens regarding the Life Sciences Project occurred at the direction of Skanska in an attempt to create

a sham jurisdictional dispute and related to Local 528's attempt to determine whether a subcontracting violation had occurred.

Furthermore, that singular communication in no way constituted a claim for work because, at most, it was representational, not jurisdictional, in nature. Local 528 has at no time sought to displace Leewens' employees performing the work. At most, Local 528 sought, via perfectly legitimate enforcement of its subcontracting clause with Skanska, only to represent the Leewens employees on the project performing the epoxy work at issue. Finally, even if Local 528's communications with Leewens somehow constituted a claim for the work, Local 528 properly disavowed those communications and disclaimed such work.

IV. STATEMENT OF FACTS

Skanska is signatory with both the Laborers and Local 528. Local 528's CBA explicitly covers epoxy work, which is the work at issue. In 2017, Skanska subcontracted epoxy work on the Life Sciences Project to Leewens, which is not signatory to Local 528. Leewens signed a "per job agreement" with the Laborers to perform the work on the Life Sciences Project, though none of its forty field employees were referred from the Laborers hiring hall. TR 67. Local 528 filed a subcontracting grievance with Skanska and processed that through the parties' grievance procedure. TR 33. At no time did Local 528 file a grievance with Leewens.

In July 2017, Patrick Leewens, the owner and vice-president of Leewens, called Local 528 Business Agent Justin Palachuk. TR 57; E-9. Patrick Leewens was told by Skanska to make the call because of the grievance filed by Local 528. TR 68–69. Palachuk testified unequivocally that he did not request or demand that the epoxy work be assigned to Local 528. TR 106. Rather, he asked for information regarding the scope of Leewens' work that it was performing. TR 105–06. Palachuk

further informed Leewens that the work described was covered in the Washington State prevailing wage scopes of work for Cement Masons, meaning that it had to be paid at Cement Masons rate. TR 109.

Patrick Leewens testified that Palachuk stated “that Skanska Life Sciences project was work that Cement Masons was claiming as theirs.” TR 58. On cross examination, Patrick Leewens admitted that, when he testified Palachuk “made a claim” for the work, “[h]e made the claim that L and I assigned the work to the Cement Masons.” TR 69–70. He further confirmed that Palachuk at no time requested that Local 528 members replace his employees on the jobsite, made no threats, and did not demand that Leewens sign an agreement with Local 528. TR 72. Over five months after the only Patrick Leewens sole communication with Local 528, in November and December 2017, the Laborers sent two letters to Skanska purporting to threaten to strike if the epoxy work was reassigned. E-6 and E-7.

V. ARGUMENT

A. *Local 528 has not made a claim for the work in question as it has merely filed a lawful subcontracting grievance with its signatory contractor.*

The Board should dismiss this proceeding and refuse to make a determination because there are not competing claims for the epoxy work on the Life Sciences Project. The Board has long held that a union can file a grievance over subcontracting with a general contractor without creating a claim for work under Section 10(k). Laborers (Capitol Drilling Supplies), 318 NLRB No. 100 (1995). Put another way, in the construction industry, a union’s action through the grievance procedure, arbitration or judicial process, to enforce an arguably meritorious claim against a general contractor that work has been subcontracted in breach of a lawful union subcontracting clause, does not constitute a claim to the work - provided that the union does not seek to enforce its position by engaging in or encouraging strikes, picketing or boycotts or by threatening such actions. *Id.*

Since 1995, the Board has consistently found claims for work in similar situations only when the grieving union went far beyond merely filing a subcontracting grievance. Thus, in Ballast Construction, 346 NLRB No. 126 (2016), the Board found a claim for work when the Operating Engineers local filed not just a subcontracting grievance against a signatory general contractor but also a grievance directly against the subcontractor with which it had a contract. Similarly, in Plasterers and Cement Masons Local 502, 328 NLRB No. 084 (1999), the Board found a claim for work where the union's business agent called the subcontractor directly, told the subcontractor that two employees were not supposed to be working on the project, stated that the work belonged to the union, and threatened to picket the job. *See also* IBEW Local 363, 326 NLRB 1382 (1998) (union representative directly approached subcontractor, claim to subcontractor that they were stealing the union's work, and threatened subcontractor with physical harm).

Here, Local 528 filed a subcontracting grievance with Skanska. Local 528 did not file a grievance with Leewens, nor did it threaten the company, request that it sign a collective bargaining agreement, or demand the assignment of work. At no time did Local 528 contact Leewens, and in fact repeatedly refused efforts by Skanska to enmesh it in a jurisdictional dispute. One single discussion occurred with Leewens, at the behest of Skanska, in which Local 528 merely pointed out that the correct rate of pay under state law is the Cement Masons'. That is a far cry from previous actions.

B. Local 528's communication with Leewens was limited to understanding scope of work and truthfully informing Leewens of state prevailing wage requirements.

We sought to avoid enmeshing the subcontractor. We refused to meet, we did not call.

Only one communication, phone call from Leewens to Local 528 Business Agent Justin Palachuk. Palachuk testified unequivocally that he did not request or demand that the epoxy work be

assigned to Local 528. Rather, he asked for information regarding the scope of Leewens' work that it was performing. He further informed Leewens that the work described was covered in the Washington State prevailing wage scopes of work for Cement Masons, meaning that it had to be paid at Cement Masons rate. Leewens confirmed that, when he testified Palachuk "made a claim" for the work, that it was in reference to the prevailing wage to be paid. He further confirmed that Palachuk at no time requested that Local 528 members replace his employees on the jobsite, made no threats, and did not demand that Leewens sign an agreement. Essentially, Leewens interpreted Palachuk's statement that Leewens pay the Cement Masons prevailing wage as a claim for the work. It is not.

Simply informing an employer of the applicable prevailing wage rate cannot constitute a claim for the work, as the Board's "determination of the merits of the dispute decides only which group of employees is entitled to perform the work, not the wages that the Employer must pay them for the work." IBEW Local 42, 354 NLRB 556, 558 (2009). Totally separate issue, and does not become a claim for the work as that is known.

While Patrick Leewens initially testified that Palachuk "claimed the work," his testimony was conclusory and ultimately is a legal determination. Furthermore, his testimony makes clear that Palachuk stated that the Washington State Department of Labor and Industries had determined that the work falls within the Cement Masons' scope of work, i.e., that the State had determined that the work must be paid at the Cement Masons' wage rate. The general April 2017 letter from Local 528 makes the similar point - such work must be paid, under state law, at the Cement Masons' pay scale.¹ E-4.

¹ While the letter does not explicitly state "prevailing wage," its repeated references to the State's prevailing wage enforcement agency, Labor and Industries, makes clear that that is what is referenced.

While Mr. Leewens apparently interpreted Palachuk's comment as a claim for work, that does not make it so under the law.

If a claim for work can be created based solely off a subcontractor's unilateral interpretation of a statement made by a union official, then union officials would not be able to have any conversations with subcontractors - even where, as here, they are seeking information to determine whether the scope of work involved covers their collective bargaining agreement. This is particularly true given that Local 528 repeatedly demonstrated by its words and actions that it did not desire to enmesh the subcontractor in this dispute. Again, this phone call was initiated by Skanska, not Local 528, and Local 528 refused to meet with Leewens in connection with the grievance. Regardless, Local 528's action in answering a single phone call from a subcontractor, investigating the subcontractor's scope of work for a subcontracting grievance, and informing the subcontractor of its obligations under state law, do not rise to the level of a claim for work, and this matter should be dismissed.

C. Even if Patrick Leewens' initial testimony is accurate, no claim for work occurred because this involved a representational issue, not a jurisdictional issue.

Assuming *arguendo* that Patrick Leewens correctly described Palachuk's initial statement, those statements are insufficient to create a claim for work. Under Lymo Construction Co., Inc., 334 NLRB 422 (2001), a finding of reasonable cause is precluded when the case involves a representational, not a jurisdictional, issue. The Board has said that, for a dispute to arise under Section 8(b)(4)(D), there must "be either an attempt to take a work assignment away from another group, or to obtain the assignment rather than have it given to the other group." FedMart Stores, 262 NLRB 817, 819 (1982).

That has not occurred here; Local 528 has never attempted to replace Leewens' employees with its own members. Importantly, Leewens is not fully signatory to the Laborers, so there is no reason that

Local 528 could not have simply represented Leewens' employees on the project. In fact, Skanska's own evidence demonstrated that Leewens has done precisely that on previous occasions. TR 74-75; E-3. Thus, this issue does not involve a traditional jurisdictional dispute, where Local 528 sought to replace Leewens' employees with its own members. At most, Local 528 sought to represent Leewens' employees, as it had in the past, and ensure that they were paid the correct wage rate under state law. As such, this matter should be dismissed.

D. Even if Local 528 somehow made a claim for the work at issue, it properly and effectively disclaimed that work.

Even if a claim for work had been made to Leewens, Local 528 has expressly disclaimed its interest in the assignment of such work, leaving only its lawful and proper subcontracting grievance remaining. CM 1. It is well established that when a party to a jurisdictional dispute effectively renounces its claim to the work in question, the Board considers the dispute to be at an end and quashes the notice of hearing. Operating Engineers Local 369 (Sustin Co.), 255 NLRB 476, 478 n. 1 (1981). It is also well established that the party raising such an issue "has the burden to satisfy the Board's requirements of a clear, unequivocal, and unqualified disclaimer of all interest in the work in dispute." Operating Engineers Local 77 (C. J. Coakley Co.), 257 NLRB 436, 438-39 (1981).

Local 528 sent an effective disclaimer to Leewens, the only party to whom a claim for the work allegedly had been made.² CM-1. As described above, it is well-established that Local 528 is entitled to pursue a subcontracting grievance with Skanska. The only action it arguably took to provide the Board with reasonable cause to consider this matter is Local 528's alleged claim made to Leewens for the work. By disclaiming and disavowing any such alleged statements to Leewens, the Board is left

² Given the disclaimer, Local 528 should be permitted to continue its permissible subcontracting grievance. Furthermore, it need not have sent that disclaimer to Skanska because it is not inconsistent with Local 528's permissible subcontracting grievance.

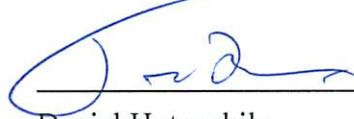
with only a subcontracting grievance, which is wholly insufficient to constitute a claim for work. As such, this matter should be quashed.³

VI. CONCLUSION

For the foregoing reasons, the notice of hearing should be quashed.

Respectfully submitted this 9th day of April, 2018.

MCKANNA BISHOP JOFFE, LLP



Daniel Hutzenbiler

Counsel for OPCMIA, Local 528

³ As Local 528 has not made a claim for the work, it is not addressing the merits of the dispute because they are irrelevant.

CERTIFICATE OF SERVICE

on: I hereby certify that I served the foregoing OPCMIA LOCAL 528'S POST-HEARING BRIEF

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by the following indicated method or methods:

- by **mailing** a copy thereof in a sealed, first-class postage-paid envelope, addressed to the attorney(s) listed above, and deposited with the United States Postal Service at Portland, Oregon, on the date set forth below.
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DATED this 3rd day of April, 2018.



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