

The Laborers and Cement Masons have both claimed the resinous flooring work at the UW Life Sciences Project. Skanska has instituted 10(k) proceedings to resolve this dispute. The Board, in utilizing the 10(k) factors, should assign this work to the Laborers.

II. STATEMENT OF FACTS

A. BACKGROUND FACTS

1. **Skanska USA Building Inc. (“Skanska”)**. Skanska is a general contractor performing construction services in the Washington area. (Tr. 18:12-17.) Skanska is signatory to five unions: Cement Masons, Laborers, Pacific Northwest Regional Council of Carpenters, International Union of Operating Engineers Locals 302 and 612, and the Iron Workers District Council of the Pacific Northwest. (Tr. 16:1-9.)

2. **Public Bid Process**. Skanska bids on public and private projects. There is a significant difference between the public bid process and the private bid process. (Tr. 40:13-15.) For public jobs, a general contractor is required to adhere to Washington State procurement rules regulated by RCW Title 39. (Tr. 40:16-20.) In doing so, Skanska is required to file a public notification for projects for a public bid. (*Id.*)

Once the bids are received from all the interested subcontracting parties, Skanska opens the bids publicly for the bidders to see the bid results. At that time there is an apparent low bid. (Tr. 41:2-3.) Skanska then reviews responsibility criteria to ensure that the low bidder is qualified to perform the work on the project. (Tr. 41:3-10.) If the successful low bidder is determined to be qualified, then they are required by state law to receive the work. (Tr. 41:11-18; RCW 39.10.380.)

3. **Qualified Low Bidder**. Skanska is required to give the bid project to the lowest qualified bidder. (Tr. 41:19-21.) If the covered work, however, is covered by one of

Skanska's five labor agreements, such as resinous flooring work, Skanska has the authority to direct the qualified bidder to use the appropriate craft for that work. (Tr. 42:2-5; RCW 39.10.380(1).)

In fact, on the UW Life Sciences Project, Skanska put out the greenhouse work for a subcontractor bid. The low qualified bidder was a Belgian company. (Tr. 20:15-21.) Because the greenhouse work was within the scope of Skanska's Iron Workers labor agreement, Skanska directed the Belgian company to use the Skanska iron workers to perform the work. (Tr. 20:15-21:1.) When that Company was unable to obtain iron workers, Skanska assigned and directed iron workers from its own workforce to complete the greenhouse project. (*Id.*)

4. Disputed Work. The parties have stipulated that the Disputed Work is: "the installation of resinous flooring in the lab areas at the Life Sciences building in the UW." (Tr. 11:17-12:15) (hereinafter "Disputed Work"). Resinous flooring is an epoxy, urethane or acrylic-based chemical compound. It is applied with specific tools in a specific manner to coat a flooring area. Resinous flooring is non-cementitious product used to create a very durable floor. (Tr. 43:20-45:7.) The resinous flooring process requires the use of caulking tools, steel blades for scraping the floor, cove trowels, rollers, roller covers, paint brushes, spike rollers, spiked shoes, shot blasters, vacuums, brooms, squeegees, and rollers. (Tr. 55:15-56:11; 83:4-7.) The specific product for resinous flooring at issue in this case is MMA from BASF. BASF, as the manufacturer, requires that any company or applicators that use its product are certified. (Tr. 63:22-64:4; 89:1-17.)

5. UW Life Sciences Building Project. The UW Life Sciences Project is a public works project that was awarded to Skanska in January or February of 2016. (Tr. 42:20.) Part of this project involved the Disputed Work. (Tr. 11:17-12:15.) The Disputed Work is within the

scope of the Laborers assignment of work with Skanska. (Tr. 21:3-15.) Skanska bid the project pursuant to the public procurement rules and received four bids: Leewens, FD Thomas, HDI Polymers, and Riverstone. (Tr. 48:3-12; Emp. Exh. 8.) Leewens and FD Thomas both utilize Laborers. (*Id.*) Leewens was the low bidder. (*Id.*)

6. **Leewens Corporation.** Leewens Corporation is a company that performs resinous flooring work, tank linings, waterproofing, concrete strengthening, and repairs of plastic liners. (Tr. 53:11-12.) Leewens Corporation has performed a number of subcontracting projects regarding resinous flooring with Skanska over the years. (Emp. Exh. 3) (performing 23 resinous flooring jobs since 2014). It is uncontested that at public works jobs Skanska had the authority to direct the work to ensure that it was not in violation of its contractual labor agreements. (Tr. 20:5-11; 42:2-5; 102:14-20.)

B. **LABORERS CLAIM FOR WORK**

7. **Currently Performing.** The Laborers have been performing the Disputed Work since awarded the project in 2016. (Tr. 48:1-10; 49:14-16.)

8. **Laborers Work within Scope of Skanska CBA.** The Laborers consider the resinous flooring work within the scope of the Skanska CBA. (Tr. 101:17-102:16.)

9. **Laborers Threat.** The Laborers have threatened Skanska to “use all means necessary, including resorting to picketing and economic action, if Skanska ceases to ensure that [the disputed work] is assigned to the Laborers Union.” (Emp. Exh. 7.)

C. **CEMENT MASONS**

10. **UW Animal Research Care Facility Claim (“ARCF”).** The Cement Masons’ claim for work was initiated regarding the ARCF Project. (Tr. 25:23-26:1.) The ARCF Project also utilized resinous flooring. (*Id.*) Skanska awarded the work to DPK, Inc. (*Id.*) DPK, Inc.

utilized Laborers. (Emp. Exh. 3.) Eric Coffelt, the Cement Masons Business Manager, informed Don Kowalchuk, Vice President of Operations at Skanska (also handles labor relations), that the resinous flooring work on the ARCF Project was within the scope of the Cement Masons. (Tr. 24:15-24; 25-26:19.) He also indicated that the UW Life Sciences Project Disputed Work was claimed by the Cement Masons. (Tr. 37:7-9.) The Cement Masons then filed a claim with the Washington Department of Labor & Industries to have the Disputed Work classified under the scope of Cement Masons work. (Tr. 27:3-7.)

11. **April 27, 2017 Cement Masons Claim of Disputed Work.** After receiving an unfavorable L&I determination, the Cement Masons claimed all resinous flooring within the scope of their work. (Emp. Exh. 4.)¹ In response to the Union's April 27, 2017 claim for work, Don Kowalchuk emailed his project managers informing them of the work claimed by the Cement Masons and the various trades. (Tr. 118:22-119:23.)

12. **July 17, 2017 Claim to Leewens Corporation.** In response to this letter, ultimately Patrick Leewens of Leewens Corporation contacted Justin Palachuk at the Cement Masons. Palachuk informed Leewens that the Disputed Work at the Life Sciences Project was claimed by the Cement Masons. (Tr. 57:4-59:12.) Palachuk further stated that the Cement Masons claimed any work with rollers, squeegees, cove trowels and other trowels. (Tr. 59:13-16.) All of this work was the work being performed on the UW Life Sciences Project. (Tr. 59:17-24.) Leewens followed up this phone conversation with Justin Palachuk with an email to Skanska on the same day detailing the conversation. (Emp. Exh. 11.)

13. **July 18, 2017 ARCF Grievance.** The day after the July 17, 2017 conversation, the Cement Masons filed a pay-in-lieu grievance over the ARCF resinous flooring work. The

¹ The April 27, 2017 letter was not limited to just public prevailing wage jobs. (Tr. 119:24-120:4, Exhibit 4.) The seamless coating work listed in the April 27, 2017 letter is the resinous flooring work. (Tr. 25:3-15.)

ARCF Project was completely finished at that period of time. Since there was no work being performed on the UW ARCF there was no basis of subcontracting that work to a different entity. The only basis for the grievance would be to seek pay-in-lieu of work. (Emp. Exh. 13.) The Union sought all monetary damages related to the work. (Emp. Exh. 14.)

14. UW Life Sciences Grievance. During the meetings with the Union regarding the UW ARCF over the Disputed Work, the Union made an oral grievance over the Disputed Work at the UW Life Sciences Project. (Tr. 117:6-11.) This oral grievance was followed with the Union's Step Two grievance processing the matter. (Emp. Exh. 5.) The matter is currently proceeding to arbitration. (Tr. 29:3-8.)

15. Meeting to Resolve Jurisdictional Dispute between Laborers & Cement Masons. Pursuant to the agreement with the Cement Masons, Skanska attempted to have a meeting between the two trades to resolve the dispute over the work. (Tr. 28:4-16.) The Cement Masons refused to attend. (*Id.*)

16. Current Status of the Grievance. It is uncontested that the Cement Masons are continuing to process the grievance regarding the UW Life Sciences Project against Skanska.² (Tr. 29:3-8; 120:11-12.) The parties are proceeding to arbitration on this matter. (*Id.*) The Cement Masons have not disclaimed the work to Skanska. (*Id.*) Nor have they relinquished their grievance claim. (*Id.*)

III. DISCUSSION

A. JURISDICTION UNDER SECTION 10(K) OF THE ACT.

Skanska is caught between two competing claims for the Disputed Work. Sections 8(b)(4)(D) and 10(k) regulate jurisdictional disputes and their resolution. These sections were

² The Union is also processing the UW ARCF grievance against Skanska.

“designed to resolve competing claims between rival groups of employees, and not to arbitrate disputes between a union and an employer where no such competing claims are involved.” *Highway Truckdrivers and Helpers, Local 107 (Safeway Stores, Inc.)*, 134 NLRB 1320, 1322 (1961.) Section 10(k) is designed to determine which of the two competing unions is entitled to perform the existing work. The Board has held that the applicability of Section 8(b)(4)(D) is not limited to competing groups of employees working for the same employer, but also extends to an attempt, as here, to groups of employees of another [employer].” *Western Electric Co., Inc.*, 141 NLRB 888, 894 (1963.)

Section 10(k) requires the Board to make an affirmative award of disputed work based on the evidence presented by the parties. *NLRB v. IBEW, Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 577 (1961.) To proceed under Section 10(k), there must be reasonable cause to believe that Section 8(b)(4)(D) has been violated. *IBEW, Local 48 (Kinder Morgan Terminals)*, 357 NLRB 2217, 2218 (2011.) The standard factors establishing Section 10(k) jurisdiction are: (1) competing claims to the disputed work between rival groups of employees; (2) the use of proscribed means by a party to assert a claim to the work in dispute; and, (3) the lack of an agreed upon method of voluntary adjustment of the dispute. (*Id.*)

Where a labor organization is claiming work that has not been previously performed by employees it represents, the “objective is not work preservation, but work acquisition,” and the Board will resolve the dispute through a 10(k) proceeding.” *Laborers Local 310 (Donley’s III)*, 361 NLRB No. 37, at *11-12 (slip opinion) (quoting *Kinder Morgan Terminals*, 357 NLRB at 2219) (finding that the Operating Engineers pay-in-lieu grievances to claim the forklift and skidster work that they had not historically performed was a claim for work.)

1. **The Laborers and the Cement Masons have both made a competing claim for the Disputed Work.**

The Laborers and the Cement Masons have both made a competing demand to Skanska for the Disputed Work. Skanska is stuck in the middle of these competing claims.

LABORERS

The Laborers are currently assigned to perform the Disputed Work. (Tr. 21:3-15; 48:3-12.) A trade craft that performs the work indicates that they have made a claim for work in dispute. *Sheet Metal Workers Local 54 (Goodyear Tire & Rubber Co.)*, 203 NLRB 74, 76 (1973).

Furthermore, the Laborers have made a written claim for the Disputed Work, and threatened to picket Skanska if the work is reassigned. Emp. Exh. 6, 7. At the hearing, the Laborers emphasized the claim for the Disputed Work. (Tr. 101:17-102:16.)

CEMENT MASONS

The Cement Masons have also made a claim for the work. In fact, they have made repeated claims for the Disputed Work to Skanska, as well as to Leewens Corporation. Those claims are as follows:

- (i) On a different project — UW ARCF — involving resinous flooring, Eric Coffelt, the Cement Masons' Business Manager, spoke with Don Kowalchuk, Vice President of Skanska responsible for labor relations. (Tr. 24:15-25:4, 25:23-26:25.) After the resinous flooring work on the ARCF project was assigned to the Laborers through DPK, Inc. (a subcontractor), Coffelt claimed the resinous flooring work for the Cement Masons. (Tr. 26:11-17.) During that conversation, he also spoke about the Disputed Work on the UW Life Sciences

project. (Tr. 32:7-9.) Coffelt claimed the resinous flooring work (on both projects) for the Cement Masons.³ (Tr. 24:15-25:4, 25:23-26:25, 32:7-9.)

- (ii) On April 27, 2017, Coffelt followed up his conversation with Kowalchuk with a detailed list of the work claimed by the Cement Masons. (Emp. Exh. 4; Tr. 24:15-25:9.) This list included the Disputed Work. (*Id.*)
- (iii) On July 17, 2017, Justin Palachuk, Cement Masons' Business Agent, spoke with Patrick Leewens, Vice President of Leewens Corporation. (Tr. 57:4-14; Emp. Exh. 11.) Leewens Corporation was the subcontractor performing the Disputed Work. (Tr. 21:3-15.) Palachuk started the conversation by informing Leewens that the Disputed Work was claimed by the Cement Masons. (Tr. 58:14-19; Emp. Exh. 11.) Palachuk told Leewens that the Cement Masons claimed all work with rollers, squeegees, and cove trowels. (Tr. 59:13-16; Emp. Exh. 11.) All of this was the type of resinous flooring work in dispute at the UW Life Sciences Project. (Tr. 59:17-22; Emp. Exh. 11.)
- (iv) In July 2017, the Cement Masons filed two separate pay-in-lieu grievances against Skanska claiming the resinous flooring work. The initially grievance was filed on July 18, 2017 by the Cement Masons concerning resinous flooring work on the UW ARCF project. (Emp. Exh. 12.) During the grievance step meetings on the ARCF grievance, the Cement Masons presented an oral grievance on the Disputed Work at the UW Life Sciences Project, and subsequently followed up this grievance in writing. (Emp. Exh. 5; Tr. 117:6-14.) It is uncontested that the Cement Masons have filed a grievance over the

³ Coffelt was present at the Cement Masons' table during the 10(k) proceeding and elected not to testify.

Disputed Work. (*Id.*) Both pay-in-lieu grievances are proceeding to arbitration. (Tr. 28:17-29:8.) The Cement Masons have never disclaimed or renounced the grievances against Skanska over the Disputed Work.

The Cement Masons have made three different types of claims for the Disputed Work. First, they have made a claim directly to Skanska to have the work assigned to them. Next, the Cement Masons have filed pay-in-lieu grievances concerning the Disputed Work. Finally, they made a claim to the subcontractor, Leewens Corporation, to have the work assigned to them.

(1) The Cement Masons made a claim for the Disputed Work directly to Skanska.

Coffelt made a claim for the Disputed Work to Skanska, through Don Kowalchuk. He informed Kowalchuk that the Cement Masons claimed the resinous flooring work at the UW Life Sciences Building Project. (Tr. 32:7-9.) He followed up on this phone conversation with a letter to Skanska claiming all resinous flooring work. (Emp. Exh. 4.) This included the Disputed Work. (Tr. 119:17-120:4.) In that letter, the Cement Masons informed Skanska that “Local 528 [was] experiencing a large volume of issues concerning our scope of work regarding division 9 portions of our scope.” (*Id.*) The letter was sent to ensure that all contractors “will understand that this extent of work is claimed by Local 528 Cement Masons.” (*Id.*) The demand by the Cement Masons was not limited to public works projects. (*Id.*; Tr. 119:24-120:4.) Skanska understood that this letter was a claim by the Cement Masons on all work performed on Skanska projects. (*Id.*) Coffelt did not rebut this testimony.

(2) The Cement Masons made a claim for the Disputed Work by filing the pay-in-lieu grievances over that work.

In addition to the claim for the Disputed Work made directly to Skanska, the Cement Masons have also claimed the Disputed Work through its pay-in-lieu grievances against

Skanska. “The Board has long held that pay-in-lieu grievances alleging contractual breaches in the assignment of work constitute demands for the disputed work.” *Laborers Int’l Local 310 (Donley’s III)*, 361 NLRB No. 37, at *3-4 (2014) (finding the OPEIU’s pay-in-lieu grievance was a claim for disputed work); *Carpenters Los Angeles Council (Sinerton & Walberg)*, 298 NLRB 412, 414 (1990); *Local 30, United Slate, Tile & Composition Roofers v. NLRB*, 1 F.3d 1419, 1427 (3rd Cir. 1993) (attempted distinction “between seeking work and seeking pay for the work is ephemeral”); *Laborers Int’l (Super Excavators)*, 327 NLRB 113, 113-14 (1998) (The Board found the Union made claim for work, even though the union argued that it was not seeking reassignment of the work, but simply seeking money damages based upon contractual violations.) The Board has further held that a grievance to a general contractor concerning subcontracting work is also a claim for work. *Laborers Local 860 (Ballast Construction)*, 364 NLRB No. 126 (2016) (slip op.) (holding that a grievance filed against a general contractor regarding subcontracting work did involve a jurisdictional claim for work).

The Cement Masons’ grievance over the Disputed Work seeks backpay for the work performed. (Tr. 33:7-10.) The Cement Masons acknowledged that it was seeking monetary damages for the work performed. (Emp. Exh. 14.) Making a contractor pay twice for the same work is the essence of a pay-in-lieu grievance, thereby forcing the contractor to reassign that work to their members. This is a pay-in-lieu grievance.

The Cement Masons claim that the subcontracting grievance is not a pay-in-lieu grievance is misguided. This is no different than the traditional 10(k) proceeding and claim for work. *See, e.g., Laborers’ Int’l Local 931 (Carl Bolander & Sons Co.)*, 305 NLRB 490 (1991).

“We find no merit to this contention. This case presents a traditional 10(k) situation in which two unions have collective-bargaining agreements with the Employer and each union claims its contract covers the same work. In these circumstances, a claim

to the work in dispute based on an asserted contractual right to the work does not remove the case from being a 10(k) dispute. Rather, the contractual claim constitutes a claim to the work and is one of the relevant factors for the Board's consideration in awarding that work. Otherwise, a union could consistently avoid the reach of Section 10(k) and Section 8(b)(4)(D) of the Act by couching its claim in terms of a contract claim for damages. Consequently, we conclude that there exists active competing claims to disputed work between rival groups of employees.”

Id., at 491 (internal citations omitted).

In *Donley's III*, there was a dispute over the assignment of work related to a forklift and/or a skid steer. 361 NLRB No. 37, at *1-2. The employers received grievances from the Operating Engineers claiming the assignment of the skid steer work violated the subcontracting clause of the parties' contract. The Operating Engineers, similar to the Cement Masons, argued that they had not made a claim for work, but instead were only seeking monetary damages under the parties' contract. (*Id.*), at *8-9. The Board found that the Operating Engineers had made a claim for the work by way of their pay-in-lieu grievances. (*Id.*), at *10-11. As will be shown below, the Laborers have consistently performed the resinous flooring work. “Where, as here, a labor organization is claiming work that has not previously been performed by employees it represents, the objective is not work preservation, but work acquisition,” and **the Board will resolve the dispute through a 10(k) proceeding.**” *Id.*, at *4 (citing *Kinder Morgan Terminals*, 357 NLRB No. 182, at *3 (2011)). After all, the Board has instructed the Region to look to the “real nature and origin of the dispute in determining whether a jurisdictional dispute exists.” *SSA Terminal*, 344 NLRB 1018, 1020 (2005).

The Board sees through the façade of a union attempting to escape Section 10(k) relief by merely claiming that it wants monetary damages for the work performed, but has no interest in the work. *Donley's III, supra; Laborers' Local 931 (Carl Bolander & Sons, Inc.)*, 305 NLRB

No. 49, at *5-6 (1991) (slip op.); *Operating Engineers Local 18 (Donley's II)*, 360 NLRB No. 113, at *4 (2014) (slip opinion); *Laborers (Eshbach Bros., LP)*, 344 NLRB 201, 202 (2005).

It is expected that the Cement Masons may claim that merely filing a subcontracting grievance against the general contractor is not a claim for work, citing *Laborers (Capital Drilling Supplies)*, 318 NLRB 809 (1995). In *Capital Drilling*, the Board held that in the construction industry, a union's efforts to enforce a lawful union-signatory subcontracting clause against a general contractor through grievance, arbitration or court proceeding, does not constitute a claim for work to the subcontractor. The Board has later narrowed this holding by finding that "a true jurisdictional dispute [does arise] when a union, seeking enforcement of a contractual claim, not only pursues its contractual remedies against a general contractor, but also makes a claim for the work directly to a subcontractor. *IBEW Local 702 (F.W. Electric)*, 337 NLRB 594 (2002).

Moreover, in *Capital Drilling*, one union made a claim of work to the general contractor, and another union made a claim of work to the subcontractor. See *Super Excavators, Inc.*, 327 NLRB 113, (1998) (finding that the union's pay-in-lieu of grievance was a claim for work, and the concurring Board Member Hurtgen acknowledged that *Capital Drilling* was not applicable because the employer in *Super Excavating* had agreements with both unions, whereas in *Capital Drilling* the general contractor had an agreement with one union, and the subcontractor had an agreement with another one). The argument that the Cement Masons' pay-in-lieu of grievance is not a claim for work has no merit. *Id.* After all, "the Employer can avoid the grievance only by giving the work to the grieving union." *Id.* In the instant matter, the Employer is signatory to both Unions, and both Unions have made a claim for the work to the general contractor. The

Board has long held that a grievance aimed at obtaining work, not simply preserving it, is a jurisdictional claim for work.

Furthermore, this case is less like *Capital Drilling* and more similar to *Ballast Construction*. In that case, there was a jurisdictional dispute between the operating engineers and the laborers under 10(k.) 364 NLRB No. 126, at *3-4. The operating engineers had filed a pay-in-lieu grievance against the general contractor. *Id.*, at *5. The employers and the laborers contended that there were competing claims for the work in dispute. The operating engineers claimed that they had not made a claim for the work, but instead – relying upon *Capital Drilling Supplies* – asserted that it was only pursuing a contractual grievance against the general contractor for failing to honor the subcontracting clause. *Id.*, at *10-11. The Board found that the operating engineers had made a claim for the work. *Id.*, at *12-15.

(3) The Cement Masons made a claim for the Disputed Work directly to the subcontractor, Leewens Corporation.

In addition to making a claim for the Disputed Work to Skanska, the Cement Masons have also made a claim directly to the subcontractor, Leewens Corporation. On July 17, 2017, the Cement Masons' Business Agent spoke with Patrick Leewens, Vice President of Leewens Corporation. During that conversation, Palachuk claimed the Disputed Work for the Cement Masons. (Tr. 58:14-19; Emp. Exh. 11.) Palachuk also told Leewens that the Cement Masons claimed all work with rollers, squeegees, cove trowels and other trowels. (Tr. 59:13-16; Emp. Exh. 11.) All of this was the type of resinous flooring work in dispute at the UW Life Sciences Project. (Tr. 59:17-22; Emp. 11.) Not only did Patrick Leewens credibly testify, but his testimony is supported by other communications that the Cement Masons were having with Skanska concerning the work that they claimed. (Emp. Exh. 4.) He certainly provided reasonable cause to believe a claim was made.

The Cement Masons have not limited their dispute to Skanska. By making a claim for the work to Leewens Corporation, *Capital Drilling* is not applicable. See *F.W. Electric, Inc. Local 227*, 337 NLRB at 595 (holding that a claim to the general contractor and a statement to the subcontractor that the union had claimed the work was sufficient to find that the union made a claim for the work to the employers); *Glass, Molders, Pottery, Plastics & Allied Workers Int'l Union (Olympian Precast, Inc.)*, 333 NLRB 93 (2001) (finding that the union's statement to the subcontractor that if the subcontractor hired out of the union hall the grievance against the general contractor would go away was a claim for work). The Cement Masons cannot now claim that they do not claim this work.

The Cement Masons may attempt to claim that they have sufficiently disclaimed interest in the Disputed Work. Any such claim is meritless. On January 8, 2018 (on the eve of the initial 10(k) proceeding date),⁴ the Union issued a letter to Leewens right before the initial hearing date for the 10(k) hearing whereby the Union claimed that it was not seeking Leewens' work. The Cement Masons have not disclaimed its intent to pursue the pay-in-lieu grievance against Skanska, or renounced its intent to do so in any way. As a result, the Cement Masons have not disclaimed the disputed work.

To be of valid disclaimer, the Union must take clear unequivocal steps to renounce all claims for work. *Laborers Local 79 (DNA Contracting)*, 338 NLRB 997, 998-99 (2003). "Conduct inconsistent with a disclaimer militates against its effectiveness. Thus, an otherwise clear and unequivocal disclaimer may be rendered ineffective by subsequent union conduct manifesting a continuing jurisdictional claim." *Id.* Where a party's actions are inconsistent, the Board will not find a proper disclaimer was made. *Id.*; see also, e.g., *Iron Workers Local Union*

⁴ The 10(k) notice of hearing was sent to the parties on January 5, 2018. The 10(k) proceeding was initially scheduled to occur on January 25, 2018. The hearing was cancelled due to the government shutdown.

112 (*Freesen, Inc.*), 346 NLRB 953 (2006) (rejecting the union's disclaimer due to the union's continuation of a court proceeding that the Board found inconsistent with a disclaimer of the work). The Cement Masons' claim in this case was not an effective disclaimer because the Cement Masons have continued its pay-in-lieu grievance against Skanska.

In fact the Board has dealt with an issue directly on point in *Southern California Pipe Trades District Council No. 16 (L&M Plumbing)*, 301 NLRB 1203 (1991.) In *L&M Plumbing*, the union had made a phone call to a subcontractor that it claimed certain work. Shortly after that phone call, the union then filed a grievance against the general contractor. The union's grievance sought monetary damages against the general contractor for allegedly violating the parties' subcontracting clause for the work that was being performed by the said subcontractor. The issue proceeded to 10(k) hearing. Prior to the 10(k) hearing, the union sent a letter to the subcontractor saying it was no longer interested in the work and had no interest in representing the employees of the subcontractor. The Board found this was not an effective disclaimer. Specifically, the Board found that the continuance of the grievance was inconsistent with any assertion of the disclaimed interest in the work. Because the union continued its claim against the general contractor, the disclaimer was not effective.

Here, regardless of the January 8 letter to Leewens Corporation, the Cement Masons have continued to pursue its grievance claim against Skanska over the Disputed Work. (Tr. 28:17-29:8, 37:14-21, 38:7, 120:9-23.) The Cement Masons have not stopped the grievance process. (*Id.*) The Cement Masons have made no disclaimer or renouncement to Skanska that it does not intend to pursue monetary damages through the grievance process. (*Id.*) Therefore, under Board law, the Cement Masons' argument that they have effectively disclaimed the Disputed Work is completely without merit.

(4) Skanska is the proper party seeking protection under 10(k.)

The Cement Masons have made a claim over the Disputed Work directly to Skanska and to the subcontractor, Leewens Corporation. Thus, the Board has jurisdiction under Section 10(k) of the Act. The Cement Masons, however, may claim that Skanska as the general contractor is not the party that assigns work and, therefore, 8(b)(4)(D) does not prohibit their conduct. Any such claim will be an error.

First, in reviewing the applicability of Section 10(k) jurisdiction, the Board must take into account the real-life factors of each individual case. Here, Skanska can direct the work of its subcontractors, because: (1) the Disputed Work is part of a public project; and (2) the Disputed Work is covered within the scope of the Laborers CBA with Skanska. In fact, on this UW Life Sciences Project, Skanska has already assigned a trade (iron workers) to perform work for a subcontractor. The Board has stated that it considers the “realities of the situation.” Where an Employer has the “proprietary power” to determine who will perform the work, then the Employer “exerts sufficient control over the work in dispute for it to be considered the employer [] for the purposes of [the 10(k) proceeding.” *Int’l Union (General Motors)*, 239 NLRB 365, 367 (1978). In this case, unlike most construction cases, Skanska has legal authority to assign the work, and is, therefore, the appropriate Employer to assign and direct the work.

Furthermore, even if that is not the case, the Board still has jurisdiction. Section 8(b)(4)(D) applies not only to employers whose work is in dispute, but to any employer against whom a union engages in unlawful proscribed activity. The seminal case in this issue is *Longshoremen ILA, Local 1911 (Cargo Handlers)*, 236 NLRB 1439 (1978.) In that case the union had coerced a stevedore to assign certain work which the stevedore had no power to assign. Despite this the NLRB determined that this was exactly the kind of case that 8(b)(4)(D)

was intended to remedy. The Board found that Section 8(b)(4)(D) makes it an unfair labor practice for a labor organization to engage in or induce any individual employed by any person engaged in commerce to engage in a strike or to threaten, coerce or restrain any person engaged in commerce or by an object thereof is forcing or requiring **any** employer to assign particular work to employees in a particular labor organization or a particular tradecraft or class rather than employees of another tradecraft or distinction. The word “**any**” before employer gave clear indication to the Board as outlined in *Cargo Handlers* that it was not simply the entity that assigned particular work.

Cargo Handlers has been followed on several occasions, for instance *International Longshoremen Ass’n (Rukert Terminals Corp.)*, 266 NLRB 846, 849 (1983), the NLRB made it clear again that an employer being threatened or coerced to assign work could maintain a Section 8(b)(4)(D) charge, even if it does not have the power to reassign the work in dispute to the respondents. *See also, Int’l Union of Elevator Constructors, Local 8, (Otis Elevator Co.)*, 355 NLRB 76 (2010) (there is a valid jurisdictional dispute even where the union directs its proscribed activity against an employer that did not employ the employees who performed the work in dispute;⁵ *Int’l Union of Operating Engineers (Structure Tone, Inc.)*, 352 NLRB 635, 636 (2008) (Section 8(b)(4)(D) was intended to provide a remedy to an employer even if the employer is not the party that employs the operator who currently performs the work in dispute);⁶ *United Association of Journeymen (Gulf Oil)*, 275 NLRB 484, 485 (1985) (Section 10(k) jurisdiction is proper even where the charging party does not directly employ the employees who perform the disputed work because the Act protects not only the employers whose work is in dispute but any employer who the union acts for the purpose of forcing or

⁵ *Otis Elevator* and *Structure Tone, Inc.* work both abrogated by the Supreme Court’s decision in *New Process Steel, LP v. NLRB*, 560 U.S. 674 (2010), but nevertheless represent persuasive authority.

⁶ See the previous footnote.

acquiring a work assignment); *Auto Workers (General Motors)*, 239 NLRB 365, 367 (1978) (even were the Board to accept the “finding that the employer lacks the authority to effect an assignment of work in dispute, it would still find the employer had raised a causable jurisdictional dispute”). The Board has consistently found it has jurisdiction over an employer that is an object of a union’s unlawful conduct. Whether the employer is the one that assigns particular work or not, is not the determinate factor. The question is – is the union’s conduct aimed at obtaining that work regardless of who employs the employees. Here, the clear answer is yes.

2. The Laborers have used a proscribed means to assert a claim to the Disputed Work.

Laborers have threatened a work stoppage. (Emp. Exh. 7.) Specifically, the Laborers stated: “the Laborers are prepared to use all means necessary, including resorting to picketing and economic action” if the work is diverted from them. (*Id.*) It is well established that threats of picketing and threats of a work stoppage constitute a proscribed means under the Act. *Laborers’ Local 731 (Pully Construction)*, 352 NLRB 107, 109 (2008). A threat over the assignment of work made in written letter is sufficient for reasonable cause for a 10(k) hearing. *Carpenters (Standard Drywall, Inc.)*, 348 NLRB 1250, 1253 (2006); *Laborers Int’l Union of N. Am., Local 210*, 351 NLRB 210 (2007) (finding that the threat to strike was a proscribed means to enforce the claim to the work in dispute); *Laborers Int’l (Super Excavators)*, 327 NLRB 113, 113-14 (1998).⁷

Similarly, in *Structural Steel & Bridge Painters (Carabie Corp.)*, 356 NLRB 971 (2011) the employer had a labor agreement with Local 806, and also with Local 731. Local 806's

⁷ To the extent the Cement Masons attempt to argue that the Laborers’ threat was a sham, there is no evidence to support such a contention. A strike threat is not a sham simply because it would have violated a no-strike clause in a collective bargaining agreement. *Lancaster Typography Union 70 (C.J.S. Lancaster)*, 325 NLRB 449, 451 (1998).

business representative, told the employer that Local 806 would picket and sue the employer if the employer gave the work to employees represented by Local 731. Applying the standard for 10(k) cases, the Board determined “first, we find that there is reasonable cause to believe that there are competing claims to the disputed work because [i]n any event, where, as here, two unions have contracts and each union claims its contract covers the same work, the Board has found competing claims for disputed work. *Id.* Second, the Board determined that “ we find that there is reasonable cause to believe that Local 806 used means proscribed under Section 8(b)(4)(D) to enforce its claim” because threatening to picket is a proscribed means of enforcing a claim to disputed work. *Id.*

3. The Parties have stipulated that there is no agreed upon method of voluntary adjustment.

The Parties have stipulated that there is no agreed-upon method of voluntary adjustment.

(Tr. 13:18 – 14:3.)

B. SECTION 10(k) FACTORS SUPPORT THE ASSIGNMENT OF WORK TO THE LABORERS.

Section 10(k) requires the Board make an affirmative award of the disputed work based on the evidence provided by the parties. *Columbia Broadcasting*, 364 U.S. at 577. The Board, in determining a jurisdictional dispute, should be considered “an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case.” *E&B Paving*, 340 NLRB 1256, 1259 (2003); *see also J.A. Jones Construction Co.*, 135 NLRB 1402 (1962). The *Jones Construction* factors include, but are not limited to: (1) certifications and collective bargaining agreements; (2) employer preference, current assignment, and past practice; (3) industry and area practice; (4) relative skills; and, (5) economy and efficiency of operations.

1. There are no NLRB Certifications

The parties stipulated that the Employer is not failing to conform to an order or certification of the Board determining the bargaining representative for the employees performing the work in dispute. (Tr. 12:16-13:4.)

2. The Laborers Collective Bargaining Agreement Support an Award of the Disputed Work to the Laborers

Here, Skanska has labor agreements with both the Laborers and the Cement Masons. (Emp. Exhs. 1, 2.) The only testimony provided was that the Disputed Work was covered under the terms of the Skanska / Laborers Collective Bargaining Agreement. (Tr. 101:17-102:16.) The Cement Masons provided no evidence that their labor agreement with Skanska would cover this work. Moreover, the overwhelming past practice was that Skanska utilized subcontractors that used Laborers for this work. (Emp. Exh. 3.)

3. Employer Preference

It is well settled that the factor “employer preference” is entitled to “substantial weight.” The Employer prefers that the Laborers continue to perform this work.⁸ (Tr. 23:3-13, 50:6-14.) The Disputed Work is approximately 95% complete. (Tr. 50:13-14.) The Laborers have the most qualified work force with certified applicators to perform the Disputed Work. (Tr. 23:3-13, 50:6-14.) The Laborers have a good history of performing the resinous flooring work for the Employer with a high-level of quality. (*Id.*)

4. Current Assignment of the Disputed Work

It is undisputed that the Disputed Work is currently performed by the Laborers. (Tr. 23:17-19, 49:14-16.)

⁸ Also, although not required, the subcontractor, Leewens Corporation, also prefers to have Laborers finish the work. (Tr. 63:22-25.)

5. The Employer's Past Practice

Next, Laborers have a lengthy history of performing the resinous flooring work for Skanska. Since 2014, the following Skanska jobs required resinous flooring to be performed, and Laborers performed the work.⁹

Order Date	Job Description
1/9/2014	BOEING 4-21 JET CITY CAFE COW
1/10/2014	UWMC SE 116 AGS
3/28/2014	BOEING 737 MAX FUSELAGE SI
5/14/2014	BOEING 737 MAX EMPENNAGE
6/19/2014	CORBIS MEZZANINE
9/9/2014	BOEING 4-81 MAX TRANS MAINT RE
9/25/2014	BOEING 9-120 SIDING REPL. COW
10/29/2014	BOEING 737 MAX-Eng Bldup Reloc
12/10/2014	BOEING 5 AXIS GANTRY MILL-COW
12/31/2014	BOEING Rate 4-20 Line 4 Fut Rd
2/3/2015	BOEING 4-82 Rosie's Remodel
2/26/2015	BOEING 2015 CC128 Inst 2 Wg Po
2/26/2015	BOEING Ln 2 Flow Day 8 Epoxy F
2/26/2015	BOEING 2015 Rosie's Phase III
3/5/2015	BOEING 737 MAX Twin Line
3/31/2015	BOEING 5-AXIS 55' GNTRY ML-COW
5/5/2015	BIFI VIS & SP PROJECT

⁹ Skanska has had 31 projects that required resinous flooring since 2014. Of those 31, 30 of the projects utilized Laborers.

5/31/2015	BOEING 737 MAX 3PME Ins Ln 1&2
8/31/2015	UW ARCF
4/4/2016	HBO CODE LABS CoW
5/3/2016	BOEING 40-56 Carpet Shop Move
8/3/2016	BOEING IRC Router Area
8/30/2016	STANTEC TI 400FV-CoW
9/27/2016	UW LIFE SCIENCES COW
10/10/2016	THE CHARTER
11/3/2016	BOEING-Add Man 3D Print-WBS 2.
11/15/2016	BOEING 9-101 H-STAB
1/12/2017	BOEING 4-86 FUTURE FLW-PreBake
4/13/2017	BOEING 45-12 STATIC COW
7/20/2017	BOEING 4-86 Futr Flw-Dinol Bth

(Emp. Exh. 3.)

6. Industry Practice

There is also an industry practice that Laborers perform resinous flooring work. Skanska presented evidence that it has overwhelmingly used Laborers to perform the resinous flooring work. This is consistent with the industry practice.

Leewens Corporation received a jurisdictional arbitration award from the Plan for Settlement of Jurisdictional Disputes in 2003 concerning epoxy flooring work at the Seattle Public Library.^{10 11} (Emp. Exh. 10.) That arbitration decision determined that the resinous

¹⁰ Epoxy-based flooring is essentially identical to resin-based flooring; the compounds are slightly different. (Tr. 61:7-13.)

¹¹ The Cement Masons elected not to participate in this jurisdictional dispute. Any trade may participate in the jurisdictional dispute process. (Tr. 61:5-6.)

flooring work was Laborers' work. *Id.*, at *5. Since 2003, Leewens Corporation has exclusively used Laborers to perform this work. (Tr. 63:1-10.)

Leewens Corporation's use of Laborers is consistent with the other resinous flooring work in the area. (Tr. 100:16-24.) Along with Leewens Corporation, DPK, Inc., F.D. Thomas and Contech Service also utilize Laborers to perform the resinous flooring work. (*Id.*) There was no testimony that Cement Masons perform this work in the area. (Tr. 89:18-21.)

7. Relative Skills

Resinous flooring is utilized on projects because it is extremely durable, impervious to moisture, is chemically resistant, and cures extremely fast. Whereas a cementitious (or concrete-based) product may take twenty-eight (28) days to cure, a resinous-product cures overnight. (Tr. 44:23, 47:1-5.) Based upon this extremely fast curing process, employees must be skilled to handle the product. (Tr. 84:12-23.) If the product is not properly applied, it can be a "disaster." (Tr. 86:14-18). In fact, the manufacturer requires that the applicators are certified by the manufacturer. (Tr. 89:1-13.) The Laborers are certified and trained to apply the resinous flooring that is in dispute. (*Id.*) There was no testimony that the Cement Masons have anyone that is certified to perform this work.

8. Economy and Efficiency of Operations

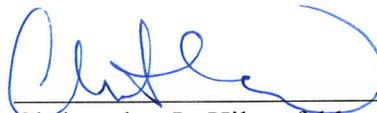
Finally, economy and efficiency of the operations also establish the Laborers as the preferred craft to perform the work. The Disputed Work is approximately 95% complete. (Tr. 50:14.) It would be extremely disruptive to bring in Cement Masons to finish the job. (Tr. 50:18-51:3.) It would interfere with the Employer's project schedule, and it is unclear that the Cement Masons could even provide qualified labor. (*Id.*) Moreover, warranty requirements for the resinous flooring work require that a single entity perform work. (Tr. 46:3-47:5.) It

could be incredibly harmful to bring in a different source of labor to finish the last bit of the Disputed Work.

IV. CONCLUSION

For all the reasons above, the Board should determine the dispute by protecting the status quo, which requires the Disputed Work remain with the Laborers.

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Christopher L. Hilgenfeld
DAVIS GRIMM PAYNE & MARRA
701 5th Avenue, Suite 4040
Seattle, WA 98104-7097
Ph. (206) 447-0182 | Fax: (206) 622-9927
Email: chilgenfeld@davisgrimmpayne.com

Attorneys for Skanska USA Building, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of April, 2018, I electronically filed the foregoing ***POST HEARING BRIEF OF EMPLOYER SKANSKA USA BUILDING, INC.*** with the National Labor Relations Board using the NLRB E-Filing system.

I further certify that I caused to be served a true and correct copy of the foregoing document upon the following individuals via electronic mail as required under the authority of Rule 102.5:

Attorney for WA & N ID Dist Council of Laborers:

Danielle Franco-Malone
Dmitri L. Iglitzin
Schwerin Campbell Barnard Iglitzin & Lavitt
18 W Mercer Street, Suite 400
Seattle, WA 98119-3971
Ph. (206) 257-6011 / (206) 285-2828
Fax: (206) 378-4132
E-mail: franco@workerlaw.com
Iglitzin@workerlaw.com

Attorney for OPCMIA Local 528:

Daniel R. Hutzenbiler
McKanna Bishop & Joffe
1635 NW Johnson Street
Portland, OR 97209
Ph. (503) 226-6111
Fax: (503) 226-6021
E-mail: dhutzenbiler@mbjlaw.com

WA & N ID Dist Council of Laborers:

Jermaine Smiley
Business Manager
WA & N ID District Council of Laborers
P.O. Box 12917
Mill Creek, WA 98082-0917
Ph. (425) 741-3556
Fax: (425) 741-2787
E-mail: jsmiley@nwlaborers.org

OPCMIA Local 528:

Eric Coffelt
Business Manager
OPCMIA Local 528
6362 Sixth Avenue S
Seattle, WA 98108
Ph. (206) 441-9386
Fax: (206) 441-9018
E-mail: ecoffelt@opcmialocal528.org



Betsy E. Green, Legal Assistant to Attorneys
for Skanska USA Building, Inc.
E-mail: bgreen@davisgrimmpayne.com