

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 7**

MICHIGAN LABORERS' DISTRICT
COUNCIL, AN AFFILIATE OF THE
LABORERS' INTERNATIONAL UNION OF
NORTH AMERICA, AFL-CIO

Case 07-CD-221111

and

RAM CONSTRUCTION SERVICES OF
MICHIGAN, INC.

and

LOCAL 324, INTERNATIONAL UNION OF
OPERATING ENGINEERS, AFL-CIO

and

LOCAL 2, INTERNATIONAL UNION OF
BRICKLAYERS & ALLIED CRAFTWORKERS
(BAC), AFL-CIO

and

LOCAL 149, UNITED UNION OF ROOFERS
WATERPROOFERS & ALLIED WORKERS, AFL-CIO

and

MICHIGAN REGIONAL COUNCIL OF
CARPENTERS, UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF AMERICA,
AFL-CIO

**INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 324's POST-
HEARING BRIEF**

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INTRODUCTION

The Collective Bargaining Agreement, applicable to RAM Construction Services and Local 324 of the International Union of Operating Engineers is clear that the operation of all power-driven and power-generating equipment belongs to the Operating Engineers. Central to the subject 10(k) hearing is the assignment of such work to other trades, particularly the Laborers. The Employer alleges that there is not enough equipment work to support an Operator in their self-proclaimed “composite crews,” in which a group of employees made up of various labor trades perform work on a project or jobsite. It is clear from the record however, that the Employer in this matter is disregarding the work jurisdiction provisions of the Collective Bargaining Agreements it has entered into, with the basis being that there is not enough work at RAM Construction Services, Inc., on power-driven or power-generating equipment to support an Operating Engineer, and abide by the Agreement, as a farce to guarantee that it can create “composite crews” of cheaper trades. Under RAM’s composite crew theory, that it did not bargain for, RAM can use any trade for any work regardless of their contractual requirements. The Employer has colluded with its preferred trade, and/or in a contrived fashion, created a dispute, and ignored agreed upon alternate dispute resolution procedures, in order to improperly end up in front of the board. There are no 8(b)(4)(D) violations, no active competing claims, no proscribed activity threatened or taking place, the parties are stipulated to the Plan, an alternative voluntary dispute resolution process, and the applicable CBAs explicitly set forth jurisdictional dispute procedures which were not followed. This matter should not be in front of the Board.

This case involves a dispute over certain work performed by RAM Construction Services, Inc., (“RAM” or “Employer”) involving “The operation of all power-driven or power-generating construction equipment used in the building or alteration of all structures and

engineering works in building, heavy construction and residential work, for the erection, operation, and maintenance of all hoisting and portable equipment, installation and operation of well point systems and freeze-pipe systems, involving the job performed by Ram Construction Services of Michigan, Inc. at its Detroit Free Press restoration job site located at 321 West Lafayette Blvd., Detroit, Michigan.” (BD Ex J). The Charging Party, RAM, filed the instant charge against Michigan Laborers' District Council, an Affiliate of the Laborers' International Union Of North America, AFL-CIO, (“Laborers”), alleging a violation of Section 8(b)(4)(D) of the National Labors Relation Act (“Act”) (Bd Ex B).

On June 18, 2018, the Regional Director for NLRB Region 7 issued an order, scheduling a 10(k) hearing. (Bd Ex D) On June 22, 2018, RAM Construction Services of Michigan, Inc. (RAM) filed a Motion to Include as an Interested Party, Bricklayers and Allied Craftworkers Union Local 2 of Michigan (Local 2). On July 13, 2018, the Regional Director for NLRB Region 7 issued an amended order scheduling a 10(k) hearing including Local 2, International Union of Bricklayers & Allied Craftworkers, Local 149, United Union of Roofers, Waterproofers & Allied Workers, and the Michigan Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America. (Bd Ex J). On July 27, 2018, The Carpenters filed a Motion for Removal as an Interested Party, or Alternatively, Adjournment of the August 01, 2018 Hearing. The Board entered an Order denying such. (Bd Ex l). The hearing was ultimately held on August 01, 02, and 07, 2018.

STATEMENT OF FACTS

The Employer is a waterproofing and restoration contractor and is specifically engaged in concrete restoration, vertical restoration, and façade restoration of buildings and parking decks

throughout the State of Michigan, Ohio and other parts of the Midwest. They also maintain a Department of Transportation Division. (T mini 91-92).

Since at least 2006, RAM Construction Services (previously, Western Waterproofing Company), has been bound to several collective bargaining agreements between Local 324 and certain employer organizations, including the AGC of Michigan CBA (J Ex 3) via a Short Form Agreement. (E Ex 12). Per the short form agreement, the “Employer agrees to abide by...all other terms, conditions and provisions in the most current Collective Bargaining Agreements between...” several employer associations “and the Union, for the entire State of Michigan.” The Short Form Agreement also states:

The parties hereto agree that in the event of a jurisdictional dispute with any other union or unions, the dispute shall be submitted to the Impartial Jurisdictional Disputes Board for settlement in accord with the plan adopted by the Building Trades Department of the AFL-CIO. The parties hereto further agree that they will be bound by any decision or award of the Disputes Board. There shall be no stoppage of work or slowdown arising out of any such dispute, nor shall either party resort to proceedings before the National Labor Relations Board, State Boards, or State or Federal Courts before a decision is rendered by the Impartial Jurisdictional Disputes Board.

(E Ex 12)

The AGC of Michigan CBA, Section 3, states clearly that:

The jurisdiction of the Union is recognized by the Employers to be the operation of all power-driven or power-generating construction equipment used in the building or alteration of all structures and engineering works insofar as the National Labor Relations Board recognizes operation of such types of equipment as being under the jurisdiction of Operating Engineers, Firemen, Oilers, and Apprentice Engineers, rather than any other skilled trade group.”

(J Ex 3).

Section 3(c) of the AGC of Michigan Agreement requires that the “Employer shall employ Operating Engineers for the erection, operation, and maintenance of all hoisting and portable equipment, installation and operation of well point systems, and freeze pipe systems used in

construction work.” (J Ex 3). The combined language of these provisions are nearly identical to the work set forth in the notice of hearing. (Bd Ex j).

The International Union of Operating Engineers (IUOE), to which Local 324 is affiliated, is a member of the Building and Construction Trades Department of the AFL-CIO (BTC/D/NABTU) and has been a member of the BTC/D/NABTU at all times relevant to this matter. (T mini 625). The Laborers' International Union of North America, AFL-CIO, to which the Michigan Laborers' District Council is affiliated, is also a member of the BTC/D/NABTU and has also been a member of the BTC/D/NABTU at all times relevant hereto. Article X of the BTC/D's Constitution states:

All jurisdictional disputes between or among affiliated National and International Unions and their affiliated Local Unions and employers shall be settled and adjusted according to the present plan established by the Building and Construction Trades Department, or any other plan or method of procedure adopted in the future by the Department for the settlement of jurisdictional disputes. Said present plan or any other plan adopted in the future shall be recognized as final and binding upon the Department and upon all affiliated National or International Unions and their affiliated Local Unions.

(OE Ex 16)

Member Unions of the BTC/D are beholden to the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (“Plan”) (OE Ex 17). As stated in the Plan’s preamble:

The Agreement is entered into by and among the Building and Construction Trades Department, AFL-CIO, on behalf of its constituent National and International Unions and their affiliated local Unions... and the Employer Associations signatory to this Agreement...

Around the early months of 2015, Kermit Burke, Local 324 Business Agent was assigned to RAM Construction Services, replacing Agent Derrick Sanders, in an effort to smooth a contentious relationship between the Union and Ram. (T mini 524-525). During that transition and throughout his tenure as the business agent, Mr. Burke became aware of issues with RAM

using Laborers' and not Operators on their power-driven and power-generating equipment. (T mini 525-526). Mr. Burke received these complaints from people that were on jobsites where RAM was working or Operators employed by RAM themselves. (T mini 526). Mr. Burke would then conduct on-site visits to observe who was operating the equipment, and upon observing Laborers operating the equipment, would attempt to resolve the situation by consulting with the foreman of the project, superintendents, and RAM's Director of Operations, Michael McNab, and attempt to get an Operator on the equipment. (T mini 527-530). Usually, RAM would move an operator over from another site or Mr. Burke would acquire Operators for them. (T mini 527-530). For example, at a RAM jobsite at the Little Caesars Arena, Mr. Burke got a hold of the Local 324 steward at Little Caesars and made arrangements for him to take care of RAM for any of their operating needs. If wasn't available, Local 324 would have one of the other operators onsite accommodate RAM. (T mini 533) (E Ex 25). (OE Ex 12).

Central to the subject 10(k) hearing is the assignment of power-driven and power-generating work to other trades, particularly the Laborers. Local 324 has consistently claimed this work, and historically, has attempted to rectify the situation by communicating with RAM to get an operator on the equipment notwithstanding limited and sporadic equipment use which has never been an issue between the parties. (T mini 525-527)

As Mr. Mazur testified, the Operators have been consistent with pursuing their assigned work:

- Q. So it was more than a -- it's 2018 so it's been more than a couple of years, two three years apparently then since you were receiving complaints from the operators about their equipment being ran by a different trade, correct?
- A. Yeah, we -- like you had said though, it's not an everyday or every job occurrence. It happens plus or minus once a quarter, once every six months we receive a verbal complaint that we have a laborer or a bricklayer or somebody else on a piece of equipment. (T mini 170)

On April 17, 2018, Mr. Burke received a call indicating that at the Old Detroit Free Press Building Project, RAM Construction was utilizing equipment, but not utilizing Operators. As a result, Mr. Burke arrived at the job site and upon his arrival witnessed a bobcat being driven by a laborer, Tim Wolf. Mr. Burke conversed with Mr. Wolf, and Mr. Wolf indicated that he had asked for an Operator but was told no and indicated that Mr. Burke should call Mr. McNab.

(T mini 538-539). Mr. Burke called Mr. McNab, and the President of the Company, Robert Mazur. Mr. Mazur told Mr. Burke that it was the work of the Laborers, that RAM had assigned the work to the Laborers, and if Mr. Burke could show him in the Operator's contract where it was they work then RAM might reconsider. (T mini 541). Mr. McNab told Mr. Burke to send over some names of Operators to fit the position, but then later backtracked and indicated that RAM was not going to hire any operators, that the work was laborers work, and that it had been assigned to the Laborers. (T mini 543). Mr. McNab then emailed Mr. Burke, attaching an unsigned letter of assignment, dated November 25, 2015 which assigned the work in question to the Laborers. (E Ex 20) (OE Ex 2). This was the first instance that the Operating Engineers became aware that there was an alleged, albeit unsigned, assignment of their work to the Laborers. (E Ex 20)

(OE Ex 2). It is important to note however that this letter was not signed, and no verification was attached to indicate that it was ever sent or received. It simply never appeared before. RAM was taking a new stance.

As a result of RAM's refusal to hire Operators for the Old Detroit Free Press Building, on or about May 03, 2018, IUOE Local 324 filed a grievance against RAM Construction under the collective bargaining agreement applicable to RAM and the Operating Engineers (J Ex 3) regarding RAM's assignment of some equipment operation to employees other than Operating

Engineers, in connection to RAM's Detroit Free Press restoration project in Detroit. (OE Ex 7). On May 22, 2018, Geno Alessandrini, Business Manager of the Michigan Laborers' District Council wrote to Doug Stockwell, Business Manager of Local 324, and noted that pursuant to the jurisdictional dispute provisions of both the National Specially Agreement (J Ex 5) and The AGC Agreement (J Ex 3) with RAM, the Unions should move forward to the International Union Representatives meeting with the Employer. (E Ex 22). However, in response to Local 324's grievance, ignoring the resolution procedures already beginning, on May 25, 2018, RAM alerted the Michigan Laborers' District Council that work that had been assigned to laborers was to be reassigned to employees represented by Operating Engineers because of concern over an unrelated Fringe Benefit Fund audit and not wanting to pay fringe benefits twice. (E Ex 17). The Laborers' District Council responded by threatening RAM with unambiguous job site disruptions on May 29, 2018. (E Ex 24).

On May 31, 2018, Business Agent Kermit Burke filed two jurisdictional dispute reports against RAM, with the International Union of Operating Engineers, including one for the Old Detroit Free Press Building. (OE Ex 8 &9). RAM filed an unfair labor practice (ULP) charge with the National Labor Relations Board (NLRB) on May 31, 2018, charging that the Michigan Laborers' District Council had violated §8(b)(4)(D) of the National Labor Relations Act. (Bd Ex B). The International Union of Operating Engineers filed notice of this violation with the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry's Administrator on June 01, 2018. (OE Ex 18) In response, on June 05, 2018, the Plan Administrator instructed RAM and the Laborers to cease the alleged violations and process any jurisdictional disputes through the Plan. (OE Ex 19). The Administrator indicated that if these actions were not taken, the matter would be referred to a Plan arbitrator. (OE Ex 19) Local 324, withdrew the subject

grievance on June 05, 2018. (E Ex 28). The Laborers' International Union responded accordingly as well, and wrote to the Business Manager of the Michigan Laborers' District Council, Geno Alessandrini, on June 6, directing that the Michigan Laborers' cease any offending conduct and process any jurisdictional disputes under the normal procedures of the Plan for the Settlement of Jurisdictional Disputes. (OE Ex 6) The Laborers complied with this directive, and wrote to RAM on June 7, 2018:

It is our understanding that Local 324 has withdrawn the grievance and has applied to the jurisdiction of the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (the "Plan"). Article II, §2 of the Plan states, "When a contractor has made a specific work assignment, all unions shall remain at work and process any complaint over a jurisdictional dispute in accordance with the procedures herein established by the Administrator." **Accordingly, we hereby withdraw any threat to stop work or picket RAM projects.** We understand that Local 324 is not processing any complaint over RAM's job assignment to the Laborers and, therefore, [we] expect work assignments to be made consistent with RAM's past practices.

(E Ex 14) (Emphasis Added)

Thus, the Laborers' District Council agreed to remain at work and process the jurisdictional dispute in accordance with the procedures set forth by the Plan Administrator.

In the interim, RAM continued to dispute that it was bound by the plan. On June 06, 2018, RAM responded to the Plan Administrator stating that the Plan did not have jurisdiction over IUOE's complaint, because RAM was not stipulated to the Plan. (OE Ex 22) The Plan Administrator requested a response from IUOE and IUOE presented multiple documents which illustrated that RAM was indeed stipulated to the Plan. (OE Ex 25).

On June 07, 2018, The Plan Administrator again wrote to the parties, noting that the Laborers International had directed the Michigan Laborers Council to cease any impediment to job progress, but also noting that RAM's pursuit of an unfair labor practice charge against the Michigan Laborers' District Council over a jurisdictional dispute had not been resolved. The Plan

Administrator opined that via the short-form, RAM was bound to the Plan and that the complaint would move forward. (OE Ex 20) In accordance with the provisions of the plan, the Plan Administrator selected an arbitrator to rule on whether the parties were bound by and/or stipulated to the Plan. (OE Ex 20). RAM submitted its position to the Arbitrator on June 11, 2018 (E Ex 13). A hearing followed on June 12, 2018 in front of Arbitrator Greenberg.

On June 13, 2018, in an award issued under the Plan's procedures, an arbitrator found the parties to be bound to the Plan. (OE Ex 21) A Supplemental Decision and Order was issued on June 17, 2018 (E Ex 15). Arbitrator Greenburg concluded that "although the Michigan Laborers' District Council improperly threatened economic action against RAM in connection with an issue involving work assignment, Laborers' has taken effective steps to withdraw that threat. RAM's unfair labor practice charge with the NLRB constitutes an improper "impediment to job progress" under the Plan and its Procedural Rules, and thus is prohibited. RAM Construction Services was directed to withdraw its unfair labor practice charge filed May 30, 2018, and RAM further was directed to cease any participation in the processing of the ULP charge or related proceedings. RAM also was directed to resolve any jurisdictional or work assignment disputes through the normal Plan mechanisms." (E Ex 15). Local 324's grievance remains withdrawn, and the Laborers have not taken, or threatened to take any improper economic action against RAM.

Thus, without a proscribed objective violative of 8(b)(4)(D) from either Union, the Board cannot proceed to issue an award of work pursuant to Section 10(k) of the act and must quash the Notice of Hearing. As noted by Arbitrator Greenberg, the subject jurisdictional dispute must proceed through normal Plan mechanisms.

ARGUMENT

The NLRB has established a test for determining when a dispute is properly deemed jurisdictional and submitted to a § 10(k) hearing. Before the Board may proceed with the determination of a dispute pursuant to Section 10(k) of the Act, The Board conducts a three-step inquiry to determine "whether there is reasonable cause to believe that §8(b)(4)(D) of the Act has been violated." *Int'l Alliance of Theatrical and Stage Employees, Local Union No. 39 (Shepard Exposition Services)*, 337 N.L.R.B. 721, 723 (2002). This requires a finding of reasonable cause to believe that (1) a union has used a proscribed means—such as picketing or threatening to picket—to enforce its claim to the work in dispute; (2) there are competing claims to the disputed work between rival groups of employees; and (3) there is no agreed-upon method for resolving the dispute voluntarily. *Laborers Int'l Union of N. Am., Local No. 1184 (Golden State Boring)*, 337 N.L.R.B. 157, 158 (2001). When these requirements are met, the Board will award the disputed work to one or the other of the vying unions, based on considerations such as the employer's past practice, industry custom, and contract rights. *NLRB v. Radio & Television Broad. Eng'rs Union*, 364 U.S. 573, 81 S. Ct. 330 (1961).

Local 324 states that there are no proscribed means — such as picketing or threatening to picket— taken by the respective unions, to enforce any claim to the work in dispute at the old Detroit Free Press Building, and that any threats that may have been made have been permanently withdrawn. Local 324 has withdrawn their grievance, and the Laborers' stated in writing that they withdrew any threat to stop work or picket RAM projects. (E Ex 14) Just as significant, the parties are bound to resolve jurisdictional disputes through the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry ("Plan"), which is a well-

recognized method for the voluntary adjustment of jurisdictional disputes, as well as having clear and defined mechanisms to resolve such disputes in their respective collective bargaining agreements. The factors cannot be met in this matter. There is no reasonable cause to believe that §8(b)(4)(D) of the Act has been violated, or will be violated at the Old Detroit Free Press Building, and thus, the Board cannot proceed with a determination.

Stipulation To The Plan

The Board has long recognized the Plan as a method for the voluntary adjustment of jurisdictional disputes as long as the party unions and the employer are bound to submit jurisdictional disputes to the Plan. Here, the party unions are local constituent bodies of member International Unions of the BCTD. Thus, the Unions are required to abide by the Plan's procedures for the settlement of jurisdictional disputes. According to the NLRB itself:

“Before proceeding to determine the dispute, the Board must satisfy itself that it is "empowered" to do so under Section 10(k). First, it must decide whether reasonable cause exists to believe that Section 8(b)(4)(D) has been violated. This requires determining whether there is reasonable cause to believe that there are competing claims to the work in dispute and that the charged union used proscribed means - such as a threat to picket the charging party employer if the work is reassigned - to enforce its claim. In addition, because Section 10(k) conditions the Board's power to determine the dispute on the absence of an agreed-upon method for its voluntary adjustment, the Board must satisfy itself on that score as well. If there is no reasonable cause to believe that 8(b)(4)(D) was violated, or if the parties have agreed upon a method to adjust it to which all of them (including the employer) are bound, then the Board quashes the notice of Section 10(k) hearing, and that's the end of that.”

<https://www.nlr.gov/rights-we-protect/whats-law/unions/jurisdictional-disputes-section-8b4d-10k>.

In addition to failing to meet the first two steps of the Board's three-step inquiry to determine "whether there is reasonable cause to believe that § 8(b)(4)(D) of the Act has been violated," all of the parties are stipulated to the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry as adopted by the Building and Construction Trades, Department of the

AFL-CIO, and thus, fail to meet the third step. Local 324 and the Laborer's District Counsel are stipulated to the Plan pursuant to their affiliation with the Building and Construction Trades Department. See *IUOE Local 363* N.L.R.B. No. 17 (2015). Indeed, that fact is no longer in dispute. RAM is bound by the Plan pursuant to its signed Short Form Agreement dated August 2006. (E Ex 12).¹

This agreement was signed by Robert T. Mazur, then-president of Western Waterproofing. Western Waterproofing later merged with RAM Building Restoration & Waterproofing, and Western Waterproofing had adopted RAM's name, effective January 1, 2008.

Robert Mazur - the individual who signed the Western Waterproofing short-form agreement – continues today as the CEO of RAM Construction Services.

The relevant short-form agreement includes the following provision:

JURISDICTIONAL DISPUTES - The parties hereto agree that in the event of a jurisdictional dispute with any other union or unions, the dispute shall be submitted to the Impartial Jurisdictional Disputes Board for settlement **in accord with the plan adopted by the Building Trades Department of the AFL-CIO**. The parties hereto further agree that they will be bound by any decision or award of the Dispute Board. There shall be no stoppage of work or slowdown arising out of any such dispute, nor shall either party resort to proceedings before the National Labor Relations Board, State Boards, or State or Federal Courts before a decision is rendered by the Impartial Jurisdictional Disputes Board. (E Ex 12)

Emphasis added.

The referenced Impartial Jurisdictional Disputes Board was replaced by the current Plan, which was created in 1984. (OE Ex 17) The Plan is sponsored by the construction unions (acting together as the Building and Construction Trades Department/NABTU) and several major national construction employer entities and trade associations. It was widely understood within

¹ Please note that this signature page is from Western Waterproofing Company. RAM is the legal successor of same. The record is clear that this issue is not in dispute.

the construction industry that the Plan was the successor of the Impartial Jurisdictional Dispute Board.² Although the subject parties had not updated the text of the short-form agreement by 2006 to remove the long-outdated reference to the Impartial Jurisdictional Disputes Board, (even then) it is evident that the short-form agreement's reference to "the plan adopted by the Building Trades Department of the AFL-CIO" plainly points to the Plan, which is the official jurisdictional disputes mechanism endorsed by the Department and was in place for 22 years prior to the signing of the short form.

Indeed, at the Tuesday, June 12, 2018, Arbitration in Washington D.C in this matter, the two unions acknowledged that they and their local affiliates are participants in the Plan by virtue of their affiliation with North America's Building Trades Unions (NABTU, formerly known as the Building and Construction Trades Department, AFL-CIO). (OE Ex 21). The NABTU Constitution includes the following provision:

ARTICLE X

Jurisdictional Disputes

All jurisdictional disputes between or among affiliated National and International Unions and their affiliated Local Unions and employers shall be settled and adjusted according to the present plan established by the Building and Construction Trades Department, or any other plan or method of procedure adopted in the Future by the Department for the settlement of jurisdictional disputes. Said present plan or any other plan adopted in the future shall be recognized as final and binding upon the Department and upon all affiliated National or International Unions and their affiliated Local Unions.

(OE Ex 16)

Local 324's Business Manager Doug Stockwell, testified that Local 324 is bound by the terms of the Plan through its affiliation with its International. (T mini 625). The Employer is bound to the AGC CBA via the Short Form Agreement (E Ex 12). As noted above, the short

² The Supplemental Decision and Order of Arbitrator Greenberg at pages 9 and 10 deal directly with this successor relocation shown. (E Ex 15)

form contains language addressing the method for resolving jurisdictional disputes. Thus, the "Jurisdictional Disputes" clause of the 2006 short-form agreement between RAM and Local 324 constitutes a stipulation to the Plan. The Laborers' NABTU affiliation was fully sufficient to bind the Laborers' International Union and its local Michigan affiliates to the Plan; this is clearly demonstrated by Laborers' International Union of North America's correspondence to the Michigan Laborers' Council June 06, 2018 letter and participation with the Plan Administrator. (OE Ex 6). As such, all parties are stipulated to agreed-upon method for the voluntary adjustment of jurisdictional disputes.

That is what RAM agreed to when it became a signatory to the Short Form, especially in light of the fact that at the time of signature, the Impartial Jurisdictional Disputes Board no longer existed, and how it agreed to deal with potential jurisdictional disputes. RAM cannot change that position at this time because it feels it can get a better result in a different venue. As a result, the Board has no jurisdiction to hear the subject jurisdictional dispute and the Notice of Hearing must be quashed.

Collective Bargaining Agreement Jurisdictional Dispute Provisions

Additionally, RAM conveniently ignored and did not follow Section 4 of the AGC CBA, which is entitled "JURISDICTIONAL DISPUTES". That Section does not mandate that such disputes, even if RAM claims to not be stipulated to the plan, be taken to the Board. Instead, the Agreement calls for the competing unions and the Employer to "meet" at "the jobsite...to settle the dispute. If a settlement is not reached at that meeting the Union shall request that its International Union assign a representative who shall make arrangements to meet representatives of the other International Union or Unions involved and representatives of the Employer on the jobsite to seek settlement of the dispute." (J Ex 3). The Provision also requires the Employer

itself to reach out to the international. “The Employer shall also request the International Union involved to assign representatives to seek settlement of the dispute. (J Ex 3). RAM did not contact the International Union of Operators in accordance with the AGC Agreement . (T159-161)

The National Specialty Agreement between the Laborers’ International Union of North America AFL-CIO and Western Waterproofing Company (J Ex 5), contains similar language in Article XVII, “Jurisdictional Disputes” indicating that “In the event of a dispute over the assignment of work, it will first be required to have a meeting between the Local Union Representatives in an effort to adjust. In the event that no resolution is reached, it will then be necessary to refer the jurisdictional dispute to the General Presidents of the International Unions Involved.” (J Ex 5). Such contractual adherence is evidence by Geno Alessandrini’s May 22, 2018 letter to Doug Stockwell (E Ex 22.).

Therefore, both Unions have agreements with RAM that set forth the procedures to follow in the event of a jurisdictional dispute. (J Ex 3 & J Ex 5). Only RAM chose to not follow the applicable collective bargaining agreements, hoping to avoid going to the Plan or dealing with its provisions, contrary to the entire purpose of Section 10(k), which is to protect the “innocent employer” from being caught between competing Unions.

Furthermore, consistent with the terms of the Plan, the AGC Agreement requires that the “Union and the Employer agree that there shall be no strikes, lockouts, or interruption of the disputed work over jurisdictional disputes.” (J Ex 3) Local 324 has upheld this agreement. Both the Laborers’ and Local 324’s collective bargaining agreement does not require that jurisdictional disputes be heard by the Board even if the absence of The Plan. The proper procedure is laid out, with the dispute ultimately being referred to the International Unions.

Thus, via stipulation to the Plan, and pursuant to the applicable Collective Bargaining Agreements, the Board does not have subject matter jurisdiction to resolve jurisdictional disputes subject to resolution through The Plan.

Board Jurisdiction

The Board, like other administrative agencies, has limited jurisdiction, and “some showing of legal jurisdiction must be made in every case brought before it.” *International Longshoreman & Warehouseman’s Union (Catalina Island Sightseeing Lines)*, 124 NLRB 813, 814-815 (1950).

In the context of jurisdictional disputes, the NLRA itself limits the board’s authority. Section 10(k) provides that when a party is charged with violating Section 8(b)(4)(D), “the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen unless...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.” 29 USC §160(k).

The Board has consistently interpreted the language within Section 10(k) to mean that it lacks subject matter jurisdiction to resolve a jurisdictional dispute if the parties have agreed upon a method for resolving the dispute or if the dispute has actually been resolved. *Plumbers Local 447*, 224 NLRB at 988. In fact, the Board has explained that “Section 10(k) of the Act, although directing that the Board hear and determine disputes out of which Section 8(b)(4)(D) charges have arisen, contains equally mandatory language directing that in certain circumstances the Board is not to make any determination.” *Carpenters Local 943 (Manhattan Construction Co.)*, 96 NLRB 1045, 1047-49 (1951). The Board simply “has no authority to determine the dispute,”

where an agreed-upon method of voluntary adjustment exists. *Teamsters Local 627 (George E. Hoffman & Sons, Inc.)* 119 NLRB 1345 (1958).

The Board has made it clear that it is preferable that parties involved in jurisdictional disputes resolve their differences amicably without governmental interference. Indeed, the Board explained that “the manifest purpose of [Section 10(k)] is to afford the parties an opportunity to settle jurisdictional disputes among themselves, without Government intervention whenever possible. *Ironworkers Local 25 (Pittsburgh Plate Glass Co.)*, 125 NLRB 1035 (1959). The Supreme Court has endorsed the Board’s understanding of their place in resolving jurisdictional disputes. In *NLRB v Radio & Television Broadcast Eng’rs Union*, 364 U.S. 261, 266 (1964), the Court explained that Section 10(k) “offers strong inducements to quarrelling unions to settle their differences by directing dismissal of unfair labor practice charges upon voluntary adjustment of jurisdictional disputes.”

The Supreme Court has also noted that Congress has a preference for voluntary settlement and that the language of Section 10(k) actively encourages such. See *Arnold v Carpenters District Council of Jacksonville*, 417 US 1218 (1974) and *Carey v Westinghouse Elec. Corp.*, 375 U.S. 261 (1964).

In this case, despite RAM’s obvious desire not to be, all of the parties are stipulated to the Plan for the Settlement of Disputes in the Construction Industry and the parties’ obligations under the Plan should be followed. Further, the applicable collective bargaining agreements of the Laborers’ and Local 324, set forth alternate procedures for resolution of jurisdictional disputes through their International Unions. RAM, via its President has tried valiantly to claim ignorance that the dispute in question is even jurisdictional in order to avoid the Plan and its own

contractual obligations for the sake of profit, wasting the government's time and the taxpayers' money:

Q: What we have here today is a jurisdictional dispute, is it not?

A. I don't know what it is to be honest with you, sir. I've wasted a lot of time, I've wasted a lot of money, and I don't know where we are.³

Regardless of the Employer's deep desire to be heard by the Board and save money by hiring Laborers' instead of Operators for their contractual work, The Board is not empowered to determine this jurisdictional dispute, and thus, cannot proceed to issue a determination under Section 10(k) of the Act.

Local 324, further states that this particular argument has already been confirmed by an award issued under the Plan's procedures, following the June 12, 2018 Arbitration Hearing in Washington D.C., in which Arbitrator Greenberg found that the parties are bound to the Plan. (E Ex 15 & OE Ex 21). On June 12, 2018 Arbitrator Greenburg concluded that "although the Michigan Laborers' District Council improperly threatened economic action against RAM in connection with an issue involving work assignment, Laborers' have taken effective steps to withdraw that threat. (Emphasis added). RAM's unfair labor practice charge with the NLRB constitutes an improper "impediment to job progress" under the Plan and its Procedural Rules, and thus is prohibited. RAM Construction Services is directed to withdraw its unfair labor practice charge filed May 30, 2018, and RAM further is directed to cease any participation in the processing of the ULP charge or related proceedings. RAM also is directed to resolve any jurisdictional or work assignment disputes through the normal Plan mechanisms." (E Ex 15 and OE Ex 21). Accordingly, the Notice of 10(k) hearing must be quashed, and the jurisdictional dispute resolved via the plan, or in the alternative, in accordance with the procedures set forth in

³ Please note that Mr. Mazur testified to this despite his acknowledgment of and failure to follow Jurisdictional Dispute Language in the applicable CBA. (T 159-161)

the jurisdictional disputes provisions of the Laborers' and Local 324's Collective Bargaining Agreements with RAM. (J Ex 3 and J Ex 5).

No Violation Of 8(b)(4)(D)

The NLRB has established a test for determining when a dispute is properly deemed jurisdictional and submitted to a § 10(k) hearing. Before the Board may proceed with the determination of a dispute pursuant to Section 10(k) of the Act, The Board conducts a three-step inquiry to determine "whether there is reasonable cause to believe that § 8(b)(4)(D) of the Act has been violated." *Int'l Alliance of Theatrical and Stage Employees, Local Union No. 39 (Shepard Exposition Services)*, 337 N.L.R.B. 721, 723 (2002). This requires a finding of reasonable cause to believe that (1) a union has used a proscribed means—such as picketing or threatening to picket—to enforce its claim to the work in dispute; (2) there are competing claims to the disputed work between rival groups of employees; and (3) there is no agreed-upon method for resolving the dispute voluntarily. *Laborers Int'l Union of N. Am., Local No. 1184 (Golden State Boring)*, 337 N.L.R.B. 157, 158 (2001). When these requirements are met, the Board will award the disputed work to one or the other of the vying unions, based on considerations such as the employer's past practice, industry custom, and contract rights. *NLRB v. Radio & Television Broad. Eng'rs Union*, 364 U.S. 573, 81 S. Ct. 330 (1961). Here, there are no proscribed means, no active competing claims, and, an agreed upon method for resolving the dispute exists.

As the Laborers' Business Manager testified, the laborers are just trying to preserve their hours:

- Q. So in sending your May 29th, 2018 correspondence ... you weren't trying to gain additional work, were you?
- A. What letter were you stating? I'm sorry.
- Q. Your letter. Your letter saying that hey, if I don't -- if you make this reassignment, you know, there's certain action we have to take.
- A. Was I trying to gain man hours?

- Q. Right.
A. No.
Q. No. You were trying to retain --
A. Correct.
Q. -- you know, preserve the hours that you had, correct?
A. Correct.

(T mini 466)

Most importantly however, there is no violation of Section 8(b)(4)(D) of the Act. Local 324 has withdrawn its grievance and there are no pending grievances. As a result of Local 324's withdrawal and in accordance with a directive from its International Union to proceed with resolving the dispute through the Plan (OE Ex 6), the Michigan Laborers' District Council formally withdrew any threats to stop work or picket on RAM projects. This remains true to this day, as testified to by the Business Manager of the Michigan Laborers' District Council:

- Q. Any of the action that you threatened in this letter, did you ever take any of that action?
A. I do not threaten.
Q. Well saying that you were going to take, you were going to take whatever means necessary to protect your work.
A. I know. I just don't like the word, threaten.
Q. You can call it what you want. Did any of those things happen?
A. No.
Q. And as of today, from that day till today, you haven't taken any action against RAM, correct?
A. That is correct.
...
Q. And in this correspondence, you withdraw any threat to stop work or picket any projects, correct?
A. Correct.

(T mini 462-463).

There are no active claims for competing work in this matter. Although the Michigan Laborers' District Council did improperly threaten economic action against RAM in connection with an issue involving work assignment, the Laborers' have taken effective steps to withdraw that threat. (OE Ex 6). (E Ex 14). As noted, Local 324 withdrew its grievance regarding the Old

Detroit Press Project on June 05, 2018. (E Ex 28) Regardless, the Board has held that a grievance, in and of itself does not raise a claim of competing jurisdiction. *Graphic Communications Local 79L (Butterick Co.)*, 301 NLRB 195, 196 (1991). (“When a union in the first instance simply resorts to available grievance or no-raid procedures, there is no coercion and thus no basis for finding the existence of a jurisdictional dispute within the mean of Section 8(b)(4)(D) of the Act.”) Local 324 has not filed any additional grievances. The Laborers’ have not engaged in any proscribed activity since their June 07, 2018 withdrawal. Because there are no competing claims, there is no need for further proceedings in this case. Thus, the issue is moot and there is no violation of Section 8(b)(4)(D) and no evidence that such a violation could re-occur.⁴

Improper Motive To Reach The Board

It is clear that the Unions have agreed to resolve their jurisdictional dispute with the Plan without committing any violations of Section 8(b)(4)(D). Alone, RAM stands, eager for the NLRB to issue a decision, outside the Board’s jurisdiction, in order to avoid a possible Federal Court action and in order to exclusively hire a cheaper trade. (OE Ex 10 & OE Ex 11) RAM Construction Services did not abide by the procedures to settle a jurisdictional dispute pursuant to its Collective Bargaining Agreements, (J Ex 3 & 5) and instead assigned the grieved work to the Operators in order to reach the Board. (E Ex 17)

Contrary to the essence of a jurisdictional dispute, RAM Construction desires to proceed because the Local 324 Fringe Benefit Funds are currently auditing RAM. Local 324 does not know the results of that audit or the direction it will ultimately go. (Exhibit 12) Local 324 did not ask or direct the 324 Fringe Benefit Funds to audit RAM. (T 627-628). Conducting an audit is a

⁴ As noted, the Michigan Laborers District Council and Local 324 are operating in accordance with their International Unions directives, their applicable CBAs and in accordance with the Plan.

function of the Operating Engineers Local 324 Fringe Benefit Funds normal course of conduct, required by ERISA, which has nothing to do with the subject work dispute and the audit was not directed by the Local Union.

Fringe benefit Funds are a separate legal entity not controlled by the Local Union. See *Amax Coal* 453 US 322 (1981). A routine audit is not a threat or interference of work against an employer. Audits are recognized, indeed **required** by ERISA, to conform with the fiduciary duty of trustees. Attempting to ascertain the outcome of audits is entirely speculative and the typical procedure allows the employer to comment and contest any audit findings following its completion.

Here, there is no completed audit; there is no Federal Court ERISA action. Most importantly, there is no proscribed activity and there will not be. If the Board does not quash the Notice of 10(k), the Board is issuing a preemptive ruling based on the activity of a third party, and not the activity of the charging or charged party, or even an involved party. The Board is not the proper venue to get involved in any dispute between RAM and the Fringe Funds, if such a dispute even exists; the Federal District Court is. There are no active competing claims for the work, just the employer hoping to defeat an unrelated audit by forcing disputes and bringing in additional parties. Local 324 has withdrawn the grievance relating to the work at dispute, and the laborers have withdrawn any threat of proscribed activity. It is clear that RAM wants to pursue the charge even when the factors necessary for it to go forward are not present. However, a 10(k) hearing held when there is no violation of Section 8(b)(4)(D), to influence an ERISA matter and potentially a Federal Court is simply not proper.⁵

⁵ RAM has indicated it does not want to pay fringe benefits twice (E Ex 17). The 6th Circuit has many, many ERISA cases on double pay. Moreover, there are many, many ERISA cases on mistaken contributions. The NLRA and NLRB are not involved in these cases.

Additionally, only after Local 324 filed the May 03, 2018 grievance, did the Employer make an affirmative act to reassign the disputed work. As indicated above, when Local 32 became aware of RAM using a Laborer on the equipment, Local 324 would contact RAM and attempt to an Operator on the equipment. With the project at issue, the old Detroit Free Press Building, for the first time was the situation not attempted to be resolved by RAM, and the work was officially assigned to the Laborers, via an unsigned letter allegedly drafted in 2015. (OE Ex 2). Even the hearing officer was concerned with the level of exclusivity, and questioned why it looked as if the work was being assigned to the Laborers' exclusively, and not to a "composite crew" as RAM claimed was its practice. (T mini 168-170). Only after Local 324's grievance, did RAM send a letter to the Laborers' reiterating their assignment of the work (E Ex 19) and then immediately assign the work to the Operators. (E Ex 17). It is clear that the Employer contrived the situation, in order to insure that the dispute would end up in front of the Board, and insure the result RAM would like. Such conduct, in order to guarantee free rein to hire a cheaper trade (OE Ex 10 & OE Ex 11), by manufacturing a dispute, and filing an unfair labor practice charge (Bd Ex b), contrary to the alternate dispute resolution procedures in its CBAs already occurring, is entirely an improper motive.

There is no pending Section 8(b)(4)(D) violation and thus, this matter cannot proceed any further.

IN THE EVENT THE BOARD DOES PROCEED WITH A DETERMINATION, THE BOARD SHOULD AWARD THE WORK IN QUESTION TO THE MEMBERS OF LOCAL 324

As set forth above, the Notice of Hearing must be quashed as a matter of law. Resolution of the dispute should be decided by the parties' agreed upon method of voluntary adjustment or the procedures set forth in the applicable CBAs. Central to this 10(k) proceeding is the concept

of “Composite Crews.” The Board will not find composite crews in any Collective Bargaining Agreement related to this dispute. Composite crews are merely the Employer’s method of improperly changing the contract and wanting to employ a cheaper trade. If the Board rejects this request to quash and determines that it should proceed with a determination of the dispute under Section 10(k) of the Act, the work in question should be awarded to the members of Local 324, based on the factors typically considered.

Certification and collective bargaining agreements

The work-jurisdiction provision in the AGC Agreement applicable to RAM construction Services and Local 324, International Union of Operating Engineers states clearly that: “The jurisdiction of the Union is recognized by the Employers to be the operation of all power-driven or power-generating construction equipment used in the building or alteration of all structures and engineering works insofar as the National Labor Relations Board recognizes operation of such types of equipment as being under the jurisdiction of Operating Engineers, Firemen, Oilers, and Apprentice Engineers, rather than any other skilled trade group.” (J Ex 3). Section 3(c) of the AGC of Michigan Agreement requires that the “Employer shall employ Operating Engineers for the erection, operation, and maintenance of all hoisting and portable equipment, installation and operation of well point systems, and freeze pipe systems used in construction work.” (J Ex 3) RAM is bound by the AGC Agreement pursuant to the signed short-form. (E Ex 12). It must be noted that the Jurisdictional Language of the AGC Agreement conforms nearly identically to the language used in the Notice of Hearing. (Bd Ex j). That language cannot be found in any other Collective Bargaining Agreement in the instant matter.

Nowhere in the provisions of the AGC Agreement RAM is bound to, does it state that the operation of power-driven or power generating construction equipment is to be shared amongst

the trades, or subject to a “composite crew.” Such limitations do not exist and were not bargained for, as testified by Mr. Mazur:

- Q: Is there anywhere in Exhibit J-3, Joint 3, which is the Operators' contract, that it discusses composite crews?
- A. I don't believe so.
- Q. I know counsel, Mr. Day, pointed out some percentage thing with the Bricklayers, but any of the other contracts are you aware of negotiated terms regarding composite crews?
- A. It's all been verbal through negotiations.
- Q. Who did you verbally negotiate composite crews with the Operator Engineers?
- A. Predecessor to Geno.
- Q. Operating Engineers, I'm sorry. That's laborers.
- A. I didn't say -- I -- no one.
- Q. So you didn't negotiate that with the Operating Engineers?
- A. Nope.

(T mini 152)

It is clear that RAM does understand that the operation of power-driven and power-generating equipment is the work of the Operators, as demonstrated by Michael McNab's testimony:

- Q. So you understand this is what the Operating Engineers are saying is their craft trade?
- A. Yes.
- Q. And you understand that this contract is binding on RAM, correct?
- A. Yes.
- Q. In the beginning of your testimony today with Mr. Day, you listed a number of pieces of power-driven, power-generating equipment, correct?
- A. Yes.
- Q. And so pursuant to this trade jurisdiction provision, it would -- those pieces of equipment fall under it; do they not?
- A. They would.
- Q. Are you familiar with anything in this contract that talks about composite crews?
- A. No.

(T mini 303-304)

Composite Crews are not to be found anywhere in the subject Collective Bargaining Agreement. Central to this 10(k) hearing is the assignment of power-driven and power-generating operation work to other trades, particularly the Laborers, contrary to the CBA. Local 324 has consistently

claimed this work, notwithstanding limited and sporadic equipment use which has never been an issue between the parties. Until this time, and the formal assignment of the work to the Laborers, and RAM's hasty reassignment of the work to the Operators, the situation has always been resolved amicably. However, it is abundantly clear that the disputed work is covered by The AGC Agreement by the clear language of such. As discussed previously, RAM is bound by the AGC Agreement pursuant to the signed short-form.

Contrary to the craft jurisdictional provision and contractual obligations under the AGC Agreement, RAM *chooses* to not use Operators for the covered work. As Mr. Burke testified:

A. Well, I was told one of the -- one of the times that the Operators were like a cancer to RAM. That they would like to be rid of it.
HEARING OFFICER: Who told you this?
THE WITNESS: Mr. McNab.

...

Q. Were you ever told anything by Mr. McNab regarding the hiring practices pertaining to regardless of trade?

A. Yes.

Q. What was that?

A. That he didn't really care what trade it was. He was going to -- he, on more than one occasion, he would say that he was going to put his foremen to work first, his key guys. It didn't matter what trade they were or what work they were doing, that they would be put to work first. Because I had mentioned I knew that on the Free Press job, I knew that they had some of their steady operators were sitting at home waiting to be called back to work. And I suggested that. And he -- they refused to do it. (T mini 533-

535)

The Employer's blatant failure to abide by the AGC Agreement in regards to the operation of specific power-driven and power-generating equipment was collaborated by RAM President Robert Mazur.

Q. And does it matter who rides a sweeper?

A. No, sir.

Q. What's a shot blast?

- A. A shot blast is a self-contained unit that cleans horizontal slab surfaces, again, used a lot on the bridge surfaces. It cleans the concrete and all the debris is vacuumed up into a vacuum that's towed behind it.
- Q. Does it matter to you who operates a shot blast machine?
- A. No.
- Q. What does matter to you on a shot blast machine?
- A. That there's going to be a skilled person who knows what he's doing riding the machine. He's going to do a good job, and he's going to have a job to do when the cleaning is done.
- Q. What's a Gradall?
- A. A Gradall is basically a big forklift.
- Q. And do you have Gradalls?
- A. Yes, sir.
- Q. Does it matter to you who runs a Gradall?
- A. No, sir.
- Q. Is a Gradall usually an 8-hour-a-day job or 7-hour day, 6-hour day job?
- A. No, sir.
- Q. As needed?
- A. As needed.
- Q. So far is that largely true of the various equipment that I've asked you about so far in your opinion?
- A. All of it.
- Q. What's a ride on?
- A. Ride on?
- Q. What's a mini excavator? Forget ride on.
- A. Okay, mini excavators, it's an excavator smaller in size. Usually it will only dig to a depth of six feet.
- Q. Does it matter to you who operates a mini excavator from a trade union standpoint?
- A. No, sir. (T mini 130-131)

Again, contrary to the craft jurisdictional provision and contractual obligations under the AGC Agreement, RAM merely chooses to not use Operators for their covered work. It is clear that the relevant CBA explicitly covers this work, and as such, should be awarded to the Operating Engineers.

Employer Preference, current assignment and past practice

As the President of RAM Construction Services indicated in his testimony at the 10(k) hearing when questioned regarding his opinion on RAM not having operators on operators

equipment, "My comment has always been and continues to be that we run composite crews and if in fact a laborer has to be on a piece of equipment, so be it. There's no need to hire an operator for an hour or two hours' worth of work a day. So we've run a composite crew made up of multi-trades doing multiple facets of work on, as Kevin had reported earlier, many, many, many jobs. (T mini 102-103). The Operation of power-driven and/or power-generating equipment is the work of the Operators pursuant to the AGC CBA (J Ex 3), however, Local 324 understands that occasionally, other trades will hop on and hop off the equipment. This sporadic usage has not been an issue in the past, and Local 324 has consistently pursued equipment work that extended past brief and sporadic, resulting in sufficient resolution up until the present. It is clear that placing Laborers on the equipment is the Employer's preference, most likely due to the cheaper rates of the Laborers (OE Exs 10 & 11) (T mini 550-554) but the merits of such preference in contrast to the contractual jurisdictional provisions, are not sufficient to override the agreed upon contract.

It was not until the e-mail chain between Kermit Burke and Michael McNab (E Ex 20), that the Operating Engineers were aware that there was an alleged, albeit unsigned assignment of their work to the Laborers. (OE Ex 2). According to Mr. Mazur, this letter assigning work under the Operators' Contract was allegedly sent to the Laborers to ensure they would accept a work assignment:

- A. At the time we were getting some pushback from the Operators saying that regardless of the type of equipment that was on our jobsite, if it had a machine on it and it was power driven, that they were going to claim it and it would not no longer be the work of the Laborers. We simply went on record saying, "Here's what we've historically done, are you going to defend and accept a work assignment?" And if they would have said no, we would have had a meeting with the operators. (T mini 168).

However, it is important to note that this letter was never signed, there is no verification that it was ever sent or received, and was not brought up until April 2018, when it was sent to Kermit. On May 22, 2018, following Local 324's grievance against RAM for the work, Michael McNab sent correspondence to the Laborers' indicating that RAM was standing by its assignments and its current and historical practices. (E Ex 19).

In regards to RAM's past practice of utilizing Operators, it appears that Operators are consistently utilized when their advanced training of power-driven and power-generating equipment and official certifications are **required**, and the extra cost cannot be avoided. As Mr. Mazur testified:

- Q. The question I asked was, why do you have Operating Engineers?
A. I have three boom trucks. The operators historically are the only people who touch and operate my boom trucks.
Q. You never put another trade on the boom truck?
A. No, sir. (T mini 154)

As Superintendent Anthony Dorenzo testified:

- Q. Is -- typically, is the boom truck run by any particular tradesman?
A. Operators only, CCO, certified crane operator.

Often, this is to the chagrin of RAM, as the skillful operation of the equipment comes with a higher pricetag. (OE Ex 10 & 11) As Mr. Mazur complained:

- A. So again, the boom trucks, a big piece of equipment technically need training, always has been, always will be the job of the Operators in our firm. Boom truck goes out, operator goes out. We just got a new boom truck. It's over the weight, which I didn't know the rules on that, and now we have to have an oiler. They've given me an oiler. I have an oiler who stands there all day and I pay to make sure the machine is oiled. Remember, I can't compete on some jobs because non-union's kicking my tail. But I have an oiler who stands there all day and makes sure the machine is oiled. (T mini 175)

Unless forced by regulation or official certifications, RAM continually practices selectively choosing to ignore the contracts it has signed.

Although the record shows that the majority trade that RAM hires (and puts to work) is the Laborers, it is clear that work which involves the operation of power-driven and power-operating equipment has been consistently and continually done by the Operators. This work has been continually claimed by the Operators, and is currently assigned to the Operators by RAM.

Area and industry practice

All parties had difficulty expounding on how the use of Composite Crews was used in the industry. This was made exceedingly difficult because “Composite Crews” are not in anyone’s contract. Additionally, although the Laborers’ provided assignment letters of similar work (L Ex 1) with multiple other entities, many have no contracts with the Operating Engineers and the Operators are not aware of problems with other trades. (T mini 628-630) The Employer has attempted to win this hearing by smoke and mirrors, but the fact remains that no evidence was submitted to show that “Composite Crews” have been negotiated for in any Collective Bargaining Agreement in the industry. Thus, pursuant to the AGC Agreement, the disputed work should be assigned to the Operating Engineers.

Relative skills and training

Local 324 maintains and administers an extensive training facility that provides instruction for all aspects of heavy equipment operation related to restoration, construction and hoisting including cranes, boom trucks, forklifts, excavators and skid steers. It requires at least 3 years and 6000 hours of training, before apprentices become a full-fledged operator for Local 324. (OE Ex 23 & 24). This training includes at least 600 hours of structured hands-on training, forklift technical class and crane certification. (OE Ex 23 & 24). No evidence was presented that either RAM or the Laborers provide training that is nearly as extensive as that experienced by Local 324 members. As a result, a Local 324 member will be more qualified and better trained

with respect to all aspects of equipment operations. In fact, RAM consistently uses Operators for their equipment, like the boom truck, which mandates certifications. (T mini 154). This fact supports a finding that the work in question be assigned to Local 324 Operators.

Economy and efficiency of operations

The record is clear that it is Employer's contention that they use "composite crews" made up of different trades in order to ensure the efficiency of work. This is a fallacy created by RAM for an improper purpose. There is no efficiency in signing five collective bargaining agreements, only to ignore the agreements, and give the work to the cheapest trade. The Employer contends that there is not enough work of the Operation of power-driven or power-generating equipment for an Operating Engineer to be assigned to the composite crew.⁶ This is merely an improper attempt to avoid its contractual obligations under the AGC Agreement, and inflate its profits.

RAM Construction Services allegedly created the composite crew many years ago, yet signed, via a short form agreement in 2006 (E Ex 12), a Collective Bargaining Agreement which requires the use of Operators for "...the operation of all power-driven or power-generating construction equipment used in the building or alteration of all structures and engineering works insofar as the National Labor Relations Board recognizes operation of such types of equipment as being under the jurisdiction of Operating Engineers, Firemen, Oilers, and Apprentice Engineers, rather than any other skilled trade group." (J Ex 3). As Mr. Mazur makes clear, the contract does not come into play often:

- Q. So it's really not determined of what the contract covers as we were talking about earlier, power driven equipment and power generating equipment. To you it's more what do I need done on this job?

⁶The validity of this contention can easily be ascertained and supported or disproven by the production of equipment logs requested by Local 324, of which is currently the subject of an appeal with the Board. The Employer's vehement objection to the production of such, demonstrates that there most likely is a significant amount of use of the equipment.

- A. Well, it's a combination on what I need done on the job, number one; number two, how long somebody's going to be on that piece of equipment; and number three, the efficiencies that can be obtained. Because it's not fair for me to have the operator, work him two hours and send him home. I don't do that. (T mini 156)

The Employer asserts that the nature of its work does not support a fulltime operator. (T mini 124). However, it has not been independently verified that there is not a substantial amount of equipment operation in the projects performed by RAM. Local 324 subpoenaed equipment logs from the employer which track the weekly accumulation of hours the equipment is used, and the Employer's vehement objection to producing same, is indicative that indeed, there is significant time spent on the equipment. Again, as Mr. Burke testified, there were numerous occasions where he would either hear from his men that Laborers' were operating equipment, or he would show up at a site and personally observe same.

Richard Honaker, a Local 324 member who was employed by RAM from 2012-2016 testified that RAM construction services did utilize a significant amount of power-driven and power-generating equipment, but the Operation of such varied by trade:

- Q. How much percentage of your time would you say you worked as an operating engineer, operating equipment?
A. 90 percent of the time.
Q. Approximately 2016, did you quit working for RAM?
A. Yes, I did.
Q. Why did you quit working for RAM?
A. I didn't like what was going on.
Q. When you say you didn't like what was going on, explain what you mean.
A. Amongst many a things that I didn't like what was going on, I had sat at home one winter for 3 months calling for work, trying to get work while they had laborers running my equipment, doing my job while I was sitting at home. A lot of time was spent trying to get work that seemed to be going to other trades that I wasn't getting. (T mini 501)

Mr. Honaker further testified that other trades were operating said equipment and that he would report same, with the result being that RAM had no intention of following the AGC Agreement:

- Q. When working for RAM from 2012 to 2016, would you observe laborers running equipment such as the bobcats --
- A. Yes.
- Q. -- and other such equipment. I'm sorry?
- A. Yes.
- Q. What would you do?
- A. Normally, I would call my BA. (T mini 502)
-
- Q. What would occur when they would be called out to jobsites? What would you observe?
- A. For the most part, the BAs would show up and the other trades would get off the equipment.
- Q. What would happen after the BAs left the site?
- A. They were ordered to get back on the equipment.
- Q. Who would order them to get back on the equipment?
- A. The foremen on the job. (T mini 502)
- ...
- Q. Just to give you a time frame, in 2015/2016 time frame about how many times a week would you call the BAs regarding this issue?
- A. For the last year of my employment there?
- Q. Last year to 2 years.
- A. I would make one, two calls a week -- two or three calls 1 a week -- one to three calls a week possibly that time. (T mini 502-503)

As a result of Mr. Honaker's desire for work and persistence in reporting the Operation of power-driven and power-generating equipment to the Local 324 Business Agent, RAM, knowing that they were violating the contractual provision of the AGC Agreement, threatened Mr. Honaker's livelihood:

- Q. Toward the last year of your employment did you do anything or notice anything about your hours?
- A. Yeah, for the last year that I was there my hours had drastically dropped.
- Q. How many hours did you work in a week prior to that, if you recall generally?
- A. On average I would work 45, 55, all the way up to 60 hours a week.
- Q. And what did you notice happening towards that last year or so?
- A. After I had started calling my BAs?
- Q. Yes.
- A. My hours drastically dropped. I probably went months without receiving a 40-hour paycheck.

- Q. Did you talk to any of the company supervisors or have any information from them regarding why your hours had dropped.
- A. Yeah. I had went into the shop quite a few times when I wasn't receiving 40-hour checks inquiring on why I wasn't working, and where the work was at, and everything.
- Q. What would they tell you?
- A. I was -- I was told on more than one occasion that keep involving the union and keep having your BAs come out to the jobsite and you'll work less.
(T mini 505-506)

Mr. Honaker was told by RAM Foremen and Superintendents that his communication with Local 324 Business Agents was the reason he was not working. (T mini 504-506)

Local 324 Business Manager Doug Stockwell, who had worked for RAM in the past, additionally testified that he performed significant Operation work during his tenure there:

- Q. What kind of work did you do for RAM when you worked there?
- A. I was operating engineer.
- Q. What type of equipment did you operate?
- A. Cranes, sweepers, bobcats, fork trucks, both industrial and squirt booms that, you know, rough terrain crane or fork trucks.
- Q. How much of your day on any given day was in operating the type of equipment you just described and that pretty much that you worked with?
- A. Most every single day. I worked all day long. There was a few days in between you didn't have something to do, you just sort of fit in with the crew.
- Q. Would you say well over 90 percent of your time was actually operating the equipment?
- A. Yes.
(T mini 598)

One of RAM's own superintendents, Anthony Dorenzo, has attempted to get an Operator on his project from RAM for work, and encountered difficulty from RAM's dispatch. (T mini 417).

Tim Wolf, the RAM foremen Mr. Burke encountered at the Old Detroit Free Press site was told he couldn't have an Operator. (T mini 538-539)

What is clear from this testimony is that RAM does substantially engage in the Operation of the power-driven and power-generating equipment. What is additionally clear, is that it has nothing to do with efficiency, and merely about protecting their own, or paying a cheaper trade.

The work is there as evidenced by the continual observations, but it is clear that RAM does not want to utilize Operators.

The scope of the Award should be Limited

“In determining whether a “broad award in a 10(k) proceeding...” is appropriate, the Board will look for evidence that: (1) The disputed work has been a continuous source of controversy in the relevant geographic area and that similar disputes may recur; and (2) that there is a proclivity by the offending union to engage in further proscribed conduct to obtain the disputed work. *Laborers’ International Union of North America, Local 860*, 364 NLRB No. 126 (2016). Requests for an “areawide award are [not] often granted when the charged party represents the employees to whom the work is awarded.” That said, the more critical factor is “evidence that similar disputes may occur in the future.” *Id.* Citing *Carpenter (Standard Drywall)*, 348 NLRB 1250, 1256 (2006)).

An areawide award ruling is not appropriate in this case. The dispute in the instant matter arose specifically from work being assigned at the Old Free Press Building in Detroit. Indeed, the Notice of Hearing that the hearing was held under, narrowed the scope of the work at dispute to this job site solely. This narrow scope was discussed at the hearing and confirmed by the hearing officer (T mini 671-673). Crucially, the grievance was withdrawn, and any threat of proscribed activity has also been withdrawn. Therefore the Board’s requirements for a broad award are not present in this matter.

CONCLUSION

In conclusion, there is simply no current violation of 8(b)(4)(D). This dispute should not be in front of the Board. The parties are stipulated to the Plan, an alternative voluntary dispute resolution process. The Employer should not be permitted to use the Board as a means to obtain

jurisdiction when and how it sees fit by avoiding its stipulation to the Plan, and avoiding the jurisdictional disputes provisions of its Agreements with Local 324 and the Laborers.

Additionally, the applicable collective bargaining agreement is clear that the operation of all power-driven and power-generating equipment belongs to the Operating Engineers. Central to this 10(k) hearing is the assignment of such work to other trades, particularly the Laborers, based on the Employer's allegation that there is not enough of the work to support utilizing an Operator. Testimony has proven that this is false, and merely a way for the Employer to employ a cheaper trade contrary to the Collective Bargaining Agreement. Additionally important is that RAM's claim that the Fringe Funds pursuit of an audit gives this Board the jurisdiction to determine its contractual jurisdiction, is legally unsound and incorrect. As stated, the Fringe Funds and Local 324 are completely separate entities. The audit was not called or directed by Local 324. That issue is an ERISA matter to be dealt with in the Federal Courts, if it ever needs to be.

Based on the evidence and the factual and testimonial statements made by at the hearing, there is simply not an 8(b)(4)(1) violation under the Act, nor is there likely to be one in the future. The 10(k) process was not created as a means for an Employer to change its contracts in order to be more profitable. The 10(k) process was created to ensure that employers were not held hostage to competing Unions, and that projects continued without disruptive picking and work stoppages. RAM construction is not held hostage to competing Unions, and there is no threat of work stoppage. If the Board's proclivity to entertain Employers' overexpansion of the 10(k) process continues, Federal Courts shall lose their jurisdiction and Employers can pick and choose which contracts they wish to follow, violating the rights belonging to employees, via

negotiated Contracts. Thus, the Notice of 10(k) must be quashed, or in the alternative, the disputed work at the Old Detroit Free Press Building be awarded to Local 324.

Respectfully submitted,

s/David J. Selwocki
David J. Selwocki, P51375
Sullivan, Ward, Asher & Patton, P.C.
25800 Northwestern Highway
Southfield, MI 48037-0222
248.746.0700
dselwocki@swappc.com

Dated: August 24, 2018

CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2018, I electronically filed the foregoing paper with the NLRB using their electronic filing system, and served the foregoing paper on all parties of record by email.

s/Jessica L. Schuhrke
Jessica L. Schuhrke, P77561

CC:

Daniel G. Helton
Law Offices of Daniel G. Helton
300 Stroh River Place – Suite 5600
Detroit, MI 48207
Via email: dan@danielghelton.com

John R. Canzano, Esq
McKnight, Canzano, Smith, Radtke, & Brault, P.C.
423 North Main Street – Suite #200
Royal Oak, Michigan 48067
Via email: jcanzano@michworkerlaw.com

Robert E. Day
Law Offices of Robert E. Day
300 River Place-Suite 5600
Detroit, Michigan 48207
Via E-mail: rday@rdaypc.com

J. Douglas Korney
Law Offices of J. Douglas Korney
32300 Northwestern Hwy Ste 200
Farmington Hills, MI 48334
Via email: dkorney@dkorneylaw.com

David Malinowski
Novara Tesija & Catenacci, PLLC
2000 Town Center , Suite 2370
Southfield, MI 48075
Via email: dm@novaratesija.com