

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

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 47,
Charged Party,

Case 31-CD-223008

and

TITAN SERVICES, INC.,
Charging Party,

and

L.K. COMSTOCK NATIONAL TRANSIT, INC.,
Employer,

and

INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 12, AFL-CIO,
Party in Interest

**BRIEF OF INTERNATIONAL
BROTHERHOOD OF ELECTRICAL
WORKERS, LOCAL 47, IN RESPONSE
TO *AMICUS CURIAE* BRIEF OF PLAN
FOR THE SETTLEMENT OF
JURISDICTIONAL DISPUTES IN THE
CONSTRUCTION INDUSTRY**

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 47,
Charged Party,

and

L.K. COMSTOCK NATIONAL TRANSIT, INC.,
Charging Party,

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TITAN SERVICES, INC.,
Employer,

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INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 12, AFL-CIO,
Party in Interest.

Case 31-CD-222858

I. Introduction.

International Brotherhood of Electrical Workers, Local 47, AFL-CIO (“Local 47”) has already submitted a post-hearing brief establishing that the National Labor Relations Board (“Board” or “NLRB”) may proceed under Section 10(k) of the National Labor Relations Act (“Act”), 29 U.S.C. § 160(k), to determine the instant dispute.

The Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (“Plan”) has now filed an *amicus curiae* brief contending that the Board may not determine the instant dispute because all parties are bound by the Plan, an agreed-upon method for voluntary adjustment of the dispute. For the reasons that follow, the Board should reject that argument.

For over 50 years, the Board has held that the Plan does not bind the outside locals of the International Brotherhood of Electrical Workers (“IBEW”), such as Local 47. It recently reaffirmed that precedent in *Local 876, International Brotherhood of Electrical Workers (Newkirk Electric Association)*, 365 NLRB No. 81 (May 19, 2017), holding that an outside local of the IBEW, Local 876, was not bound by the Plan.

Nevertheless, the Plan contends that Local 47 voluntarily agreed to be bound by the Plan for the purposes of resolving this dispute. According to the Plan, Local 47 agreed to be bound by a project labor agreement (“PLA”) between the Los Angeles County Metropolitan Transportation Authority (“MTA”) and the Los Angeles/Orange County Building and Construction Trades Council (“LA/OC BCTC”). Under the PLA, jurisdictional disputes are resolved by the Plan.

However, it is undisputed that Local 47 is not a member of the LA/OC BCTC, and is not a party to the PLA. Thus, the Plan is left to argue that Local 47 engaged in various conduct that manifested its intention to be bound by the PLA, and in turn the Plan. For the reasons discussed

herein, the Board should reject that argument and proceed to determine the instant dispute pursuant to its authority under Section 10(k) of the Act. Additionally, for the reasons discussed by Local 47 in its post-hearing brief, the Board should award the disputed work to Local 47-represented employees.

II. The Plan Fails to Acknowledge More Than 50 Years of NLRB Precedent Establishing that Outside Locals of the IBEW Are Not Bound to the Plan.

The Plan's *amicus curiae* brief fails to acknowledge, let alone distinguish, more than 50 years of consistent Board precedent holding that IBEW's outside locals,¹ such as Local 47, are not bound by the Plan. As a result, the Plan offers no reason for the Board to depart this clear and binding line of precedent.

As early as 1962, the Board observed that the outside locals of IBEW are not bound by the AFL-CIO's construction industry jurisdictional dispute resolution procedures. *See Local Union 825, Int'l Union of Operating Eng'rs, AFL-CIO (Nichols Elec. Co.)*, 137 NLRB 1425, 1429 (1962). In *Nichols Electric*, the Board rejected the argument that an outside local of IBEW was bound by the AFL-CIO's predecessor construction industry dispute resolution procedure,

¹ IBEW affiliates are either "outside" or "inside" locals. *See* Transcript of Proceedings ("Tr.") 345:8; *see also* Tr. 141:12-142:20. "Outside" locals, like Local 47, typically represent employees of electric utilities, including employees who perform construction work on overhead and underground power lines. Tr. 345:23-346:6; 141:18-20; 142:19. Outside locals also represent employees of contractors who perform similar construction work for electric utilities. *See id.* By contrast, "inside" locals represent electricians employed in commercial, industrial and residential settings. Tr. 141:12-142:11; 345:16-18. Such electricians do not perform work on high-voltage power lines. *See* Tr. 143:10-11; 263:20-21.

noting that “[t]he IBEW for many years has consistently taken the position that it will not be bound by any Joint Board determination involving line work.” *Id.* at 1429.²

Since that time, the Board has consistently rejected the argument that IBEW’s outside locals are bound by the AFL-CIO’s procedures for construction industry jurisdictional disputes. *See, e.g., Local 478, Int’l Union of Operating Eng’rs (Utility Srvc.)*, 172 NLRB 1877, 1879 (1968) (“As we have recognized in the past, the IBEW and the [National Electrical Contractors Association] have consistently refused to participate in Joint Board proceedings involving ‘outside’ work”); *Local 542, Int’l Union of Operating Eng’rs (Pangborne & Co.)*, 213 NLRB 124, 126-27 (1974) (holding that “IBEW ‘outside’ locals are not members of the AFL-CIO Building Trades Council and are not, therefore, bound by [Plan] decisions.”); *Int’l Bhd. of Elec. Workers, Local 44 (Utility Builders, Inc.)*, 233 NLRB 1099, 1100 (1977) (“[W]e note that the Board has, in several decisions over the years, recognized the distinction between ‘inside’ and ‘outside’ locals of the IBEW and taken official note of the fact that the latter are not subject to the [Plan].”).

Moreover, the Board has rejected the argument that IBEW’s outside locals are bound by the Plan simply because IBEW is affiliated with the AFL-CIO Building and Construction Trades Department, and is itself bound by the Plan. *See Int’l Bhd. of Elec. Workers, Local 196 (Aldridge Elec.)*, 358 NLRB 737, 739 n.5 (2012) (“Even if the arbitrator’s decision establishes that the International is bound under the Plan, it does not necessarily follow that Local 196 was so bound.”); *Int’l Bhd. of Elec. Workers, Local 357 (W. Diversified Elec.)*, 344 NLRB 1230,

² The “Joint Board” refers to the “National Joint Board for the Settlement of Jurisdictional Disputes of the Building and Construction Trades Industry.” *See, e.g., Local 423, Laborers’ Int’l Union of N. Am., AFL-CIO*, 199 NLRB 450, 451 (1972).

1240 (2005) (rejecting argument that “the Plan is binding on all national and international unions affiliated with the AFL-CIO’s Building and Construction Trades Department and their local constituent bodies, including both Operating Engineers and IBEW.”).

The record in this case amply supports the conclusion that Local 47 is not bound by the Plan. Local 47 is an “outside” local of the IBEW. *See* Tr. 345:6-20. It is not a member of, and does not pay dues to, the AFL-CIO Building and Construction Trades Department. Tr. 538:2-7.³ It is not affiliated with, and does not pay dues to, any regional building and construction trades councils, including the LA/OC BCTC. Tr. 538:10-539:2. Local 47 has never signed an agreement reflecting consent to be bound by the Plan, has never voluntarily submitted a jurisdictional dispute to the Plan, and has never participated in a Plan proceeding. Tr. 540:5-20.

Furthermore, it is undisputed that the Outside Line Agreement – the multi-employer collective bargaining agreement between Local 47 and a chapter of the National Electrical Contractors Association to which both Titan Services, Inc. (“Titan”) and L.K. Comstock National Transit, Inc. (“Comstock”) are signatory – makes no reference to the Plan. Tr. 540:25; *see* Comstock Ex. 2. This, too, supports the conclusion that Local 47 is not bound by the Plan. *See, e.g., Int’l Bhd. of Elec. Workers, Local 196 (Aldridge Elec.)*, 358 NLRB at 740 (holding that IBEW outside local was not bound by Plan where, *inter alia*, “the collective bargaining agreement between the Employer and Local 196 does not support a finding that Local 196 was bound by the Plan because it makes no reference to the Plan.”); *Int’l Bhd. of Elec. Workers, Local 357 (W. Diversified Elec.)*, 344 NLRB at 1240 (holding that IBEW outside local was not

³ The AFL-CIO Building and Construction Trades Department is now known as North America’s Building Trades Union. Tr. 537:18-20.

bound by Plan where, *inter alia*, “IBEW claims the work under its outside agreement with the Employer, and that agreement . . . makes no reference to the Plan.”); *Local Union 825, Int’l Union of Operating Eng’rs, AFL-CIO (Nichols Elec. Co.)*, 137 NLRB at 1429 (holding that IBEW outside local was not bound by Joint Board where, *inter alia*, “the contract between Nichols and Local 262, directly applicable to this dispute, makes no provision for the referral of any such dispute to the Joint Board.”).

Nor is a different result warranted simply because a Plan arbitrator concluded that Local 47 is bound by the Plan. *See* Local 12, Ex. 1, Ex. 11 (arbitration decision). Just like it did here, in *International Brotherhood of Electrical Workers, Local 196 (Aldridge Electric)*, 358 NLRB 737 (2012), the International Union of Operating Engineers (“IUOE”) introduced into evidence a decision by a Plan arbitrator concluding that an IBEW outside local union was bound by the Plan. *See id.* at 739. Even so, the Board ruled that the arbitrator’s decision “cannot bind [IBEW] Local 196 to the Plan inasmuch as [IBEW] Local 196 was not party to the arbitral proceeding and did not agree to be bound by its results.” *Id.* That same conclusion applies here, where Local 47 did not participate in the Plan arbitration and never agreed to be bound by its results. *See* Tr. 548:25- 549:4.

The Board’s most recent decision regarding the Plan’s application to IBEW’s outside locals is consistent with Board precedent, and confirms that Local 47 is not bound by the Plan. In *Local 876, International Brotherhood of Electrical Workers (Newkirk Electric Association)*, 365 NLRB No. 81 (May 19, 2017), the IUOE filed a claim with the Plan against an IBEW outside local union. *Id.*, slip op. at *3. In response to a letter from the Plan directing the parties to process their jurisdictional dispute through the Plan, IBEW President Lonnie Stephenson

directed the IBEW outside local union to “cease the alleged violations and any impediment to job progress in violation of the Plan” *Id.* Thereafter, a Plan arbitrator issued a ruling that “all the parties are stipulated to the Plan, despite IBEW Local 876’s status as an ‘outside’ local.” *Id.*

The Board, however, rejected IUOE’s claim that all the parties were bound to the Plan. As is the case here, the Board found that the collective bargaining agreement between IBEW Local 876 and the employer did “not contain any provision binding Local 876 to the Plan.” *Id.* at *5; *see* Comstock Ex. 2; Tr. 540:25. Furthermore, like this case, the “Local 876 Business Manager . . . testified without contradiction that only ‘inside’ locals are bound to the Plan, that IBEW Local 876 is an ‘outside’ local, and that IBEW Local 876 is not affiliated with [NABTU].”⁴ *Local 876, Int’l Bhd. of Elec. Workers (Newkirk Electric Association)*, 365 NLRB No. 81, slip op. at *5; *see* Tr. 537:18-541:11.

In sum, a long line of clear, well-established Board precedent holds that IBEW outside locals are not bound by the Plan. Although the Plan largely fails to address this precedent in its *amicus curiae* brief, such precedent nevertheless applies here and supports the conclusion that Local 47 is not bound by the Plan.

⁴ There is a notable distinction between this case and *Newkirk Electric*. In *Newkirk Electric*, IBEW President Lonnie Stephenson wrote to Local 876 and directed it to comply with the Plan. *See Local 876, Int’l Bhd. of Elec. Workers (Newkirk Elec. Ass’n)*, 365 NLRB No. 81, slip op. at *3. Although that fact did not convince the Board that Local 876 was bound by the Plan, *see id.* at *5 (“Contrary to Operating Engineers Local 324’s argument, however, we find that President Stephenson’s letter alone is insufficient, under the circumstances, to establish that IBEW Local 876 is bound to the Plan in light of the countervailing evidence set forth above.”), here President Stephenson wrote to the Plan and informed it that IBEW’s outside locals *are not* bound by the Plan, *see* Local 47 Ex. 3. Hence, this case presents an even more compelling record than *Newkirk Electric* for concluding that Local 47 is not bound to the Plan.

III. The Plan’s Argument that Local 47 Manifested Its Agreement to Be Bound by the Project Labor Agreement, Which Incorporated the Plan, Is Not Convincing.

The Plan offers an unpersuasive argument to side-step the long line of clear Board precedent holding that IBEW’s outside locals are not bound by the Plan. According to the Plan, although Local 47 is not a party to the project labor agreement (“PLA”) between the LA/OC BCTC and the MTA, Local 47 nevertheless manifested its intent to be bound by the PLA, and in turn the Plan (which is incorporated into the PLA). *See* Plan Brief, 11-16. The Board should reject this argument for several reasons.

As an initial matter, none of the parties made this argument in its post-hearing brief, and the Plan fails to cite any authority supporting the conclusion that an *amicus curiae* can raise an argument that no party has raised in a post-hearing brief. For this reason alone, the Board should not consider this argument.

In any event, the Plan’s argument lacks merit. “To determine whether a party has adopted a contract by its conduct, the relevant inquiry is whether the party has displayed ‘conduct manifesting an intention to abide by the terms of the agreement.’” *S. Cal. Painters & Allied Trade Dist. Council No. 36 v. Best Interiors, Inc.*, 359 F.3d 1127, 1133 (9th Cir. 2004) (quoting *NLRB v. Haberman Constr. Co.*, 641 F.2d 351, 356 (5th Cir.1981) (en banc)).

The Plan relies primarily on three points purportedly establishing that Local 47 agreed to be bound by the PLA, and in turn the Plan, even though Local 47 did not sign the PLA, and is not a member of the LA/OC BCTC: (1) Local 47 “accept[ed] a work assignment covered by the PLA”; (2) Local 47 “participat[ed] in the grievance process under . . . the PLA”; and (3) Local 47

“participat[ed] (through its parent union) in the jurisdictional dispute arbitration under the Plan” Plan Brief, 15. Each point fails to bear the significance the Plan places on it.

First, that Local 47-represented employees performed the work in question hardly supports the conclusion that Local 47 manifested its intent to be bound by the PLA, let alone the Plan. The work at issue was expressly covered by the Outside Line Agreement; was assigned to Local 47-represented employees by employers signatory to the Outside Line Agreement; and has historically been performed throughout the Western United States exclusively by IBEW linemen. *See* Local 47 Post-Hearing Brief, 4-8; 17-18. Thus, the mere fact that the work was also allegedly covered by the PLA – an issue that Local 47, Titan and Comstock all dispute – falls well short of establishing that, by permitting Local 47-represented employees to perform such work, Local 47 clearly manifested its agreement to be bound by the PLA, and in turn the Plan. To the contrary, Local 47-represented employees were simply performing work clearly covered by a Local 47 collective bargaining agreement, assigned to them by Local 47-signatory employers, and historically performed by IBEW linemen.

Second, Local 47 did not participate in the PLA grievance process in such a way to suggest that it considered itself bound by the PLA, and in turn the Plan. Local 47 never filed a grievance under the PLA, it never agreed to be bound by the results of the PLA grievance process, and it never invoked the Plan in connection with the instant dispute. At most, Local 47 representatives appeared, uninvited, at Step 1 and Step 2 grievance meetings related to Local 12’s pay-in-lieu grievances against Comstock and Titan, and protested Local 12’s claims to the disputed work. *See* Comstock Ex. 21 & 22. Nothing in the record, however, comes close to

establishing that by appearing uninvited at the Step 1 and 2 meetings, Local 47 clearly manifested its intent to be bound by the PLA, and in turn the Plan.

Third, that an IBEW representative participated in a Plan arbitration does not support the conclusion that Local 47 agreed to be bound by the Plan. For example, in *International Brotherhood of Electrical Workers, Local 196 (Aldridge Electric)*, 358 NLRB 737 (2012), the Board ruled that an outside local of IBEW, Local 196, was not bound by the Plan even though an IBEW representative appeared at a Plan arbitration in connection with a dispute involving Local 196, where Local 196 was not a party to the proceeding and did not agree to be bound by its results. *See id.* at 739 & n.5. So too here: The mere fact that an IBEW representative participated in a Plan arbitration in connection with the instant dispute does not establish that Local 47 is bound by the Plan, where Local 47 was not a party to the proceeding and did not agree to be bound by its results.

Finally, the cases cited by the Plan are all plainly distinguishable from this case. *See* Plan Brief, 11-12. In *NLRB v. Habermann Construction Co.*, 641 F.2d 351 (5th Cir. 1981) (en banc), the employer abided by the applicable labor agreement in several respects, including making trust fund contributions for nearly four years, accepting union referrals, paying the union wage scale, and permitting the appointment of a union steward. *See id.* at 356. By contrast, Local 47 did nothing to manifest its intent to be bound by the PLA, let alone the Plan.

In *Eisenmann Corp. v. Sheet Metal Workers Int'l Ass'n Local No. 24*, 323 F.3d 375 (6th Cir. 2003), the employer entered into a purchase order explicitly stating that the relevant labor agreement was a term of the purchase order. *Id.* at 385. Here, Local 47 is not a party to any agreement incorporating the terms of the PLA or the Plan.

In *Local 292, Sheet Metal Workers' Int'l Ass'n, AFL-CIO (Gallagher-Kaiser Corp.)*, 264 NLRB 424 (1982), the Iron Workers, despite not signing the relevant agreement, “submitted the dispute to the [dispute resolution procedure] for resolution.” *See id.* at 429. The Board therefore concluded that “[t]he Iron Workers thus demonstrated its intention to be bound by the decision of the [dispute resolution procedure].” *Id.* As noted earlier, however, Local 47 has never voluntarily submitted any dispute, let alone the present one, to the Plan for resolution.

Last, in *Local Union No. 9, Wood, Wire and Metal Lathers Int'l Union, AFL*, 113 NLRB 947 (1955), the employer took several steps to submit to the Joint Board’s dispute resolution processes, including replying to requests for information by the Joint Board, requesting reconsideration of the Joint Board’s initial decision, and requesting intervention by the Joint Board in the jurisdictional dispute. *See id.* at 953. Moreover, the Board found that “the Company had previously acquiesced in Joint Board control of work disputes on its jobs” *Id.* The Plan can point to no similar acquiescence by Local 47 here.

In short, the Plan fails to demonstrate that Local 47 took any action clearly manifesting its intent to be bound by the PLA, and in turn, the Plan.

IV. Conclusion.

For the foregoing reasons, Local 47 respectfully submits that the Board may proceed with a determination of a dispute under Section 10(k) of the Act, 29 U.S.C. § 160(k). Indeed, for all

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of the reasons described in Local 47's post-hearing brief, it respectfully requests that the Board assign the disputed work to Local 47-represented employees.

DATE: November 29, 2018

By 
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CERTIFICATE OF SERVICE

The undersigned, hereby certifies that on November 29, 2018, the **BRIEF OF INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 47, IN RESPONSE TO *AMICUS CURIAE* BRIEF OF PLAN FOR THE SETTLEMENT OF JURISDICTIONAL DISPUTES IN THE CONSTRUCTION INDUSTRY** was filed electronically with the National Labor Relations Board at *www.nlr.gov* and duly served upon the following named individuals of record by electronic mail:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on November 29, 2018, in Pasadena, California.



JONATHAN COHEN