Michigan Laborers District Council, an affiliate of The Laborers' International Union of North America, AFL–CIO *and* Ram Construction Services of Michigan, Inc. *and* Local 324, International Union of Operating Engineers, AFL–CIO *and* Local 2, International Union of Bricklayers and Allied Craftworkers (BAC), AFL–CIO *and* Local 149, United Union of Roofers, Waterproofers and Allied Workers, AFL–CIO *and* Michigan Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFI–CIO. Case 07–CD–221111

July 3, 2019

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN RING AND MEMBERS MCFERRAN AND KAPLAN

This is a jurisdictional dispute proceeding under Section 10(k) of the National Labor Relations Act. Ram Construction Services of Michigan, Inc. (the Employer) filed a charge on May 30, 2018,[1] alleging that Michigan Laborers' District Council, an affiliate of the Laborers' International Union of North America, AFL–CIO (Laborers), violated Section 8(b)(4)(D) of the Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees it represents rather than to employees represented by Local 324, International Union of Operating Engineers, AFL–CIO (Operating Engineers). Following the original June 18 notice of hearing, three additional interested parties intervened in this proceeding: Local 2, International Union of Bricklayers and Allied Craftworkers (BAC), AFL–CIO (Bricklayers); Local 149, United Union of Roofers, Waterproofers and Allied Workers, AFL–CIO (Roofers); and Michigan Regional Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL–CIO (Carpenters). A notice of rescheduled hearing subsequently issued on July 13, and a hearing was held on August 1–7 before Hearing Officer Steven Carlson. Thereafter, the Employer, Laborers, Operating Engineers, Bricklayers, and Carpenters each filed posthearing briefs. Operating Engineers also filed a motion to quash the Section 10(k) notice of hearing.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The parties stipulated that the Employer, a Michigan corporation, performed services valued in excess of $50,000 in states other than the State of Michigan during the calendar year ending December 31, 2017. The parties also stipulated, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that Laborers, Operating Engineers, Bricklayers, Roofers, and Carpenters are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of the Dispute

The Employer is a building contractor specializing in waterproofing and restoration services. The dispute in this case concerns the Employer's allocation of certain equipment-operating work for its restoration project at the Detroit Free Press building in Detroit, Michigan. The Employer has long used composite crews of employees represented by Bricklayers, Roofers, Carpenters, Operating Engineers, and Laborers to complete its projects, and accordingly it allows employees represented by each union to operate the equipment at times. However, Operating Engineers now asserts that equipment operation is *its* work, accuses the Employer of assigning too much of the work to employees represented by Laborers, and seeks more exclusive assignment to employees it represents. For their part, the Employer and Laborers wish to continue the existing composite crew practice, including the regular and significant assignment of equipment operation work to Laborers-represented employees.[2] No party objects to the sporadic assignment of the work to employees represented by other unions as necessary.

The Employer has a separate collective-bargaining agreement with each union applicable to projects in the Detroit area. In general, the agreements state the scope of work for union-represented employees as follows:

[1] Unless otherwise indicated, all of the following dates are in 2018.

[2] Operating Engineers requests special permission to appeal the hearing officer's revocation of its subpoena seeking equipment usage records from the Employer's recent projects in Michigan. Operating Engineers sought the records during the hearing to show that the equipment in dispute was in regular use and that employees represented by Laborers were operating it. We agree with the hearing officer that the evidence sought is cumulative because it is undisputed that Laborers-represented employees regularly operate the equipment. See, e.g., *Plumbers Local 562 (C & R Heating & Service Co.)*, 328 NLRB 1235, 1236 (1999) (hearing officer properly revoked subpoena where party sought additional documents to prove facts not in dispute); *Burns Security Services*, 278 NLRB 565, 565–566 (1986) (revocation proper where information sought would be cumulative). Thus, the hearing officer did not abuse his discretion.

Bricklayers—masonry work, including caulking of joints, restoration of structures, and installation of scaffolding; Roofers—handling, installation, and removal of roofing materials; Carpenters—carpentry work, including assembly, framing, installation, and finishing; Operating Engineers—operation and maintenance of power-driven or power-generating construction equipment; and Laborers—"all work to be performed . . . at a site of construction alteration, or repair," including, e.g., masonry, roofing, installation, and "all work necessary or incidental to performing the Employer's operations in a safe and efficient manner." However, under its composite crew practice, the Employer does not necessarily conform to the precise terms of these agreements in its work assignments. Rather, the Employer allocates tasks to individual employees on an ad hoc basis, depending on the work to be performed, the available personnel, and efficiency concerns.

It is rare for the Employer to need employees to operate equipment for an entire workday. On most jobsites, there are at most only 2 hours of such work per day. Thus, equipment-operating work is usually incidental to employees' other work, particularly the general labor (e.g., site maintenance, demolition, concrete finishing) that must be performed when employees are not engaged in specialty trade work. Laborers-represented employees primarily perform this general labor and are also the Employer's largest group of employees. As a result, they receive more opportunities to operate equipment than other employees. Conversely, as acknowledged by Operating Engineers' representatives, the employees represented by Operating Engineers prefer to operate equipment and may decline to perform general labor. This predilection makes it more difficult for the Employer to hire Operating Engineers–represented employees, which results in fewer of them being available to operate equipment.

Around 2015, Operating Engineers began to periodically complain that the Employer was improperly assigning equipment-operating work to Laborers-represented employees instead of Operating Engineers–represented employees. The issue came to a head at the Detroit Free Press project shortly after it began in mid-April 2018. Operating Engineers learned that Laborers-represented employees were operating equipment there and again complained. The Employer admitted assigning the work to Laborers-represented employees, and it subsequently sent Operating Engineers a copy of a November 25, 2015 letter of assignment from the Employer to Laborers. In that letter, the Employer assigned Laborers-represented employees to operate bobcats, forklifts, shot-blasters, and ride-on sweepers on all the Employer's projects, and the Employer "look[ed] forward to [Laborers] accepting and aggressively defending each of these assignments." According to the Employer, Laborers-represented employees have operated the equipment for the past 30 years. Additional communications among the Employer, Operating Engineers, and Laborers showed that the Employer had also generally assigned the operation of hi-los, skid steers, grade-alls, compressors, and rented excavating equipment to Laborers-represented employees.

Following disclosure of this formal assignment, Operating Engineers filed a grievance against the Employer on May 3. The grievance alleged that the operation of powered equipment by non–Operating Engineers–represented employees at the Detroit Free Press project violated Operating Engineers' collective-bargaining agreement with the Employer. Laborers learned of the grievance and advised Operating Engineers on May 22 that it would "continue to claim and perform the work assigned." Three days later, the Employer informed Laborers that due to Operating Engineers' grievance and a related request for information about equipment usage, the Employer would thereafter assign the disputed work to employees represented by Operating Engineers. On May 29, Laborers responded to the Employer as follows:

> We intend to vigorously defend our jurisdiction. We feel that our jurisdiction was bargained in good faith between the two parties, and we intend to grieve and bill for every hour if another craft is performing our work. [We] do not believe that RAM or their customers need to experience this unnecessary disagreement in jurisdiction, and I am sure no one wants to see [] work stoppages or picket lines on their jobs. In addition, if this attack on jurisdiction continues, the Laborers have no choice but to protect our work by all methods and means.

The next day, the Employer filed the instant unfair labor practice charge against Laborers.

On June 1, Operating Engineers withdrew its grievance. It then contacted the Administrator of the Building and Construction Trades Department, AFL–CIO's Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (the Plan) and alleged that Laborers' work-stoppage threat and the Employer's unfair labor practice charge violated Plan Rules and Regulations. Operating Engineers requested that the Plan Administrator direct Laborers and the Employer to withdraw the threats and charge and resolve any jurisdictional dispute in accordance with Plan directives.

It is undisputed that Operating Engineers and Laborers, along with Bricklayers, Roofers, and Carpenters, are bound to resolve jurisdictional disputes using the Plan. Operating Engineers argued to the Administrator, and the Employer disputed, that the Employer is likewise bound via Operating Engineers' standard short-form labor

agreement, which the Employer signed in August 2006. The agreement includes the following "Jurisdictional Disputes" provision:

> 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.

By its terms, the short-form agreement automatically renews from year to year unless terminated during a 30-day window period. The Impartial Jurisdictional Disputes Board (IJDB) has been defunct since 1981. The Plan replaced it in 1984.

The Plan Administrator notified the Employer and Laborers on June 5 that because all parties, including the Employer, were bound to the Plan, the Administrator would process the jurisdictional dispute. Over the Employer's protest, the Administrator found immaterial the short form agreement's long-outdated reference to the IJDB because the Plan was the "recognized successor" to the IJDB. Based on the Administrator's determination and Operating Engineers' withdrawal of its grievance, Laborers withdrew its work-stoppage threat. An arbitrator subsequently upheld the Administrator's finding.

B. Work in Dispute

The notice of rescheduled hearing describes the work in dispute as

> [t]he 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.

At the hearing, the Employer and Laborers stipulated that this description—encompassing "all power-driven or power-generating construction equipment"—was accurate. However, Operating Engineers, Bricklayers, Roofers, and Carpenters refused to stipulate, maintaining that the work in dispute is the operation of only certain types of equipment. Following the hearing, Laborers asserted that the dispute encompassed not just the Detroit Free Press project, but "all jobs performed by Ram Construction Services of Michigan, Inc.," as stated in the original notice of hearing.

We find, based on the record, that the work in dispute is the operation of hi-los, forklifts, bobcats, skid steers, grade-alls, ride-on sweepers, shot-blast machines, compressors, and rented excavating equipment on the Detroit Free Press project.

C. Contentions of the Parties

Operating Engineers moves to quash the notice of hearing on several grounds. First, it contends that the Employer colluded with Laborers to create a sham jurisdictional dispute so that the Employer could solidify its preferred work assignment. Second, it asserts that because it withdrew its grievance and Laborers withdrew its work-stoppage threat, neither party has claimed the work in dispute and there is no reasonable cause to believe that Section 8(b)(4)(D) has been violated. Finally, it maintains that all parties have agreed to use the Plan as a method for voluntary adjustment of the dispute because the Employer is bound to the Plan via the 2006 short-form agreement. It argues that "[a]lthough the subject parties had not updated the text of the [agreement] by 2006 to remove the long-outdated reference to the [IJDB]," that reference "plainly points to the Plan" because "[i]t was widely understood within the construction industry that the Plan was the successor of the [IJDB]."

Alternatively, if the notice of hearing is not quashed, Operating Engineers maintains that the work in dispute should be awarded to employees it represents based on the factors of collective-bargaining agreements, area and industry practice, and relative skills and training.

The Employer and Laborers oppose Operating Engineers' motion to quash. They maintain that there are competing claims to the disputed work and reasonable cause to believe that Laborers violated Section 8(b)(4)(D) by threatening work stoppages. They also argue that the Employer is not bound to the Plan because the short-form agreement references only the IJDB, not any successor dispute resolution mechanism.

On the merits, the Employer and Laborers assert that the Board should allow the Employer to continue its existing composite crew practice—including the regular and significant assignment of the work in dispute to Laborers-represented employees—based on the factors of past practice, employer preference, area and industry practice, and economy and efficiency of operations.

Carpenters and Bricklayers emphasize that any award of the disputed work should allow employees represented

by Carpenters, Bricklayers, and Roofers to continue to operate equipment as needed in accordance with existing composite crew practice.

D. Applicability of the Statute

The Board may proceed with a determination of a dispute under Section 10(k) of the Act only if there is reasonable cause to believe that Section 8(b)(4)(D) has been violated. *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1139 (2005). This requires finding that there is reasonable cause to believe that there are competing claims to the disputed work and that a party has used proscribed means to enforce its claim to that work. Additionally, there must be a finding that the parties have not agreed on a method for voluntary adjustment of the dispute. Id. We find that these requirements have been met.

1. Competing claims for work

We find reasonable cause to believe that both Laborers and Operating Engineers have claimed the disputed work for employees they respectively represent. By its own admission, Laborers has done so; further, the employees it represents have been performing the work in dispute, and Laborers threatened a work stoppage if the Employer reassigned the work to employees represented by Operating Engineers. Operating Engineers clearly claimed the work in dispute when it filed a grievance over the assignment of that work on May 3, and we reject Operating Engineers' argument that withdrawal of its grievance negated its claim to the disputed work. To be effective, a disclaimer of work must be "clear, unequivocal, and unqualified," not merely a "'hollow disclaimer' interposed for the purpose of avoiding an authoritative decision on the merits." *Laborers Local 110 (U.S. Silica)*, 363 NLRB No. 42, slip op. at 3 (2015) (citing cases). Because Operating Engineers continued to claim the disputed work at the hearing, its purported disclaimer was clearly ineffective. Id.

2. Use of proscribed means

We find reasonable cause to believe that Laborers used means proscribed by Section 8(b)(4)(D) when it informed the Employer that its members would engage in a work stoppage if the Employer assigned the work in dispute to employees represented by Operating Engineers. See *Bricklayers (Cretex Construction Services)*, 343 NLRB 1030, 1032 (2004). Operating Engineers' contention that Laborers' work-stoppage threat was a sham and the product of collusion with the Employer is unavailing because Operating Engineers has provided no affirmative supporting evidence. See *Operating Engineers Local 150 (R&D Thiel)*, supra at 1140. See also *Laborers Intl. Union of North America, Local 265 (Henkels & McCoy, Inc.)*, 360 NLRB 819, 823 (2014) (employer's provision of rival union's grievance to threatening union did not show collusion).

3. No voluntary method for adjustment of dispute

We further find no agreed-upon method for voluntary adjustment of the dispute. Because the Jurisdictional Disputes provision in Operating Engineers' short-form agreement applies by its terms exclusively to the defunct IJDB, the Employer can only be bound to the Plan if, as Operating Engineers posits, the reference to the IJDB was a mutual mistake between the parties that warrants reformation. In a few cases, the Board has found outdated references to jurisdictional dispute resolution bodies to be such mistakes and accordingly reformed the agreements to refer to viable successor bodies. It has done so, however, only when the named bodies were recently rendered defunct. See *Painters Local 203 (E. O. Brunner Plastering Co.)*, 234 NLRB 235, 236 fn. 2 (1978) (agreement naming the defunct National Joint Board for Settlement of Jurisdictional Disputes (NJB) construed to instead refer to the IJDB where the agreement became effective 1 year after the IJDB's establishment); *Pipefitters Local No. 195, Plumbers (Cleveland Wrecking Co.)*, 218 NLRB 172, 174 (1975) (agreement that referred to defunct NJB and became effective a month and a half after the IJDB became operational construed to refer to the IJDB); *Sheet Metal Workers Intern. Assn. (Young Plumbing & Supply, Inc.)*, 209 NLRB 1177, 1179–1180 (1974) (agreement that referred to defunct NJB and became effective on the day IJDB became operational construed to refer to the IJDB).

Contract reformation is an equitable remedy, and its application depends upon the facts of each case. See *NLRB v. Cook County School Bus, Inc.*, 283 F.3d 888, 895–896 (7th Cir. 2002). Here, Operating Engineers asks us to salvage a provision facially requiring the Employer to submit jurisdictional disputes to an entity that at the time of the ostensible agreement had not existed *for 25 years*. Even assuming that the IJDB reference was a mutual mistake, we find it inappropriate in these circumstances to reform the agreement to refer to the Plan. Unlike the drafting parties in *E. O. Brunner*, *Young Plumbing & Supply*, or *Cleveland Wrecking* (relied on by our dissenting colleague),[3] Operating Engineers allowed the error to persist far past the time when it might have qualified as a mere

[3] We further note that a significant factor in the finding of a mutual mistake in *Cleveland Wrecking*—and one not present here—was successorship language binding the parties to submit jurisdictional disputes to any replacement dispute resolution body "approved by the Building and Construction Trades Department of the AFL–CIO, and signatory employer associations." Id. at 174. Indeed, the Board found that the presence of the successorship clause "clearly evidenced" that "the contracting parties obviously intended to be bound by a functioning entity"—one that came into existence a mere month and a half before the execution of the agreement. Id.

typographical error. Its conduct demonstrates an extreme lack of diligence, in derogation of the Employer's right to choose its preferred method for resolving jurisdictional disputes.[4] We therefore decline to use our equitable powers to absolve Operating Engineers of responsibility for its egregiously longstanding error.[5]

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of work in dispute after considering various factors. *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting)*, 364 U.S. 573, 577 (1961). The Board's determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402, 1410 (1962). As discussed, the crux of this dispute is whether the Employer may continue to assign the work in dispute predominantly to Laborers-represented employees on its composite crews, or whether it should reassign the bulk of that work to employees represented by Operating Engineers.

The following factors are relevant in making the determination of this dispute.

1. Board certifications and collective-bargaining agreements

The parties stipulated at the hearing that the work in dispute is not covered by any Board certification or order. Operating Engineers, however, asserts that its collective-bargaining agreement with the Employer entitles the employees it represents, not Laborers-represented employees, to the disputed work.

Operating Engineers' agreement with the Associated General Contractors (AGC) of Michigan, to which the Employer is bound, includes a jurisdictional clause that describes the covered work as "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 . . . rather than any other skilled trade group." It further instructs that the "Employer shall employ Operating Engineers for the erection, operation, and maintenance of all hoisting and portable equipment . . . ."

Laborers' jurisdictional clause in its agreement with the Employer includes, in addition to assorted manual labor tasks, "all work necessary or incidental to performing the Employer's operations in a safe and efficient manner." The clause provides that "there shall be no restrictions imposed against the use of any type of machinery, tools, or labor saving devices."

Because both agreements arguably encompass the disputed work but do not explicitly claim it, this factor does not support awarding the work in dispute to employees represented by either union. See, e.g., *Laborers Intl. Union of North America, Local 265 (Henkels & McCoy, Inc.)*, 360 NLRB at 824.

2. Employer preference and past practice

The Employer regularly assigns the work in dispute to employees represented by Laborers and prefers that they continue to perform a significant portion of the work as part of its composite crews. The Employer's representatives testified that the Employer has followed this practice for the past 30 years. Operating Engineers' representatives confirmed that the Employer has followed this practice. Thus, we find that this factor favors awarding the work in dispute to employees represented by Laborers.

3. Area and industry practice

Laborers presented letters of assignment from 13 employers, indicating that employees it represents operate equipment for these contractors at various jobsites in Michigan. However, the letters generally fail to specify the work involved or the facts and circumstances surrounding the work; to the extent such information is present, it shows that the work is dissimilar to the work in dispute. Representatives of the Employer and Laborers also testified that other employers use composite crews. However, they did not identify which union represents the employees, if any, who predominantly perform the disputed work on those crews. This evidence is therefore inconclusive. See, e.g., *Laborers Local 860 (Ronyak Paving, Inc.)*, 360 NLRB 236, 240–241 (2014).

[4] See *NLRB v. Plasterers Local 79*, 404 U.S. 116, 133–134 (1971). Contrary to our dissenting colleague, this is not a case in which parties may bear equal responsibility for a drafting mistake. Cf. *Americana Healthcare Center*, 273 NLRB 1728, 1733 (1985) (union's failure to closely read agreement purporting to represent the product of multiple bargaining sessions did not preclude reformation because the conduct of the employer who reduced it to writing "was about the same"), enfd. 782 F.2d 941 (11th Cir. 1986). While we are not finding Operating Engineers solely responsible for the error, as our colleague claims, it is undeniable that the Employer's possible carelessness pales in comparison to Operating Engineers' far more troubling negligence in failing to correct its own standard form for 25 years.

[5] It has long been recognized that contract reformation may be barred if the "[mistaken party's] fault amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing," including lack of diligence. See Restatement (Second) of Contracts § 157 (1981), which incorporates the substance of § 205 of the Restatement.

4. Relative skills and training

Both Laborers and Operating Engineers offer training to employees they represent. Laborers has a training and apprenticeship program that provides vocational training at four sites in Michigan. The program provides certifications to operate power-driven equipment such as bobcats and forklifts, but not power-generating equipment such as a generator. Operating Engineers maintains a Journeyman & Apprentice Training Fund, through which it provides training in and certifications for the operation of cranes, forklifts, graders, excavators, bulldozers, scrapers, and loaders, but not bobcats, shot-blasters, ride-on sweepers, compressors, or generators. The Employer provides additional on-the-job training.

Based on the record, employees represented by each union have comparable skills. The Employer's representatives testified that some Laborers-represented employees use their training to become Operating Engineers–represented employees and continue to work for the Employer. Conversely, these representatives testified that direct hires from Operating Engineers' hiring hall have damaged equipment and created work delays. However, there is no evidence that the Employer has been otherwise unhappy with the quality of work performed by employees represented by Operating Engineers.

We find that employees represented by Laborers as well as those represented by Operating Engineers possess the training and skills necessary to perform the work in dispute. Therefore, this factor does not favor assigning the work in dispute to employees represented by either union. See, e.g., *Laborers Intl. Union of North America, Local 265 (Henkels & McCoy, Inc.)*, 360 NLRB at 825–826; *Structural Steel & Bridge Painters Local 806 (Carabie Corp.)*, 356 NLRB 971, 973 (2011).

5. Economy and efficiency of operations

The Employer's representatives testified that the Employer uses composite crews, with Laborers-represented employees regularly operating the equipment at issue, because doing so is more efficient. The record shows that there is rarely a full day of equipment-operating work on the Employer's projects, and Operating Engineers–represented employees do not want to perform other types of work. The Employer's representatives also testified that inflexible assignment of the work in dispute to Operating Engineers–represented employees would force the Employer to relocate them during the workday, disrupting the flow of work and increasing the Employer's expenses. There is no evidence that Operating Engineers–represented employees can offset these inefficiencies by performing the work in dispute more quickly and effectively than other employees. This factor therefore favors awarding the work in dispute to employees represented by Laborers. See, e.g., *Laborers Intl. Union of North America, Local 265 (Henkels & McCoy)*, 360 NLRB at 826 (greater versatility of Laborers-represented employees supported award of disputed work to them instead of employees represented by Operating Engineers); *Laborers (Eshbach Bros., LP)*, 344 NLRB 201, 204 (2005) (same).

CONCLUSION

After considering all the relevant factors, we conclude that employees represented by Laborers are entitled to predominantly perform the work in dispute as part of the Employer's composite crews. We reach this conclusion relying on the factors of employer preference and past practice and economy and efficiency of operations. In making this determination, we award the work to employees represented by Laborers, not to that labor organization or to its members.

Scope of the Award

The Employer and Laborers maintain that our award in this proceeding should encompass the entire State of Michigan because disagreements and further unlawful conduct over the assignment of the disputed work will continue to arise on future projects. In support, they cite Operating Engineers' complaints about assignment of the disputed work on other jobsites, as well as the parties' consistently broad descriptions of the work in dispute. Operating Engineers and Carpenters oppose an areawide award, with Operating Engineers asserting that the withdrawal of its grievance and Laborers' withdrawal of its work-stoppage threat make an areawide award unnecessary.

The Board normally limits a Section 10(k) award to the jobsite that was the subject of the unlawful 8(b)(4)(D) conduct or threats. See *Chicago and Northeast Illinois District Council of Carpenters (Prate Installations, Inc.)*, 341 NLRB 543, 546 (2004). To justify an areawide award, there must be (1) evidence that the disputed work has been a continuous source of controversy in the relevant geographic area and that similar disputes may recur, and (2) evidence demonstrating the offending union's proclivity to engage in further unlawful conduct in order to obtain work similar to that in dispute. See, e.g., *Laborers' International Union of North America, Local 860 (Ballast Construction, Inc.)*, 364 NLRB No. 126, slip op. at 6 (2016).

We find an areawide award of the disputed work unwarranted. The Board generally refuses to issue such an award where, as here, the charged party represents the employees to whom the work is awarded and to whom the employer contemplates continuing to assign the work. See, e.g., *Highway Road and Street Construction Laborers Local 1010 (New York Paving)*, 366 NLRB No. 174,

slip op. at 5 (2018). No aspects of this case justify departing from the Board's general practice. Even assuming the disputed work has been a continuous source of controversy, the parties have renounced further action in support of any continuing claims to the work. There is also no evidence that Operating Engineers has a proclivity to engage in unlawful conduct to obtain the work. Accordingly, we shall limit the present determination to the controversy that gave rise to this proceeding, the Detroit Free Press jobsite. See, e.g., *Laborers Local 210 (Concrete Cutting & Breaking)*, 328 NLRB 1314, 1316 (1999).

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

Employees of Ram Construction Services of Michigan, Inc., represented by Michigan Laborers' District Council, an affiliate of the Laborers' International Union of North America, AFL–CIO, are entitled to predominantly perform the operation of hi-los, forklifts, bobcats, skid steers, grade-alls, ride-on sweepers, shot-blast machines, compressors, and rented excavating equipment as part of the restoration work being performed at the Detroit Free Press building project located at 321 West Lafayette Boulevard, Detroit, Michigan.

Dated, Washington, D.C. July 3, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MCFERRAN, dissenting.

Contrary to the majority, the Board should quash the notice of hearing here, because all parties are bound to a method for voluntary adjustment of the dispute, notwithstanding the parties' mutual mistake in identifying that method in their contract. The facts here are straightforward. In August 2006, the Employer and Operating Engineers signed a short-form agreement stating that in the event of a jurisdictional dispute with any other union, the dispute would be submitted to the Impartial Jurisdictional Disputes Board (IJDB). However, the IJDB has been defunct since 1981 and was replaced in 1984 by the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (the Plan). It is undisputed that the Plan was in existence at the time the short-form agreement was signed, the close connection between the IJDB and the Plan is widely understood in the construction industry, and the parties have substantial industry and collective-bargaining experience. Under the circumstances, it is clear that the parties simply made a mutual mistake when naming the defunct IJDB, instead of the Plan, as their agreed-upon dispute resolution body. Board precedent and common-sense dictate construing the parties' short-form agreement to incorporate the Plan. Instead, my colleagues erroneously place the onus of the parties' mistake entirely on the Operating Engineers and so allow the Employer to avoid its contractual obligation.

I.

Where parties have agreed upon a dispute-resolution clause that refers to a defunct entity, the Board has held that the parties are bound to utilize the defunct entity's successor, because the parties must have intended to create an effective agreement. See *Pipefitters Local No. 195, Plumbers (Cleveland Wrecking Co.)*, 218 NLRB 172 (1975).

In *Cleveland Wrecking Co.*, the parties signed a contract stating that jurisdictional disputes would be referred to the then-defunct National Joint Board for the Settlement of Jurisdictional Disputes (NJB). The Board found instead that this provision referred to the then-functioning IJDB, stating, "[W]e surely cannot impute to [the parties] a contractual intent . . . to be bound to a defunct entity. . . . [W]e find and conclude that the reference therein to the defunct NJB was either the result of an oversight or was in the nature of a clerical error." *Cleveland Wrecking Co.*, supra at 174.[1] This approach is fully consistent with settled contract interpretation principles, which "require (a) that the contract be construed, if possible, so that its provisions are valid rather than invalid; (b) that a reasonable meaning be accorded to all its terms; and (c) that the grammatical and ordinary sense of particular words be read, and where necessary, modified to avoid an absurdity or an inconsistency with the rest of the contract." *Supreme Sunrise Food Exchange, Inc.*, 105 NLRB 918, 920 (1953).

[1] The majority states that the presence of successorship language was a "significant factor" in *Cleveland Wrecking*. In fact, the *Cleveland Wrecking* Board only noted that successorship language as further evidence of the parties' contractual intent to be bound to a functioning entity. Such language is not necessary, as demonstrated by *Painters Local 203 (E. O. Brunner Plastering Co.)*, 234 NLRB 235, 236 fn. 2 (1978), where the Board found that the parties, whose agreement referred to the defunct NJB, were bound to the functioning IJDB, without any mention of similar successorship language. So here, too, the absence of a successorship clause is not determinative.

Here, *Cleveland Wrecking* and basic contract interpretation principles fully support reading the parties' short-form agreement, and its reference to the defunct IJDB, as referring to the Plan. The Operating Engineers and the Employer "obviously intended to be bound by a functioning entity," *Cleveland Wrecking Co.*, supra at 174, and when they executed their agreement that entity was the Plan. Construing their agreement in this manner, moreover, avoids the absurdity of finding that the parties intended to create an agreement that was ineffective from the outset. Indeed, the parties clearly knew (or reasonably should have known) that the IJDB had been succeeded by the Plan and that any future disputes would necessarily have to be submitted to the Plan. It is undisputed that the parties have substantial industry and collective-bargaining experience, and that the close linkage between the IJDB and the Plan is widely understood in the industry.

My colleagues nevertheless argue that even if the reference to the IJDB was a mutual mistake, it is inappropriate to reform the parties' short-form agreement because, in their view, the Operating Engineers demonstrated a lack of diligence in allowing the error to persist for many years.[2] But, of course, the Employer likewise signed the current short-form agreement knowing that the IJDB was no longer in existence. The salient point is that *both* parties manifested an intent to resolve their disputes through a third-party dispute resolution service, and at the time that service was the Plan. We should construe the parties' agreement accordingly.[3]

II.

Board precedent and common sense point to only one rational conclusion here: that the Employer and Operating Engineers intended to submit their jurisdictional disputes to a functioning entity, that their short-form agreement mistakenly referred to the defunct IJDB, and that they knew or should have known that they were agreeing to submit their disputes to the Plan. Thus, the Board should hold the parties to their agreement and quash the notice of hearing.

Dated, Washington, D.C. July 3, 2019

Lauren McFerran, Member

NATIONAL LABOR RELATIONS BOARD

[2] The majority does not cite to any case where the Board has held that the drafting party, or in this case the party that provides a short-form agreement, is solely responsible for mistakes in that agreement.

[3] See *Painters Local 203 (E. O. Brunner Plastering Co.)*, above at 236 fn. 2 ("It is clear that this provision refers to the IJDB and not to its predecessor the National Joint Board, since the contract is effective from June 1, 1974, to June 1, 1977, and the IJDB was established on June 1, 1973."); *Sheet Metal Workers Intl. Assn. (Young Plumbing & Supply, Inc.)*, 209 NLRB 1177, 1179–1180 (1974) (construing a jurisdictional disputes provision to refer to the then-functioning IJDB even though the defunct NJB was the named entity in the agreement).