UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 21

SOUTHWEST REGIONAL COUNCIL OF CARPENTERS, SOUTHERN CALIFORNIA CONFERENCE OF CARPENTERS, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA

Case 21-CD-675

and

TANGRAM FLOORING, INC

and

PAINTERS AND ALLIED TRADES DISTRICT COUNCIL 36, INTERNATIONAL BROTHERHOOD OF PAINTERS AND ALLIED TRADES, AFL-CIO, CLC

Party in Interest

POST HEARING BRIEF

TABLE OF CONTENTS

TABLE OF AUTHORITIES
FEDERAL CASES

STATE CASES

STATUTES

MISCELLANEOUS

I
INTRODUCTION

A. PREFATORY STATEMENT

This Section 10(k) matter arises out of a garden-variety jurisdictional dispute between Charged Party/Respondent Southwest Regional Council of Carpenters ("Carpenters") and Party-In-Interest Painters and Allied Trades District 36 ("Painters"). The dispute relates to flooring work done at the W Hotel Project in Hollywood, California. The employer in this matter, Tangram Flooring, Inc. ("TFI"), has expressed its preference among the two competing unions by selecting – and signing a collective bargaining agreement with – the Carpenters. It did so for a "laundry list" of eminently rationally-based reasons, including but not limited to the fact that the Carpenters are a stronger union, that they provide better service to the employer and its employees, and that they have a stronger pension plan. (Tr. 25:3-18.)[1]

As will follow, application of the traditional criteria governing Section 10(k) matters such as this one clearly warrants an award of work to the Carpenters. Indeed, the Carpenters are not new to Section 10(k) proceedings, and two recent rulings in their favor provide both the legal construct and result that the Board should apply in this case. (*Southwest Regional Council of Carpenters (Standard Drywall Inc.)*, 346 NLRB 478 (2006) ("*SD I*"); *Southwest Regional Council of Carpenters (Standard Drywall Inc.)*, 348 NLRB 1250 (2006) ("*SD II*").) In particular, the evidence presented at the two days of hearing in this matter make this case substantively indistinguishable to *SD I* and *SD II*, and, as such, should mandate the same result reached in both of those cases. For this reason and all those that will be discussed below, the Board should make an award of work to the

[1]Throughout this brief, several abbreviations are used, and are set forth as follows: Tr. (Transcript (both volumes)); BEX (Board Exhibit); CEX (Charging Party Exhibit); REX (Respondent Carpenters Exhibit); and PEX (Party-In-Interest Painters Exhibit).

Carpenters. This award should not be limited to this project; instead, in view of the continuing nature of the threats made by the Painters on other projects, the award should apply to all projects within the geographic region covered by the collective bargaining agreement maintained between TFI and the Carpenters. (*SD II*, *supra*, 348 NLRB at 1256.)

B. FACTUAL BACKGROUND

TFI is a corporation that installs commercial floor coverings. (Tr. 22:10-14.) Shortly after its formation, (Tr. 22:18), it executed a collective bargaining agreement with the Carpenters on August 21, 2008. (CEX 1.) That agreement, which was a Memorandum Agreement, incorporated a Master Labor Agreement, (CEX 2), and applies to a geographic region covering Southern California and several Southwestern states. Both the Memorandum Agreement and the Master Labor Agreement contain provisions covering the floor covering work in this case. (CEX 1 & CEX 2.) Pursuant to both agreements, TFI has assigned this work to the Carpenters, and in particular, has assigned work to the Carpenters on the W Hotel project. (BEX, ¶ 7.)

During its brief corporate existence, TFI has never maintained any collective bargaining relationship with any union except with the Carpenters. (Tr. 120:13-16.) TFI's decision to select the Carpenters – as opposed to signing with the Painters- was one made for a "laundry list" of sound business reasons:

> [T]he Carpenters [are] a much stronger union than what the Painters Union is. They had a more secure pension program. They showed more support to the employee and the employer than what the Painters Union did. They offer a larger pool of people that I can utilize from, as well as it offers more benefits for my employees. For example, if I'm slow and my guys have to go back to the hall on the out of work list, they don't have the option to just go to a floor covering company, they can go to multiple different companies to get work and learn different trades and better themselves. It offered a laundry list of things that was just a betterment for my employees.

(Tr. 25:3-18.)

TFI started performing installation work in late 2008. (Tr. 86:20 - 87:9) Unfortunately for TFI, the Painters began showing up on TFI jobsites to make a claim to the work being performed by TFI. For instance, on the Pacific Life project in Newport Beach, the Painters set up a 10-foot banner with the phrase "Shame On Tangram" and displayed a giant, inflatable "rat" at the worksite. (Tr. 38:2-6.) When TFI attempted to ask the Painters why they were conducting this demonstration, one of their representatives expressed his displeasure with TFI signing with the Carpenters. He warned TFI that "You understand that you're starting a war," (Tr. 39:14-20), also demanded TFI sign with the Painters. (Tr. 40:5-10.)

The Painters made another express demand for the work when none other than their lawyer, Ellen Greenstone, called TFI's Vice President David Teper in late March 2009. (Tr. 45:25 - 46:3.) In that conversation, Greenstone, who called to cancel a meeting between the Painters and TFI (something which her clients were more than capable of doing), (CEX 3), spoke to Teper about, among other things, the Painters' demonstrations against TFI. (Tr. 47:20-23.) On numerous occasions during that call, Greenstone goaded Teper to "read between the lines," so much so that her conversation with Teper became "comical." (Tr. 47:24 - 48:16.) When Teper finally asked her a direct question about whether she wanted him to sign a contract with the Painters, she answered affirmatively. (Tr. 48:17-25.)

After the call, Teper called counsel for the Carpenters to discuss the substance of Greenstone's conversation. (Tr. 49:10-13.) The Carpenters' counsel told him that if TFI signed a collective bargaining agreement with the Painters, then the Carpenters would strike every project that TFI was working on. (Tr. 49:14 - 50:3.) This conversation was followed-up by a letter of April 6,

2009, restating this threat, (Tr. 50:4-25 & CEX 4), which was done at the request of the Carpenters themselves. (Tr. 128:3-9.) In addition, the Carpenters also made threats to take job action if in fact TFI signed with the Painters. (Tr. 128:18-23; Tr: 51:1-9; Tr. 65:1 - 66:3.)

TFI filed the charge initiating this Section 10(k) matter on April 6, 2009. (BEX 1(a).) A notice of hearing was issued on May 19, 2009, with hearing set for the June 8, 2009. (BEX 1(d).) Two days of hearing was conducted on June 8 and June 10, 2009. In view of all the evidence given at the hearing, the Carpenters submit that they are entitled to an award of work not only on this project, but for all other projects as well.

II
ARGUMENT

A. THERE IS MORE THAN ENOUGH REASONABLE CAUSE TO BELIEVE THAT THE ACT HAS BEEN VIOLATED

Section 8(b)(4)(D) makes it an unfair labor practice for a labor organization to "forc[e] or requir[e an] any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class." (29 U.S.C. § 158(b)(4)(D).) "[T]he Board is empowered and directed, by § 10 (k), to hear and determine the dispute out of which such unfair labor practice shall have arisen," and upon compliance by the disputants with the Board's decision the unfair labor practice charges must be dismissed." (*NLRB v. Radio & Television Broadcast Engineers Union (Columbia Broadcasting)*, 364 U.S. 573, 577 (1961) (citing 29 U.S.C. § 160(k).)

"Before the Board may proceed with determining a dispute pursuant to Section 10(k) of the Act, there must be reasonable cause to believe that Section 8(b)(4)(D) has been violated. This standard requires that there is reasonable cause to believe that: (1) there are competing claims for the

disputed work among rival groups of employees; (2) that a party has used proscribed means to enforce its claim to the work in dispute; and (3) the parties have no agreed-upon method for the voluntary adjustment of the dispute." (*SD II*, *supra*, 348 NLRB at 1252-53 (footnotes omitted).) In resolving jurisdictional issues under the Act the Board "is not charged with finding that a violation actually occurred, but only that there is reasonable cause to believe that Sec. 8(b)(4)(D) has been violated." (*Teamster Local 282 (Mount Hope Trucking Co.)*, 316 NLRB 305, 307 n. 8 (1995).) The record presented at the two days of hearing in this case clearly establishes that there was such reasonable cause shown.

1. Both the Carpenters And Painters Have Asserted Competing Claims For The Work At Issue In This Case

a. The Carpenters Have Made A Claim To The Work Through Its Collective Bargaining Agreements And Subsequent Threats To Take Action For Re-assignment Of Work

The Carpenters have made a claim to the work here by representing TFI employees performing that work. In particular, as noted above, they maintain a collective bargaining agreement with TFI through a Memorandum Agreement and Master Labor Agreement, (CEX 1 and 2), and Carpenters represented employees are currently performing the disputed work at the W Hotel project. (BEX 2, ¶ 7.) In addition, the Carpenters have made several threats to strike if TFI would re-assign the work to the Painters. This occurred on or about April 6, 2009 when Gordon Hubel of the Carpenters communicated to TFI's Vice-President David Teper that the Carpenters would strike if TFI would reassign work to the Painters. (Tr. 128:18-23). In addition to Hubel, other Carpenters representatives made threats to strike as well. (Tr: 51:1-9; Tr. 65:1 - 66:3.) This threat was

followed-up by a letter dated April 6, 2009, written by counsel at the behest of Hubel, re-stating this intention to strike. (Tr. 128:3-9.)

b. The Painters Have Made Claims To The Work In Several Different, Independent Ways

[1] The Painters Refusal To Disclaim The Work At The W Hotel Project Is, In And Of Itself, Sufficient To Conclude That They Are Claiming The Work Being Done On The Project

At the outset of the hearing, the Painters were offered the opportunity to disclaim any interest in the W Hotel project. (Tr. 29:3-11.) They did not, explaining that "we're not disclaiming the work [because we] want the Board to consider the issue of whether an effort to enforce state apprenticeship law is somehow a claim for the work." (Tr. 29:12-15.) This refusal to disclaim the work is dispositive since such a refusal as a matter of law – and of common sense – is conclusive on this factor. (*Ironworkers Local No. 563 (Midstates Corporation)*, 272 NLRB 1371, 1372 (1984) ("We note also that Salo declined to disclaim the work in dispute, asserting in the final analysis, "It's Iron Worker's work, it's as simple as that."); *Carpenters Local 210 (Component Assemblies System)*, 327 NLRB 1, 2 n. 2 (1998) (where rival union did not disclaim work and participated fully in hearing, Board found that it was claiming work).) Moreover, the Painters desire to force the Board to rule on their argument regarding enforcement of apprenticeship law is simply a request for an advisory opinion. Because the Board does not issue such opinions, this request is clearly inappropriate. (*Bell Tel. Co.*, 118 NLRB 371, 374 (1957).) For this simple reason alone, the Board can simply find that the Painters refusal to disclaim the work and its participation in the hearing demonstrates that it is making a competing claim for the work in this matter. In turn, the Board should decline the Painters request to rule on a matter that would, at most, constitute dictum.

[2] Greenstone's Phone Call Demanding That TFI Sign A Collective Bargaining Agreement Is Another Basis Upon Which to Conclude the Painters Are Claiming the Work In This Case

In *SD I* and *SD II*, the Board found a rival union's demand for a charging party employer to a sign a contract sufficient to show that the rival was making claim for the work at issue in both cases. (*SD I*, *supra*, 346 NLRB at 480-81; *SD II*, *supra*, 348 NLRB at 1253.) Here, the Painters insistence that Tangram sign with them fits squarely within the factual context of both *SD I* and *SD II* and thus clearly satisfies this part of the Section 10(k) test. The most prominent of these claims for signing a contract was made through the Painters counsel, Ellen Greenstone. In a conversation she had with Teper, she made very clear to him that the demonstrations being conducted by the Painters would cease if he would sign a contract with her client. (Tr. 48:22-25.) The details of this conversation were amply documented in an e-mail Teper drafted shortly after the conversation took place. (CEX 3.)

While Greenstone took the stand in her own defense, her testimony lacks complete credibility for a number of reasons. First, a percipient witness to the phone call corroborated the pertinent details of Teper's testimony and his e-mail.[2] That witness, Hector de la Torre, listened to the

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[2]At the hearing, Greenstone protested the admission of Teper's testimony on grounds that there was a third party listening in on her conversation with him. (Tr. 98:1-4.) According to her, this constituted a violation of Penal Code § 632. (*Id.*) Section 632 prohibits eavesdropping of a confidential communication between two parties. (Pen. C. § 632(a).) Whatever the merits of this argument may be, it is a *state* rule wholly inapplicable to a *federal* proceeding such as this one. (*East Belden Corp.*, 239 NLRB 776, 782 n. 27 (1978) ("In view of my conclusion that Federal and not state law furnishes the standard governing the admissibility of the tape recording into evidence, I have not considered whether, in fact, Fallon's conduct in recording the September 30 meeting held in Respondent's bar ran afoul of § 632 of the California Penal Code") (*See also* Tr. 99:7-14 (noting foregoing point).) For this reason, Greenstone's objection on this count is wholly misplaced.

conversation between Teper and Greenstone and recounted, in uncontradicted testimony, the fact that Greenstone instructed Teper to "read between the lines" and demanded that he sign a collective bargaining agreement with the Painters. (Tr. 457:10 - 458:12.) In addition, the circumstances giving rise to the call were, at the very least, suspicious on Greenstone's part. These clearly show an attempt by Greenstone, a lawyer, to prevail upon a layperson under the pretext of relaying a basic message for her client, something her client could have and has done before in the past. In particular, Greenstone testified that she had called simply to advise Teper that a meeting between her client and Teper was being cancelled. (Tr. 45:19 - 46:1 & CEX 3.) Up to that point, however, she had never spoken to Teper, and the message she was ostensibly relaying was hardly one that could not be delivered by her client. In fact, her clients had cancelled a meeting with Teper before. (Tr. 45:8-18 (noting Painters cancellation of meeting via e-mail).) Furthermore, Greenstone, a seasoned lawyer of many years, failed to determine if Teper was represented by counsel, and engaged in a probing conversation with him on topics relating to the Painters campaign against TFI. (Tr. 357:6-10.) This conduct clearly violates ethical rules prohibiting a lawyer from speaking with an individual represented by counsel, (*see* ABA Model Rule 4.2 & Cal. Prof. Cond. Rule 2-100(A)), which Teper was.[3] Further compounding her credibility was the fact that Greenstone could give no reason as to

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[3]When Greenstone took the stand, she refused to answer numerous relevant questions based on attorney-client privilege grounds. (*See e.g.*,(Tr. 337:7-11) (refusal to testify why she did not say that the Painters wanted to sign an agreement with TFI); (Tr. 337:19-23) (why she instead of Painters called to cancel meeting); (Tr. 348:3-6) (why it was so important to get information about why meeting was taking place); (Tr. 356:24-357:3) (standing on privilege regarding whether purpose of phone call was to get agreement signed with TFI).) It is well-established that the privilege cannot be used as both a sword and shield where a witness like Greenstone testifies as to one issue but refuses on privilege grounds to respond to questions relevant to what she had testified to. (*CNN Am., Inc.*, 2008 NLRB LEXIS 179, *1, *13 n. 12 (2008) (citing *Anderson v. Nixon*, 444 F.Supp. 1195, 1199, 1200 (D.D.C. 1978).) Where, as here, invocation of the privilege interferes with questioning on relevant matters, testimony such

why she did not determine whether Teper was represented by counsel, (*Snider v. Sup.Ct. (Quantum Productions, Inc.)*,113 Cal. App. 4th 1187, 1209 (2003) (duty to inquire)), and the fact that she was confronted with a divisive conflict when testifying on a key, material issue in this case: one as a witness duty-bound to tell the truth in a hearing and the other as counsel to advocate zealously for her client. (ABA Model Rule 3.7(a).) Indeed, far from calling to simply inform Teper that a meeting was canceled, the surrounding circumstances of the call and the fact she discussed intimate details of issues relating to this case (e.g., why bannering was not picketing) strongly impugns her description – and in turn credits Teper's version – of the conversation. Simply put, Greenstone, a lawyer, was calling Teper, a lay person, to leverage him into signing a contract on behalf of her clients.

Communications made by Greenstone's clients further buttress the fact that she called to force Teper into signing an agreement. For instance, Vince Ramos, a Painters representative, visited Teper shortly after he signed a collective bargaining with the Carpenters. (Tr. 39:5-9.) Ramos then noted that "you understand you're starting a war." (Tr. 39:16-20.) Ramos further admonished Teper that TFI " should be signed on to the Painters." (Tr. 40:5-10.) Shedding further light on this issue was the candid admission by David Burtle, another Painters representative, that "conflicts" would arise because TFI signed an agreement with the Carpenters. (Tr. 284:5-10.) These "conflicts", according to him, related to the Painters view that the work performed by the Carpenters belonged to the Painters. (Tr. 284:16-19.) These exchanges provide clear context and insight on the Painters intent to secure rights to work via coercion that the Carpenters legitimately obtained through

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as the one given by Greenstone should be stricken. (*See e.g., United States v. Seifert*, 648 F.2d 557, 561 (9th Cir. 1980).)

collective bargaining. In doing so, this not only colors the true intent behind Greenstone's call to Teper, but it also, by itself, provides an independent basis for concluding that the Painters are making a claim to the work in this case.

[3] The Painters Attempt To Invoke The Authority Of A Jurisdictional Dispute Resolution Board Also Demonstrates Their Claim To The Work In This Case

At the hearing, the Painters offered as an exhibit a prior jurisdictional award issued in 1942 purporting to award flooring work to a Painters union entity. (PEX 4.) While this award has no precedential bearing on this matter,[4] it still is relevant to show that the Painters are claiming the work in this case. In *Carpenters Local 210*, the Board held that where, as here, a rival union does not disclaim the work at issue, participates in a hearing, and seeks to invoke the jurisdictional dispute mechanism of another board, that union is making a claim for the work in that case. (*Carpenters Local 210*, *supra*, 327 NLRB at 2 n. 2.) As noted previously, the Painters are not disclaiming the work and fully participated in the two-day hearing in this matter. Further, as in *Carpenters Local 210*, the Painters are relying on a decision awarded by an AFL-CIO entity responsible for resolving jurisdictional disputes. (Tr. 208:17 - 209:13.) In view of this factual background and the nearly identical demands made by the rival unions in *Carpenters Local 210* and this matter, it is clear that the Painters are claiming the work on the W Hotel project.

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[4]This point will be discussed, *infra*, in Section B.6.

[4] Because the Painters View Apprenticeship Enforcement In Terms Of Asserting A Claim For Jurisdiction Over Work Performed By Their Apprentices, They Are Making A Claim For The Work Here

As alluded to previously, the Painters alleged that they were seeking a ruling from the Board that apprenticeship enforcement was not a claim to disputed work. Apart from the fact that it seeks an advisory opinion, it is also based on a factual predicate that still requires a finding that the Painters are claiming the work in this case.

In the two *SD* cases, the Board found that the Plasterers union was making a claiming for disputed work on a nearly indistinguishable set of facts. There, the rival union filed a suit against Standard Drywall, the employer in that case, alleging that the "Employer is legally obligated to use apprentices trained by a state-approved apprenticeship program, which requirement is allegedly satisfied only by Plasterers' program." (*SD II*, *supra*, 348 NLRB at 1253.) The Board concluded that "the lawsuit had a jurisdictional objective because in effect it both claimed Plasterers' jurisdiction over the disputed work and sought relief that would force the Employer to assign the disputed work to Plasterers-represented employees." (*SD I*, *supra*, 346 NLRB at 481 n. 8.)

The Painters likewise are seeking a jurisdictional objective when asserting a claim for apprenticeship enforcement. As with the Plasterers plan in *SD I* and *SD II*, the Painters plan is the only approved program for the work at issue. When dispatching apprentices from this plan, the Painters view that any apprentices so dispatched fall within their jurisdiction.

> Q The hypothetical is, Tangram, a Carpenters' Union signatory contractor requests dispatch of apprentices from the Painters' apprenticeship program. They -- assume they have complied with the various agreements you have described and filled out the various forms. When those apprentices are dispatched, is it the Painters' position that those apprentices would be under the jurisdiction of the Painters' Union on the job?

A If the subcontractor that you stated made the request and did provide those documents, yes, they would.

Q Okay, how about the journeymen employees working for Tangram on that same job where the Painters' apprentices have been dispatched, what is the Painters' position as to the status of those journeymen?

. . .

[A] Based on my experience, we have no obligation to dispatch journeymen to the subcontractor you stated earlier.

(Tr. 260:14 - 261:2 & 261:21-23.)

More specifically, the Painters apprenticeship plan would not dispatch apprentices if they were not members of the Painters union, (Tr. 254:18 - 255:4), and would require any such apprentice to work pursuant to their collective bargaining agreement. (Tr. 258:8-13.) This is true even if the dispatch is to a signatory with the Carpenters.

Q When the -- when the Painters' apprenticeship program dispatches an apprentice to Tangram, *signatory to the Carpenters' Union*, are those individuals while they are working on the Tangram jobs considered under the jurisdiction of the Painters' Union?

A Yes, they would be.

(Tr. 255:22 - 256:2 (emphasis supplied).)

Given these illuminating factual admissions, any claim the Painters make to a state agency regarding apprenticeship enforcement is simply no different than the Plasterers lawsuit found to be a claim for the work in the *SD* cases. In particular, the fact that the Painters are insisting that any dispatched apprentices work under this agreement, (Tr. 258:8-13), is exactly the same type of agreement offered by the Plasterers in *SD II* since that "agreement would require the use of employees represented by the Plasterers." (*SD II*, *supra*, 348 at 1253.) Because these claims are clearly ones with a jurisdictional objective, the Board should find that they are also claims for the work here.

2. The Carpenters Threat To Strike And Picket Was A Proscribed Means To Enforce Its Claim To The Work In Dispute

At the hearing, Hubel credibly testified that he verbally informed Teper that the Carpenters would strike and picket if TFI reassigned work to the Painters. (Tr. 125:21 - 126:3.) This threat was followed-up in writing in a letter dated April 6, 2009 by Carpenters counsel, (CEX 4, p. 2 ("I have also informed Tangram that the Carpenters Union will strike and picket the job should Tangram give the work covered by its collective bargaining agreement with the Carpenters Union to the Painters Union")), at Hubel's request. (Tr. 127:24 - 128:9.) Teper, in turn, confirmed hearing the verbal threat, (Tr. 49:23 - 50:3 (from Shanley) & Tr. 65:1 - 66:1 (from Carpenters representative)), and receiving the letter containing the written threat. (Tr. 50:7-25. *See also* BEX 2, ¶ 7 (also indicating that Painters and Painters counsel received the letter).) Because a threat to picket is clearly considered an impermissible means in which to enforce a claim to work, this element of the Section 10(k) analysis is met. (*SD II*, *supra*, 348 NLRB at 1253; *Bricklayers (Cretex Construction Services)*, 343 NLRB 1030, 1032 (2004).)[5]

3. There Is No Voluntary Adjustment For Dispute In This Case

As in *SD II*, there is "no agreed on method for voluntary adjustment of the work," (*SD II*, *supra*, 348 NLRB at 1254), and, for that reason, the Board should find that the Carpenters has shown a probability that the statute has been violated in this case. This is because the Carpenters are not

[5]In their opening statement, the Painters argued that the Carpenters threat to strike was collusive. (Tr. 21:3-9.) This same allegation was made and rejected in *SD II*: "It is well established that absent *affirmative evidence* that a threat to take proscribed action is a sham or the product of collusion, the Board will find that it amounts to proscribed conduct under Section 8(b)(4)(D)." (*SD II*, *supra*, 348 NLRB at 1254 (emphasis supplied).) Because the Painters offered no evidence, much less "affirmative evidence," to support their allegation of collusion, and because there was more than sufficient evidence supporting the very opposite conclusion, the Carpenters threat to strike was legitimate.

signed to any project labor agreement for this project, (Tr. 164:15-17), and there is no mechanism to resolve jurisdictional disputes on it. (Tr. 171:12-16 & 173:11-17.) The only jurisdictional dispute machinery that exists applies only to TFI and the Carpenters. (CEX 1, ¶ 5; CEX 2, Art. VI. *See also* Tr. 129:18-24 (violation of agreement if signed with Painters & Tr. 179:17-22 (Carpenters would strike if TFI reassigned work to Painters).) As in *SD II*, the fact that, arguendo, another such jurisdictional dispute resolution process were available would be irrelevant since that process would form two tribunals passing judgment on one dispute and would thus potentially "result in conflicting awards binding on the Employer." (*SD II*, *supra*, 348 NLRB at 1254.) For this reason and all others mentioned above, there is no voluntary adjustment for dispute in this case.

B. ON THE MERITS, COMMON SENSE AND EXPERIENCE SHOULD DICTATE THAT THE WORK BE AWARDED TO THE CARPENTERS

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. (*Columbia Broadcasting*, *supra*, 364 U.S. at 573.) The Board has held that its 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 (1962).) As will follow, "common sense and experience," especially in light of the TFI's choice of the Carpenters and its reasons for making that choice, clearly warrant an award of work to the Carpenters.

1. Certification And Collective Bargaining Agreement

TFI executed a Memorandum Agreement with the Carpenters on August 21, 2008. (CEX 1.) Paragraph one of that agreement incorporates by reference the Carpenters Master Labor Agreement (CEX 2), both of which are set to expire in 2010. The Memorandum Agreement

specifically covers the work at issue here, (CEX 2, § 4), and a geographic region encompassing the 12 Southern California counties and other states in the southwestern United States. (*Id*. (preamble).) Pursuant to these Agreements, TFI has assigned work to the Carpenters, including the work being performed on the W Hotel project. (BEX, ¶ 7.) In addition, TFI has never had a collective bargaining relationship with the Painters.[6] (Tr. 120:13-16.) On these virtually identical facts, which include the very same Master Labor Agreement at issue in this case, the Board in *SD II* concluded that this factor weighed in the Carpenters favor. For this simple reason, this factor should weigh in the Carpenters favor in this case.

2. Employer Preference And Past Practice

As noted in several instances above, TFI has chosen to assign the work in this case to the Carpenters. (BEX 2, ¶ 7.) As such, this factor weighs in favor of awarding the work to the Carpenters. (*SD II*, *supra*, 348 NLRB at 1254-55.)

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[6]The Painters, at beginning of their cross-examination of Teper, began a puzzling line of inquiry with respect to TFI and its connection to a related entity, Tangram Interiors, Inc. From what the Carpenters can glean, they are arguing that both Tangram entities are the same company and that this unity in identity somehow assists them here. Setting aside the facts it is impossible to gauge both the purpose and relevance of the Painters point on this, these companies are not the same entity. Tangram Interiors, Inc. and TFI are mentioned in Section 8(e) of the Memorandum Agreement for the express purpose of demonstrating that one is different and separate from the other. (CEX, ¶ 8(e).) As noted above, TFI performs floor installation work whereas Tangram Interiors is a steel case dealership. (Tr. 84:20-23.) While the signature page of the Memorandum Agreement does reflect the fact that TFI's "State License No." was pending when it was executed on August 21, 2008, TFI in fact had obtained a license from the Secretary of State on July 18, 2008. (http://kepler.sos.ca.gov/corpdata/ShowAllList?QueryCorpNumber=C3154278. *See also* Tr. 22:17-18 (TFI formed on July 18, 2008).)

3. Area And Industry Practice

The Carpenters have performed floor work with Tangram on at least three projects, including the project in this case, Pacific Life, (Tr. 35:5-8), and Miller Children's Hospital. (Tr. 147:21-148:5.) In addition to TFI, the Carpenters also represent employees that perform this work not only in Southern California, but also nationwide and in Canada, as part of its accepted jurisdiction. (Tr. 130:21 - 131:16.) The Carpenters have been doing this work for at least as long as Hubel has been with the Carpenters, which is 20 years. (Tr. 131:14-21.) In fact, as noted by Teper himself, he performed this very same work in Michigan not only as a Carpenters signatory contractor but also as a Carpenters union member. (Tr. 24:19 - 25:2.)

Consistent with this scope of work are the far-reaching provisions of the collective bargaining agreements maintained between the Carpenters and their signatories. (*See* Tr. 155:1-6 (listing signatories).) The Memorandum Agreement, for instance, (CEX 1, § 4), applies to "all work [with the exception of wood flooring] in connection with the installation of floor coverings." The scope of the Master Labor Agreement is broader as it applies to "*all* such work on [a] job or project," (CEX 2, § 102.3 (emphasis supplied)), including "*all* wood flooring of any size, shape, or pattern." (*Id.* at § 112 (emphasis supplied); Tr. 154:23 - 155:19.) In addition, Section 102.5 of the Master Labor Agreement contains a general jurisdictional provision which applies to "*all* work falling within the recognized jurisdiction of the Union signatory to this Agreement." (Tr. 163:13-23 (emphasis supplied).) Given the Carpenters history of claiming – and the breadth of the provisions in their collective bargaining agreements covering – such work, this factor favors an award of work to the Carpenters.

4. Relative Skills

a. As A Matter Of Law, The Painters Argument About Whether One Apprenticeship Program Is Or Is Not Approved Is Irrelevant

The Painters go to great lengths to argue that the approved-status of their apprenticeship plan carries dispositive weight on the issue of relative skills. In *SD II*, the Board held that such an approved-status would not weigh in favor of any of the unions, much less have any dispositive impact. (*SD II*, *supra*, 348 NLRB at 1250 n. 5 ("Further . . . the evidence that the Employer proffers on this issue--that Carpenters' apprenticeship program for plastering has been approved by the State of California--would not tip the scales in favor of either group of employees").) Instead, the Board there, as required by "common sense and experience," evaluated the evidence of the training provided by both unions to determine whether this factor would favor either one of them. When applying this construct to this case, it is, for reasons set forth in subsection 4.b below, clear that this factor weighs in favor of the Carpenters.

b. The Factual Record Presented At The Hearing Warrants A Finding That This Factor Weighs In Favor Of The Carpenters

TFI apprentices are currently being trained in the Carpenters apprenticeship program, (Tr. 137:8-11), and are being instructed in a facility that is bigger than the Painters apprenticeship building. (Tr. 439:18-21.) The larger size of the Carpenters facility is matched by the fact that the Carpenters overall training program is more than sufficient to meet the needs of those apprentices. Indeed, at the hearing, a Painters representative, when asked whether the Carpenters training program was inadequate, significantly answered that it was not. (Tr. 294:21-25.) The commitment the Carpenters put into training is highlighted by their continued investment in education. For instance,

the Carpenters spend $20 million a year on training programs within its geographic jurisdiction, and the nationwide, the Carpenters union earmarks $175 million annually for training programs.[7] This spending is featured through newer, state-of-the art facilities, none of which is more evident than the Carpenters International Training Center in Las Vegas, Nevada. This Center, which is depicted in pictures set forth in REX 3 and 4,[8] is not only a place where TFI's apprentices could be trained, (Tr. 142:7-13), it could also send instructors from Las Vegas to provide training for TFI's apprentices in Southern California. (Tr. 145:21-24.) In addition to providing training to apprentices, the Center also provides training to the trainers themselves (i.e., those who train apprentices). (Tr. 142:11-13.) It also provides for a 76,000 square-foot dormitory space to house apprentices that are trained at the Center. (Tr. 145:25-146:6. *See also* Matthew Crowley, *Carpenters Invest In Education*, Las Vegas Review Journal, p. 1D (December 7, 1999) (reference to 76,000 square-foot dorm space).) This is, of course, highly advantageous since it "eliminate(s) the logistics of hotel scheduling and travel arranging, providing available, price-stabilized accommodations." (*Id.*)[9]

The Carpenters program is governed by an intricate set of Standards. (REX 2.) The Standards are pending approval by the state, (Tr. 134: 21-24), though two (the hardwood and terrazo flooring) have already received state approval. (Tr. 159:9-13.) Of the Standards that have been submitted, the second (floor layer) and third (carpet layer) apply to the disputed work here. (Tr.

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[7]*See* article at: http://www.businesswire.com/portal/site/google/index.jsp?ndmViewId =news_view&newsId=20061018005979&newsLang=en (last accessed on June 29, 2009).

[8]These pictures and more of the Center can be accessed at the Center's website, which can be found at: http://www.carpenters.org/CraftsAndSkills/Itc.aspx.

[9]The Carpenters have also opened a new training facility in Ontario, California in 2006. (Tr. 443:15-18.) This $15 million facility, which spans more than 72,000 square feet (*see* article linked at Note 7, *supra*) is "quite a bit bigger" than the Painters training center. (Tr. 442:1-13.)

134:9-17.) The scopes of the training are set forth in the Appendices to the Standards and provide greater detail of the extent of the training involved. (Tr. 134:25-135:4.) Like any apprenticeship program, there are several steps in the apprenticeship training regimen, (Tr. 137:22-138:5 & Tr. 139:4-7), which is set forth in Section 6 of the Memorandum Agreement. Each step is a stage in the Carpenters multi-tiered apprenticeship program, (Tr. 139:15-17), in which an apprentice ultimately graduates to become a journeyman. (Tr. 139:23-25.) The first two stages are generic to all crafts and relate to safety orientation, (Tr. 140:10 - 141:8), and the *sui generis* nature of the Standards begins approximately in the third or fourth stages of apprenticeship training. (Tr. 141:9-14.)

Despite the lack of formal approval at this time, the Carpenters are still, as previously noted, providing state-of-the-art training to TFI apprentices. Further, even if the Standards were approved today, the apprentices would still be going through initial stages of apprenticeship training. (Tr. 73:1-9 & Tr. 141:15-20.) Indeed, whatever the merits of the Painters arguments may be on this point, they do not alter the facts that the Carpenters spend millions of dollars each year to fund their training programs, build sophisticated and modern facilities in which to train apprentices, and in fact are training TFI apprentices. This was punctuated by an admission of the Painters, as noted above, that the Carpenters program was at least adequate. In view of this background, this factor should also weigh in favor of the Carpenters.

5. Economy And Efficiency Of Operations

In *SD II*, the Board held that this factor favored assignment of work to the Carpenters based on testimony by the employer explaining why it chose the Carpenters over the rival union in that case. In particular, the employer in *SD II* testified it assigned work to the Carpenters because they provided "reduced overhead costs, reduced employee turnover, and increased employee satisfaction."

(*SD II*, *supra*, 348 NLRB at 1255.) Similarly, TFI, as set discussed previously, chose the Carpenters for an indistinguishable "laundry list of reasons" from that offered by the employer in *SD II.* The reasons underlying TFI's choice is worth quoting again:

> [T]he Carpenters [are] a much stronger union than what the Painters Union is. They had a more secure pension program. They showed more support to the employee and the employer than what the Painters Union did. They offer a larger pool of people that I can utilize from, as well as it offers more benefits for my employees. For example, if I'm slow and my guys have to go back to the hall on the out of work list, they don't have the option to just go to a floor covering company, they can go to multiple different companies to get work and learn different trades and better themselves. It offered a laundry list of things that was just a betterment for my employees.

(Tr. 25:3-18.) Because these reasons are simply no different than the ones the Board relied on in awarding work to the Carpenters in *SD II*, this factor should warrant an award of work to the Carpenters in this case.

6. Prior Jurisdictional Dispute Determinations

As noted previously, the Painters offered a prior jurisdictional dispute ruling issued in 1942 where a private board split work between the Carpenters and Painters. (PEX 4.) Apart from failing to provide any foundation or context to the award, it is clearly irrelevant in this case for a number of reasons, which are set forth below:

> Iron Workers presented in support of its claim for the disputed work numerous decisions of various jurisdictional dispute boards awarding work to ironworkers rather than to employees engaged in other trades. Several of these decisions, however, neither pertain to the type of work at issue here nor involve employees represented by Bricklayers, and most concern disputes far beyond the geographical area at issue in this proceeding. Moreover, none of the decisions involve these Employers. It is also significant that, with few exceptions, these documents do not reveal the basis for the determinations, but do explicitly state that the decisions are limited to the facts of the particular disputed job. Accordingly, we do not find that this evidence of prior jurisdictional dispute determinations favors an award of the disputed work to either group of employees.

(Ironworkers Local No. 1 (Fabcon), 311 NLRB 87, 92-93 (1993).) Because the 1942 award, like the one in *Ironworkers Local No. 1*, sets forth no reasoning underlying its decision, does not apply to the employer in this case, and involved a geographical scope far beyond the one here, it cannot provide any basis for the decision in this case.

C. THE BOARD SHOULD MAKE A BROAD AWARD OF WORK IN THIS CASE DUE TO THE CONTINUED THREATS MADE BY THE PAINTERS

In *SD II*, the Board rejected a rival union's request to limit the Board's award of work in that case to the project at issue there. The Board reasoned that "given the wide breadth of Carpenters' threat here as well as the continuation of Plasterers' lawsuit, the possibility of similar disputes arising in the future seems well-founded." (*SD II*, *supra*, 348 NLRB at 1256.) As such, an award covering the geographic scope of the Carpenters jurisdiction was appropriate.

Like *SD II*, the Carpenters have made an identical threat to strike not only the W Hotel project, but all of TFI's projects. (Tr. 49:23 - 50:3.) In addition, there is not only a possibility of "similar disputes" arising in the future, but ones that are in fact occurring. For instance, the Carpenters have already made a threat to strike another project involving these very same parties. (Tr. 147:24 - 148:5.) These parties have also had disputes on other jobsites including the Pacific Life project mentioned above and at least one other in Los Angeles. (Tr. 115:1-4.) In addition, this project continues to present an ongoing dispute for TFI and the Carpenters. (Tr. 120:21 - 121:11.) Were this not enough, the Painters are using – and can continue to use – the threat of apprenticeship enforcement in the same manner as the Plasterers used their lawsuit in *SD II*. More specifically, they can go to each jobsite where TFI is working and using Carpenters-represented employees and use

apprenticeship enforcement as a pretext for asserting their view that the work being done falls within their jurisdictional scope. For this reason, a broad award is necessary.

III
CONCLUSION

For all the foregoing reasons, the Carpenters respectfully request the Board to issue a broad order covering all of TFI's projects within the geographic scope of the collective bargaining agreement maintained between them.

DATED: July 1, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

X I hereby certify that on July 2, 2009, I electronically filed the CARPENTERS POST HEARING BRIEF with the NLRB/Office of the Executive Secretary via E-filing.

I hereby certify that on July 2, 2009, I caused to be served a true copy of CARPENTERS POST HEARING BRIEF via e-mail to the following:

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_____I declare under the laws of the State of California that the foregoing is true and correct.

Executed this 2nd day of July, 2009.

_____/s/ Patricia Beaver_