

BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

SOUTHWEST REGIONAL COUNCIL OF CARPENTERS AND
ITS AFFILIATED LOCAL UNION 1780, AFFILIATED WITH
UNITED BROTHERHOOD OF CARPENTERS AND JOINERS
OF AMERICA

and

CASE NO. 28-CD-272

IMAGE EXHIBITS SERVICES, INC

and

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND
HELPERS, LOCAL 631, AFFILIATED WITH
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

**SUPPLEMENTAL BRIEF OF SOUTHWEST REGIONAL COUNCIL OF
CARPENTERS AND ITS AFFILIATED LOCAL UNION 1780**

By notice dated May 13, 2009, the National Labor Relations Board (“Board”) requested supplemental briefing in the above matter from each of the parties “stating their position on whether this case involves a jurisdictional dispute or a dispute over work preservation.” See Notice, p. 2. The date for submission of these supplemental briefs was extended twice -- first to June 10, 2009, and then to July 10, 2009.

Pursuant to this Notice the Southwest Regional Council of Carpenters (“SWRCC”) and its affiliated Local Union 1780 (“Local 1780”), affiliated with the United Brotherhood of Carpenters and Joiners of America (collectively “Carpenters Union”) hereby submit the following Supplemental Brief. In short, the instant matter does not constitute a dispute over work preservation, but rather is a jurisdictional dispute appropriate for resolution under Section 10(k) of the Act.

I. GENERAL STANDARDS RE WORK PRESERVATION DISPUTES

If a party to a Section 10(k) proceeding moves to quash the notice of hearing on the grounds that the matter is a work preservation dispute rather than a jurisdictional dispute, the Board will look to “the real nature and origin of the dispute,” to determine whether the use of a Section 10(k) proceeding is appropriate. Seafarers (Recon Refractory & Construction), 339 NLRB 825, 827 (2003), *affd.* sub nom. Recon Refractory & Construction, Inc. v. NLRB, 424 F.3d 980 (9th Cir. 2005). “Where a dispute is fundamentally one between an employer and a union, and concerns the union’s attempt to merely preserve the work it previously had performed, the Board will not afford the employer the use of a 10(k) proceeding to resolve a dispute of its own making.” Id. at 827-828.

In Teamsters Local 578 (USCP-Wesco), 280 NLRB 818, 820 (1986), *affd.* sub nom.

USCP-Wesco, Inc. v. NLRB, 827 F.2d 581 (9th Cir. 1987), this meant that the Board refused to exercise jurisdiction where the dispute arose out of an employer's subcontracting of bargaining unit work, in violation of its collective bargaining agreement with one union (UFCW) whose members had exclusively performed the subject work for over twenty years, to a subcontractor whose employees were represented by another union (the Teamsters). 280 NLRB at 818-819. UFCW grieved the breach of its collective bargaining agreement and obtained favorable awards from two arbitrators. 280 NLRB at 819. Thereafter, the Teamsters threatened to strike if the employer reassigned the work as a result of the awards. Id. However, the Teamsters stated that it did not claim the work if the subcontracting was deemed by the Board to be improper. Id. at 820. Under these circumstances, the Board ruled that the matter was a contractual dispute created by the Employer's own conduct, and therefore granted UFCW's motion to quash the proceeding.

In Recon Refractory & Construction, the Board granted a motion to quash the notice of hearing, where the dispute arose out of an employer's assignment of work to one union (IPTW), which work was within the scope of work covered under the employer's collective bargaining agreement with another union (BAC) that had exclusively performed such work in the past. 339 NLRB at 825-826. BAC filed a grievance and a lawsuit alleging the breach of its collective bargaining agreement by this assignment of work. Id. at 826. Thereafter, IPTW threatened to strike if the employer reassigned the work. Id. The Board found that the dispute was "fundamentally one between an employer and a union, and concern[ed] the union's attempt merely to preserve the work it previously had performed." Id. at 827. The Board granted BAC's motion to quash, stating that it "will not afford the employer the use of a 10(k) proceeding to resolve a dispute of its own making." Id. at 827-828.

II. NO PARTY HAS EITHER CLAIMED OR MADE A SHOWING THAT THE INSTANT MATTER ARISES OUT OF A WORK PRESERVATION DISPUTE.

As noted in the Notice and Request for Supplemental Briefs in this matter, none of the parties in this case has raised a work preservation defense. Further, none of the parties filed a motion to quash the notice of hearing. See Northeast Ohio District Council of Carpenters and Pile Drivers (Luedtke Engineering Co.), 307 NLRB 1323 1324 (1992) (finding that the dispute was properly before the Board for determination under Section 10(k), and noting that the Carpenters had neither sought to quash the notice of hearing, nor raised the USCP-Wesco case).

In order for “a work preservation defense to prevail, the [union asserting it] must show that the employees it represents have previously performed the work in dispute *and* that it is not attempting to expand its work jurisdiction.” Chicago and Northeast Illinois District Council of Carpenters (Prate Installations, Inc.), 341 NLRB 543, 544 (2004) (emphasis in original). If said union fails to make such a showing in either respect, its work preservation defense fails. Id.

No work preservation defense has been raised in this case, nor can any such defense be supported by the record. Neither the Carpenters Union nor the Teamsters Union exclusively performed the disputed work. Further, the Teamsters Union has not at any time disputed the Employer’s termination of their agreement, nor did it challenge the assignment of the disputed work to the Carpenters Union. The Section 10(b) period for filing a charge to challenge the Employer’s contract with the Carpenters Union has expired, and the Teamsters Union may not, therefore, challenge said agreement. Machinist Local 1424(Bryan Mfg.), 362 U.S. 411 (1960).

**III. THE INSTANT MATTER DOES NOT INVOLVE WORK PRESERVATION,
BECAUSE NEITHER UNION HAS EXCLUSIVELY PERFORMED THE WORK.**

It is undisputed in this matter that, historically, the Teamsters Union has not exclusively performed the work in dispute in Las Vegas. Prior to 2001, the Teamsters Union was unable to meet the need of the area trade show employers for skilled I & D (“install and dismantle”) employees. Tr. 137, 143-144, 169, 172-173.¹ This resulted in the Teamsters Union actually calling the Carpenters Union hiring hall on numerous occasions to obtain skilled workers. Tr. 125.

By late 2000 and early 2001, an industry-wide solution was reached whereby the Las Vegas Convention and Visitors Bureau requested that other unions, including the Carpenters Union, participate in the trade show industry in order assist with the skilled labor shortage. Tr. 122. The Carpenters Union, which had affiliates representing trade show employees in areas other than Las Vegas (Tr. 124), stepped in and as early as September of 2001, had secondary agreements with GES and Freeman – two of the largest trade show employers in Las Vegas. Tr. 122-123. In 2001, the Teamsters Union also changed its agreements to allow for fringe benefits to be paid into the trust funds of whatever union supplied the worker, instead of automatically into the Teamsters Union trust funds, as had been done prior to 2001. Tr. 137-138.

Since 2001, the Carpenters Union has entered into 16 primary agreements and

¹Citations to the record will be made as follows: Transcript citations as “Tr. (page #)”; Carpenters Union Exhibits as “CU Exh. (#)”; Teamsters Union Exhibits as “TU Exh. (#)”; and Employer Exhibits as “ER Exh. (#).”

approximately 43 secondary agreements with trade show employers in Las Vegas. Tr. 120.²

The Teamsters Union did not dispute this fact, other than to say that it was unaware that the Carpenters Union had attained this share of the local market. Tr. 166, 186.

The relationship between the three parties in this matter reflects this broader context. Prior to 2002, the Employer obtained its labor from the Teamsters Union, and was signatory to only the Teamsters Union contract. Tr. 65. Between 2002 and 2007, the Employer had a primary agreement with the Teamsters Union, and a secondary agreement with the Carpenters Union. Tr. 26-28; ER Exhs. 1-2. During this time, the Employer used Carpenters Union members on approximately half of its jobs. Tr. 28-29. This was due, at least in part, to the fact that the Employer consistently experienced problems getting its requests for workers fulfilled by the Teamsters Union hiring hall, and when the Teamsters did send workers out, they were frequently unqualified. Tr. 53-58. Thereafter, in 2007, the Employer terminated its agreement with the Teamsters Union and entered into a primary agreement with the Carpenters Union. Tr. 45; ER Exh. 6; CU Exh. 2.

This is, therefore, not a case involving one union's attempt to preserve the work that it has historically and exclusively performed, as in USCP-Wesco and Recon Refractory & Construction. In fact, this case is substantially and materially similar to Prate Installations, Inc., 341 NLRB 543 (2004), where the Board rejected a work preservation defense, stating:

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²The primary agreements are all with I&D employers. Tr. 131. The 43 secondary agreements are with I&D employers and with general service contractors. Tr. 130-131.

It is well established that for such a work preservation defense to prevail, the Carpenters must show that the employees it represents have previously performed the work in dispute *and* that it is not attempting to expand its work jurisdiction. . . . The Carpenters have failed to make the latter showing.

341 NLRB at 544 (emphasis in original) (citations omitted).

The disputed work in Prate Installations was the installation of shingles, underlayment, and ice and water shields, and the two unions involved in the dispute were the Roofers Union and the Carpenters Union. Id. The record demonstrated that the unions had *both* performed the work. Specifically:

[T]he more general testimony is that the Employer has variously assigned shingling work to crews of Roofers-represented employees, to crews of Carpenters-represented employees, and to composite crews. Thus, even assuming that Carpenters-represented employees have performed all aspects of the work in dispute, they have never performed it exclusively. The dispute arose when the Carpenters claimed *all* of the disputed work, including that previously performed by employees represented by the Roofers. As such, the Carpenters' objective here was not that of work *preservation*, but of work *acquisition*. Id. at 545 (emphasis in original).

The instant case is substantially similar, in that the Employer variously assigned the disputed work to the Teamsters and the Carpenters. Thus, neither union performed this work exclusively. For reasons that the Employer's representatives explained at the hearing, the Employer decided to end its primary agreement with the Teamsters, and enter into a primary agreement with the Carpenters. At this point, the Teamsters could have solicited a secondary

agreement with the Employer, but did not. The Teamsters' Security Fund, however, asserted in a separate ERISA action, that *all* of the work done by the Employer in Las Vegas should have been performed using Teamsters members and should have resulted in contributions being paid into the Teamsters' funds. See ER Exh. 8. While the Security Fund and the Union are two separate entities, the Security Fund's claims in the ERISA action are based upon a theory that *all* of the disputed work should have been done by members of the Teamsters Union, when previously said work had not been exclusively Teamsters' work.

Similarly, the Board found without merit a Carpenters Union's work preservation defense and motion to quash in International Alliance of Theatrical and Stage Employees, Local Union No. 39 (Shepard Exposition Services, Inc.), 337 NLRB 721 (2002). Like the instant matter, that case involved the installation and dismantling of booths in the trade show industry. Further like the instant matter, neither union in that case had exclusively performed the work in question. Instead, the employer in Shepard had four successive collective bargaining agreements with IATSE covering the I&D work, but then terminated its agreement with IATSE and signed an agreement with the Carpenters Union covering the work. 337 NLRB at 721. The IATSE filed an unfair labor practices charge alleging, *inter alia*, that the Employer had unlawfully withdrawn recognition and had unlawfully entered into an agreement with the Carpenters. 337 NLRB at 721-722. The Region issued a complaint based upon these charges, which led the employer to enter into a non-Board settlement agreeing to recognize IATSE. Id. When the Carpenters Union learned of this, it filed grievances and a lawsuit alleging breach of its collective bargaining agreement. Id. at 722.

The Board denied the Carpenters Union's motion to quash notice of the 10(k) hearing,

noting that the Carpenters had only performed the work in dispute on three occasions under its contract with the employer, and stating that:

The Carpenters' objective here was thus not that of work preservation, but of work acquisition. Further, the competing contractual claims by IATSE and Carpenters to the work in dispute indicate that the work assignment at issue is not readily amenable to a consistent resolution independent of this 10(k) proceeding.

Id. at 723.

Likewise, the competing contractual claims in this case indicate that the work assignment at issue cannot be consistently resolved independent of this 10(k) proceeding. Resolution of this dispute under Section 10(k) is necessary to obtain a consistent result in an action involving each of the three parties.

IV. THIS CASE DOES NOT ARISE OUT OF A WORK PRESERVATION DISPUTE OF THE EMPLOYER'S "OWN MAKING."

In both Recon Refractory & Construction, Inc., and USCP-Wesco, Inc., the Board found that the employers had created the disputes, and noted this in concluding that the motions to quash the notices of hearing should be granted. Recon Refractory, 339 NLRB at 827-828 ("the Board will not afford the employer the use of a 10(k) proceeding to resolve a dispute of its own making"); USCP-Wesco, 280 NLRB at 823 ("Safeway here is not the 'innocent' employer that Section 10(k) was intended to protect."). In both cases, the Board deemed the employer to have created the disputes by breaching its collective bargaining agreement with one of the union parties, said breach having been asserted by the relevant union by way of a grievance, a lawsuit, and/or an unfair labor practices charge. Id.

The Teamsters Union has never taken any action to claim that the Employer's termination of that collective bargaining agreement was unlawful. It did not file a grievance, a lawsuit, or an unfair labor practices charge challenging either the Employer's termination of the agreement or the Employer's entering into an agreement with the Carpenters Union. Further, any such claim is now time-barred. Machinist Local 1424(Bryan Mfg.), 362 U.S. 411 (1960).

In fact, the conduct of the Teamsters Union representatives led the Employer to believe that it had no agreement with the Teamsters, and that it was free to sign with the Carpenters. Specifically, in May of 2007, after sending notice to the Teamsters of its desire to renegotiate or terminate the Teamsters contract and receiving no response (Tr. 35-36; ER Exh. 3), the Employer had Carpenters Union members working on the trade show floor at the International Shopping Center show when a couple of Teamsters Union representatives arrived and attempted to stop the Carpenters from doing the work. Tr. 42. The Teamsters representatives made some calls back and forth to undisclosed individuals, and began to fill out a grievance, but then said that the Teamsters had no jurisdiction and walked away. Tr. 40. No grievance wound up being filed against the Employer arising out of this situation. Tr. 40.

Then in early August 2007, at the Western Show Association trade show, Teamsters Union business agent Laura Simms³ and a Teamsters Union steward stopped at a booth being constructed by Image Exhibit employees obtained from the Carpenters Union and disputed that Teamsters were not being used. Tr. 37. Mr. McKeighan came down to the show, explained to

³Teamsters Union Secretary/Treasurer Wayne King asserted that Ms. Simms was an *assistant* business agent with no authority to abrogate agreements (Tr. 146-147), but he was unaware whether employers were informed of this limitation on her authority via her business card (Tr. 151). The Teamsters did not present Ms. Simms as a witness.

Ms. Simms about his termination letter and unsuccessful attempts to get a response from the Teamsters, and Ms. Simms placed a call to the Union hall. Tr. 38. After the call, Ms. Simms told Mr. McKeighan, “The reason that nobody has called you back is because you are not signatory to the contract anymore, and they don’t feel that they are bound to talk to you.” Tr. 38. Ms. Simms then gave Mr. McKeighan the telephone number for Cheryl Schmit, the Teamsters Union Office Supervisor whom Simms said was the “right-hand person” to Wayne King, the Secretary/Treasurer of the Teamsters Union. Tr. 39, 63-64, 134. Mr. McKeighan twice left messages for Ms. Schmit, but she failed to call him back, as well. Tr. 39.

Approximately two weeks later, Teamsters Union representatives stopped Image Exhibits employees from working at a show at the Sands Expo on the grounds that the Employer wasn’t using Teamsters and wasn’t signatory to the Teamsters contract. Tr. 39, 107-9. The Teamsters Union was then able to get Freeman to provide its Teamsters employees to do the work, and Freeman billed Image Exhibits’ client for the cost. Tr. 40, 107-9. The Teamsters’ stated reason for insisting upon Freeman’s workers instead of the Employer’s was that the Employer was not signatory with the Teamsters Union. Tr. 108-9. The Teamsters did not file a grievance against Image Exhibits arising out of this incident, which was likely due to the fact that the Teamsters Union did not consider Image Exhibits to be bound by a contract any longer. Tr. 40, 108-9.

As such, on September 19, 2007, the Employer sent letters to the Teamsters Union and to the Teamsters Pension Trust memorializing that the Employer had been given notice by the Teamsters Union that it was no longer signatory, and that the Employer would no longer be making contributions into the Teamsters trust funds. Tr. 43; ER Exhs. 4-5. The Employer received a response only from the Teamsters Pension Trust, requesting information in order to

assess withdrawal liability. Tr. 47, ER Exh. 7.

On September 28, 2007, the Employer proceeded to enter into a primary agreement with the Carpenters Union to perform the I&D work. Tr. 45; ER Exh. 6; CU Exh. 2. The term of this agreement is September 1, 2007 to August 31, 2011. From this point on, Image Exhibits employed only Carpenters to perform the I&D work. Tr. 48.

Teamsters Union representatives were aware of this shift, and did not object to it. Specifically, in February of 2008, Teamsters Union business agent Tim Koviak approached an Image Exhibit installation at a trade show, where the Employer was using all Carpenters. Tr. 48-50. Mr. Koviak asked how things were going, and Mr. McKeighan responded that “things were going great with these guys.” Tr. 48. Mr. Koviak asked if the Carpenters were “taking care of” the Employer, and Mr. Keighan responded that they were. Tr. 48. The two men then proceeded to have a pleasant conversation, and Mr. Koviak left. Tr. 48. Mr. Koviak did not dispute this exchange in his testimony. Tr. 183-197.

Under the circumstances, the Employer had every reason to believe that its termination of the Teamsters contract had been accepted by the Teamsters, and that its collective bargaining agreement with the Carpenters Union was not being challenged. And again, it is too late for the Teamsters to mount such a challenge now. This case is therefore materially distinguished from Recon Refractory, USCP-Wesco, and other cases in which the Board granted motions to quash 10(k) hearings, in that it is not a dispute of the Employer’s own making, nor does it involve a timely challenge by the Teamsters Union to the Employer’s assignment of the work to the Carpenters Union.

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V. CONCLUSION

For all of the foregoing reasons, the Carpenters Union respectfully submits to the Board that the instant matter does not involve a work preservation dispute, and that the matter is therefore appropriate for resolution under Section 10(k) of the Act.

DATED: July 10, 2009

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PROOF OF SERVICE

I, Kathleen M. Jorgenson, declare as follows:

1. I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is DeCARLO, CONNOR & SHANLEY, a Professional Corporation, 533 South Fremont Avenue, Ninth Floor, Los Angeles, California 90071-1706.

2. I hereby certify that on July 10, 2009, I filed the **Supplemental Brief of Southwest Regional Council of Carpenters and its affiliated Local Union 1780** in Case No. 28-CD-272 via E-filing with the National Labor Relations Board/Executive Secretary.

3. I hereby certify that on July 10, 2009, I served the **Supplemental Brief of Southwest Regional Council of Carpenters and its affiliated Local Union 1780** in Case No. 28-CD-272 via E-mail as follows:

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I declare under the laws of the State of California that the foregoing is true and correct.
Executed this 10th day of July, 2009, at Los Angeles, California.



Kathleen M. Jorgenson