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**Bridge, Structural and Reinforcing Iron Workers,  
Local Union No. 1 of the International Association  
of Bridge, Structural, Ornamental, and Reinforcing  
Iron Workers, AFL–CIO and United  
Brotherhood of Carpenters and Joiners of  
America, Chicago and Northeast Illinois District  
Council of Carpenters and Goebel Forming, Inc.**  
Case 13–CD–661

November 28, 2003

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER  
AND WALSH

The charge in this Section 10(k) proceeding was filed on August 28, 2002, by United Brotherhood of Carpenters and Joiners of America, Chicago and Northeast Illinois District Council of Carpenters (Carpenters), alleging that the Respondent, Bridge, Structural and Reinforcing Iron Workers, Local Union No. 1 of the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers, AFL–CIO (Iron Workers), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer, Goebel Forming, Inc. (Goebel), to assign certain work to employees represented by Iron Workers rather than to employees represented by Carpenters. The hearing was held on September 20 and 23, 2002, before Hearing Officer Dawn J. Blume.

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 Goebel Forming, Inc., an Illinois corporation with a principal place of business in Chicago, is a contractor engaged in the business of providing concrete formwork for construction contractors. During the 12 months preceding the hearing, Goebel provided services valued in excess of \$50,000 for other companies directly engaged in interstate commerce. The parties further stipulated, and we find, that Goebel is engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that Carpenters and Iron Workers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

Goebel is a contractor engaged in the installation and removal of concrete formwork used to construct the concrete core and floors in commercial buildings. Goebel employs only individuals represented by Carpenters, with whom it has a collective-bargaining relationship, and does not employ any individuals represented by Iron Workers.

Turner Construction Company is the general contractor on the construction of a commercial building at 540 West Madison Street in Chicago. Iron Workers is party to the Principal Agreement, a multiemployer collective-bargaining agreement to which Turner is a signatory through a separate “compliance agreement.” The Principal Agreement contains a subcontracting clause prohibiting employers from subcontracting work covered by the agreement to any company that is not signatory to a contract with Iron Workers or an affiliated union. Turner contracted with Goebel to provide the formwork to construct the concrete core and floors for the West Madison Street building, and Goebel assigned its Carpenters-represented employees to perform this work. Goebel, in turn, contracted with II in One Rebar, Inc. (II in One), whose employees work in both trades and are represented by both Carpenters and Iron Workers, to install iron rebar and iron meshwork necessary to pour the concrete floors.

The concrete work in this case involves the installation of embedded metal, also called “embeds,” which are steel curb angles used to join building floors to building walls, during the construction of a building. It is important to distinguish between two kinds of embeds. “Perimeter embeds” are attached to steel bulkheads on the outside edge of the building. Concrete for the floor deck is then poured over them so that the embeds remain in place to support the “curtain wall.” “Core embeds” are attached to wood forms on the inner core or center support of the building, and concrete is poured into the wood forms to construct the core.

In May 2002,<sup>1</sup> Goebel, using its Carpenters-represented employees, began installing *all* embeds on the building—both the core embeds as well as the perimeter embeds. In August 2002, Matt Austin, Iron Workers’ steward, noticed that Goebel’s employees had been installing all the embeds, not just the ones on the core. On August 21, he approached a crew of Goebel employees, including Brian Kelly, Carpenters’ steward, and informed them that they were doing Iron Workers’ work, and that if they did not stop, Iron Workers-

<sup>1</sup> All dates hereinafter refer to events that occurred in 2002.

represented employees would walk off the job. Later on August 21, Austin met with John Day, Goebel's site superintendent, and told him that Austin would pull employees represented by Iron Workers off the job if Goebel did not stop performing the embed work. Austin denies that he threatened to remove Iron Workers-represented employees from the job during either conversation.

On August 28, after unsuccessful attempts to resolve the dispute through Goebel's use of a composite crew of employees represented by Carpenters and Iron Workers, Turner directed Goebel to stop all embed installation work. After hearing that Turner had stopped the work, Carpenters Business Representative Ryan pulled Carpenters-represented employees off the job. They returned to work the next day. On September 3, Iron Workers President Boscovich wrote to Turner to advise that Turner's contract with Goebel violated the subcontracting clause of Iron Workers' Principal Agreement, to which Turner was signatory. Boscovich advised Turner of his intention to file a grievance regarding the dispute with the Joint Arbitration Board, as provided for in Iron Workers' agreement with Turner. The following day, on September 4, Iron Workers submitted its subcontracting grievance against Turner to the Joint Arbitration Board.

On or about September 6, Turner removed the perimeter embed installation from Goebel and awarded the contract to II in One. Thereafter, the perimeter embed work was performed by II in One employees represented by Iron Workers, and the core embed work was performed by employees represented by Carpenters. Iron Workers then withdrew its request for arbitration of the grievance it had with Turner.

#### B. *The Work in Dispute*

The notice of hearing describes the work in dispute as "[a]ll embed installation work performed at 540 West Madison, Chicago, Illinois." Iron Workers moved to amend the description of the work in dispute to include only "the installation of metal embeds attached to the structural steel of the building at 540 West Madison Street, Chicago, Illinois." Carpenters opposes the motion.

Iron Workers contends that the description of the work in dispute in the notice of hearing is overly broad because it includes both the core and the perimeter embed work. We agree. Iron Workers never claimed the installation of the core embeds. The only work Iron Workers has claimed in this proceeding is the installation of the perimeter embeds. Therefore, we grant Iron Workers' motion and amend the description of the work in dispute to read as follows: the installation of metal embeds at-

tached to the structural steel of the building at 540 West Madison Street, Chicago, Illinois.

#### C. *Contentions of the Parties*

##### 1. Iron Workers

Iron Workers has moved to quash the notice of hearing, arguing that the Board is without jurisdiction because two of the Section 10(k) jurisdictional elements have not been satisfied. First, Iron Workers argues that there are no competing claims for the work, as required in Section 10(k) proceedings. Iron Workers contends that it had a contractual claim that Turner, the general contractor, violated the subcontracting clause of Iron Workers' Principal Agreement by subcontracting the disputed work to Goebel. Therefore, Iron Workers argues, the notice should be quashed pursuant to *Laborers (Capitol Drilling Supplies)*, 318 NLRB 809, 810 (1995):

[I]n the construction industry, a union's action through a grievance procedure, arbitration, or judicial process, to enforce an arguably meritorious claim against a general contractor that work has been subcontracted in breach of a lawful union signatory clause, does not constitute a claim to the subcontractor for the work, provided that the union does not seek to enforce its position by engaging in or encouraging strikes, picketing, or boycotts or by threatening such actions.

Second, Iron Workers argues that there is no clear evidence that it threatened Goebel with a cessation of work if the work in dispute was not assigned to Iron Workers-represented employees, and therefore there is no reasonable cause to believe that Section 8(b)(4)(D) has been violated.

If the Board does not grant its motion to quash, Iron Workers argues in the alternative that the work in dispute should be awarded to employees it represents. In making this argument, Iron Workers relies on its collective-bargaining agreement with Turner, area and industry practice, the 1968 trade agreement between the parent affiliates of the local Iron Workers and Carpenters unions involved in this dispute, prior awards, superior skills and training, economy and efficiency of operations, and Turner's preference.

##### 2. Carpenters

The Carpenters contends that Iron Workers made a direct claim to Goebel for the work in dispute and that there are therefore competing claims for the work at issue. Carpenters also asserts that Iron Workers threatened Goebel with job action, thus establishing reasonable cause to believe that Section 8(b)(4)(D) has been violated. Therefore, Carpenters contends that the work in

dispute is properly before the Board for determination pursuant to Section 10(k) of the Act.

With regard to the merits of the dispute, Carpenters argues that the work should be awarded to Carpenters-represented employees on the basis of its collective-bargaining agreement with Goebel, Goebel's preference and its assignment of the work in dispute, Goebel's past practice, and the superior skills and training of employees represented by Carpenters.

#### *D. Applicability of the Statute*

Before the Board may proceed with determining a dispute pursuant to Section 10(k) of the Act, it must be satisfied that: (1) there are competing claims for the work; (2) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated; and (3) the parties have not agreed on a method for the voluntary adjustment of the dispute.<sup>2</sup> These jurisdictional prerequisites have been met in this case, and we therefore deny Iron Workers' motion to quash.

##### 1. Competing claims for the work in dispute

In *Capitol Drilling*, supra, the Board held that in the construction industry, a union's effort to enforce a lawful union signatory subcontracting clause against a general contractor through a grievance, arbitration, or court action does not constitute a claim to the subcontractor for the work. The Board, however, distinguished those cases in which a union does more than peacefully pursue a contractual grievance against a general contractor. The Board found that a jurisdictional dispute arises when a union seeking enforcement of a contractual claim not only pursues its contractual remedies against the employer with which it has an agreement, but also makes a claim for the work directly to the subcontractor that has assigned the work. In such circumstances, the Board stated that it would find competing claims and the use of threats or coercion to enforce a claim by the representative of either group of employees would be sufficient to support an 8(b)(4)(D) allegation and a consequent 10(k) proceeding. *Electrical Workers Local 363 (U.S. Information Systems)*, 326 NLRB 1382, 1383 (1998); *Plasterers Local 502 (PBM Concrete)*, 328 NLRB 641, 643 (1999); *Capitol Drilling*, 318 NLRB at 811–812.<sup>3</sup>

<sup>2</sup> *Carpenters Local 275 (Lymo Construction Co.)*, 334 NLRB 422, 423 (2001); *Teamsters Local 259 (Globe Newspaper Co.)*, 327 NLRB 619, 622 (1999); *Laborers Local 113 (Super Excavators)*, 327 NLRB 113, 114 (1998).

<sup>3</sup> The Board has found that a union makes a competing claim to a subcontractor when it asks the subcontractor to assign the work to it (*J.P. Patti Co.*, 332 NLRB 830 (2000)); when it tells the subcontractor that the grievance will "go away" if the subcontractor hires out of the union's hiring hall (*Glass Workers (Olympian Precast, Inc.)*, 333 NLRB 92 (2001)); and when it claims the work in a letter to the sub-

Here, Iron Workers did not confine its action to a peaceful pursuit of a contractual claim against Turner Construction. Instead, on August 21, Iron Workers' Steward Austin met with Goebel Superintendent Day and stated that the embed work was Iron Workers' work. Iron Workers thereby made a direct claim to the subcontractor for the disputed work. On this basis, we conclude that there are competing claims to the work, and Iron Workers' motion to quash the notice of hearing is denied.

##### 2. Reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated

There is evidence that Iron Workers' steward, Austin, threatened Goebel's superintendent, Day, with a work stoppage. Although Austin denies it, Day testified that "[o]n the 21st, the only thing [Austin] mentioned to me is if we don't stop installing embeds, that he might have to start pulling some ironworkers off site." The fact that Austin denies making this threat is inconsequential to the establishment of jurisdiction.<sup>4</sup> Therefore, this jurisdictional prerequisite is satisfied.

##### 3. Voluntary adjustment of the dispute

Carpenters stipulated that there is no method for voluntary adjustment of the dispute to which all parties are bound. Iron Workers declined to stipulate at the hearing that there is no method for voluntary adjustment of the dispute, asserting instead that the collective-bargaining agreement between Turner and Iron Workers contains grievance and arbitration provisions that could be employed to resolve the assignment of the work in dispute. The dispute resolution mechanisms in that agreement do not bind Carpenters, a party to this dispute. Accordingly, we conclude that there is no method for voluntary adjustment of the dispute to which all parties are bound. We therefore find that all three jurisdictional prerequisites are met, and the Board has jurisdiction to resolve this dispute.

#### *E. Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). 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

contractor and in a subsequent conversation (*Electrical Workers Local 702 (F.W. Electric, Inc.)*, 337 NLRB 594 (2002)).

<sup>4</sup> Conflicting versions of an event do not prevent the Board from proceeding under Sec. 10(k). The Board need not rule on the credibility of testimony in order to proceed to a determination of the dispute because the Board need only find reasonable cause to believe that the statute has been violated. *U.S. Information Systems*, supra, at 1383.

particular case. *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402, 1410–1411 (1962).

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

#### 1. Certifications and collective-bargaining agreements

There is no evidence of any Board certification concerning the employees involved in this dispute. Accordingly, we find that the factor of certification does not favor awarding the disputed work to employees represented by either Union.

Although Iron Workers has a collective-bargaining agreement with Turner, the general contractor, that agreement is not applicable here because Turner is not the employer in this proceeding. The company that ultimately controls and makes the job assignments—in this case, Goebel—is deemed to be the employer for the purposes of a 10(k) proceeding.<sup>5</sup>

Goebel has a collective-bargaining agreement with Carpenters. Although that contract does not expressly refer to the work in dispute, the parties to that contract, by their conduct, have shown their mutual intention to apply that contract to that work. Indeed, under that contract, Goebel has traditionally assigned, and its Carpenters-represented employees have regularly performed, embed work.<sup>6</sup> By contrast, Goebel has no contract at all with Iron Workers. Accordingly, we find that the factor of collective-bargaining agreements favors awarding the disputed work to employees represented by Carpenters. See *Electrical Workers Local 134 (Pepper Construction Co.)*, 339 NLRB No. 22, slip op. at 3 (2003) (Board held that the factor of collective-bargaining agreements favored award to employees represented by union signatory to a contract with the employer, although that contract had no specific “scope of work” provision, since employer’s employees employed under that contract performed the disputed work).

Our colleague argues that the factor of “collective-bargaining agreement” should apply only where the agreement clearly and facially gives the work to one group over the other. We disagree. The Board considers the factor of “collective-bargaining agreement” in assigning the work. If one union has a contract which arguably supports that union’s claim, and the other union has no contract at all with the assigning employer, the Board

<sup>5</sup> *Olympian Precast*, supra, 333 NLRB 92, 94 fn. 8. Therefore, we deny Iron Workers’ motion to substitute Turner for Goebel as the Employer in this case.

<sup>6</sup> It is axiomatic that a contract that is unclear on its face can be interpreted in light of the mutual practices of the parties thereunder, so that the mutual intention becomes clear.

will consider those facts in its decision.<sup>7</sup> The Employer here has a contract with the Carpenters. That contract, as applied by the parties, covers the work in dispute. The Employer has no contract at all with the Iron Workers.<sup>8</sup> In these circumstances, the factor of “collective-bargaining agreement” favors the Carpenters.

The cases relied upon by our colleague do not support his view. In the *S. Rosenthal* cases,<sup>9</sup> the employer had contracts with both unions, and neither contract gave a superior claim. Thus, the factor of “collective-bargaining agreement” favored neither side. By contrast, in the instant case, the Employer has a contract only with the Carpenters. In *Airborne*,<sup>10</sup> the work was newly acquired, and thus neither contract specifically mentioned it. By contrast, in the instant case, the work has existed for a substantial period, and it has been assigned to the Carpenters under the Employer’s contract with the Carpenters.

In sum, where there are two contracts, the Board looks to whether one of them gives a superior claim. However, where, as here, one union has a contract with the assigning employer and the other does not, and that contract has been applied to cover that work, it is appropriate to consider these facts.<sup>11</sup>

#### 2. Employer preference

John Day, Goebel’s site superintendent on the West Madison Street project, testified that Goebel prefers to assign the work in dispute to its employees, who are represented by Carpenters. Accordingly, we find that the factor of Employer preference favors awarding the work in dispute to employees represented by Carpenters.

<sup>7</sup> *Pepper Construction*, supra; *Painters (Frank Burson, Inc.)*, 265 NLRB 1685, 1686 (1982). See generally *Carpenters Local 210 (Component Assemblies Systems)*, 327 NLRB 1, 2 (1998); *Laborers Local 72 (Ball Glass Container)*, 279 NLRB 227, 228 (1984).

Our colleague acknowledges that the majority in *Pepper* did not accept his view. Similarly, our colleague acknowledges that the factor of “collective-bargaining agreement” favored the Plasterers Union in *Burson* based solely on the existence of a Plasterers’ agreement [and no Painters agreement] under which the disputed work had been performed.

<sup>8</sup> The general contractor (Turner) has an agreement with the Iron Workers, but Turner is not the assigning employer.

<sup>9</sup> *Graphic Communications Local 508M (S. Rosenthal & Co.)*, 330 NLRB 405, 407 (1999); *Communications Workers Local 11-C (Rosenthal & Co.)*, 312 NLRB 531, 532 (1993).

<sup>10</sup> *Teamsters Local 174 (Airborne Express)*, 340 NLRB No. 20 (2003).

<sup>11</sup> We recognize that the factor of “collective-bargaining agreement” does not tip strongly in favor of the Carpenters, and we agree that the matter is far from “conclusive.” See *Longshoremen ILA Local 1329 (Sprague & Sons)*, 280 NLRB 1302 (1986), cited by our colleague. Our only point is that the factor of “collective-bargaining agreement” is a factor to be considered, and it tends to favor the Carpenters in this case.

### 3. Employer practice (past and current)

Goebel has historically assigned embed work to its Carpenters-represented employees, and did so on the 540 West Madison Street job until general contractor Turner removed the work from Goebel, as a result of Iron Workers threats.<sup>12</sup>

Accordingly, we find that the factor of employer practice favors an award of the disputed work to employees represented by Carpenters.

### 4. Area and industry practice

Iron Workers presented testimony from Turner General Superintendent James Roosa; II In One Vice President Robert McGee; and Iron Workers Apprenticeship Coordinator Al Bass on the factor of area practice of employers other than Goebel with regard to the installation of metal embeds.<sup>13</sup> All three witnesses had long-term experience in the construction industry in Chicago, and all three confirmed that embeds attached to structural steel are typically assigned to employees represented by Iron Workers. Carpenters did not present evidence on the factors of area and industry practice, nor did they refute Iron Workers' testimony regarding area practice. Accordingly, we conclude that the factor of area practice favors an award of the work in dispute to employees represented by Iron Workers.<sup>14</sup>

### 5. Economy and efficiency of operations

There is no evidence demonstrating that if the disputed work were assigned to a particular employee group, the Employer would be afforded any greater or lesser economy or efficiency in its operations. Therefore, we conclude that an analysis of economy and efficiency of operations does not favor an award of the disputed work to either employee group.

### 6. Relative skills and training

The record indicates that both carpenters and iron workers have the requisite skills and training to perform

<sup>12</sup> The fact that the work was thereafter reassigned to Iron Workers-represented employees does not undercut this finding. It is well settled that work assignments obtained by coercion (here by the Iron Workers' strike threat) do not militate in favor of an award of that work to employees represented by that union. See generally *Longshoremen IIA Local 1294 (Cibro Petroleum Products)*, 257 NLRB 403, 407 (1981).

<sup>13</sup> Iron Workers argues that Bass' testimony supports the contention that the practice of assigning the work in dispute to employees represented by Iron Workers is industrywide. To the contrary, Bass' testimony reflects that he worked for a single, Chicago-area contractor for a number of years as an iron worker, and there is no further indication in the record that his experience extends beyond that area.

<sup>14</sup> With respect to industry practice, the evidence is insufficient to find that this factor favors awarding the disputed work to employees represented by either Union.

the work in dispute. Thus, this factor does not favor an award of the work in dispute to either employee group.

### 7. The interunion agreement

The parent affiliates of the local unions involved in this dispute are signatory to an October 1, 1968 Agreement, which is still in effect. Article 3 of the 1968 agreement, entitled "Embedded Metal," Section 1, entitled "Curb Angles," states: "The installation of curb angles attached to concrete forms is the work of Carpenters. The installation of curb angles attached to steel and not attached to the form is the work of Iron Workers."

Although certain language in the agreement arguably pertains to the disputed work, we find, in the circumstances of this case, that the existence of that agreement should not be controlling. First, the Unions dispute the application of the agreement to the facts of this case. Thus, according to the Carpenters, the terms of article 3. section. 1 of the 1968 agreement actually support its claim to the perimeter work rather than the Iron Workers.<sup>15</sup>

Further, Goebel is not a party to that agreement. As such, that agreement is not controlling.<sup>16</sup> Rather, such an agreement is essentially a private arrangement between two unions as to how they wish to apportion work between them. To be sure, if Goebel had historically adhered to its terms, the Board might properly give significant weight to that agreement.<sup>17</sup> However, in the instant case, Goebel has not historically adhered to its terms.<sup>18</sup> As noted above, it has historically awarded the work to its Carpenter-represented employees. In these circumstances, the interunion agreement is entitled to little weight.<sup>19</sup>

<sup>15</sup> Thus, the Carpenters argue that because the embeds were installed to an edge which is used to receive concrete, the disputed work belongs to it.

<sup>16</sup> See, e.g., *Laborers Local 1030 (Exxon Chemical Co.)*, 308 NLRB 706, 710 (1992); *Operating Engineers Local 150 (All American)*, 296 NLRB 933, 937 (1989); *Plumbers Local 130 (Contracting Co.)*, 272 NLRB 1045, 1048 (1984); *Operating Engineers Local 965 (Twin-State Gang Nail Structures)*, 249 NLRB 894, 897 (1980); *Iron Workers Local 361 (Concrete Casting Corp.)*, 209 NLRB 112, 114 (1974).

<sup>17</sup> See *Teamsters Local 140 (Bert McDowell)*, 225 NLRB 1183, 1185 (1976).

<sup>18</sup> *Iron Workers Local 1 (Fabcon)*, 311 NLRB 87, 93 (1993); *Painters District Council (Quad C Corp.)*, 259 NLRB 905, 907 (1982) ("[T]he Board has given little weight to an interunion agreement, or IJDB awards predicated thereon, where, as here, the Employer's past practice is contrary, there is no reference to the agreement in the Employer's contract with the [Union], there is no evidence that the Employer has otherwise agreed to be bound by the agreement, and the [Union] continues to claim the work in dispute.")

<sup>19</sup> *Wood, Wire & Lathers Local 68 (Acoustics & Specialties, Inc.)*, 142 NLRB 1073, 1078-1079 (1963), cited by the dissent is inapposite. In that case, the relevant factors were in equipoise, and the Board tipped the balance by giving weight to an interunion agreement. By

We agree with our colleague that the Act “encourages voluntary settlement of work assignment controversies between unions.” Our disagreement is based on the fact that a settlement should include *all* parties to the controversy, i.e., not only the disputing union but also the employer who actually assigns the work and whose preferences, practices and contract reflect its stake in the outcome.

Finally, although the early case of *J.A. Jones*, 135 NLRB 1402 (1962), mentions “agreements between unions” as a factor to be considered, later cases indicate that it is not a factor where the employer is not a party thereto. Unlike our colleague, we would not overrule these later cases.

#### Conclusions

After considering all the relevant factors, we conclude that employees represented by Carpenters are entitled to perform the work in dispute. We reach this conclusion relying on the factors of collective-bargaining agreements, employer preference, and employer practice. We find that these factors outweigh the factors of area practice and interunion agreement. Thus, there are three factors in favor of an award to Carpenters-represented employees, and one of those factors (employer preference) is entitled to substantial weight. See *Machinists (Hudson General Corp.)*, 326 NLRB 62, 67 (1998). (“The Board has consistently placed great weight on the factor of employer preference in making work assignment awards.”).

We disagree with our colleague’s assertion that the substantial factor of employer preference is entitled to little weight because the Carpenters—who represent Goebel’s employees, and who share Goebel’s position on the assignment of the disputed work—filed the unfair labor practice charge rather than Goebel. The identity of the charge-filer and the extent of formal participation in the hearing are not relevant to the issue of what group of employees should be assigned the work. Nor do we agree with our colleague’s claim that, because Goebel did not make a formal appearance or file a posthearing brief [i.e., it did not retain counsel to represent it], its preference—as established by the record testimony of its job superintendent - should be minimized. To the extent that the dissent relies on *Ironworkers Local 380 (Stobek Masonry)*, 267 NLRB 284 (1983), for that proposition, we find that case distinguishable. There, the Board acknowledged the well-settled principle that employer

preference is normally accorded considerable weight. The Board further noted, however, that such weight was not warranted in the particular circumstances of *Stobek*. First, the dispute there was over a production process that the employer had just commenced performing, and which was unlike work it [or its preferred employees] previously had performed. Second, “employer preference” was the *only* factor that favored the employer’s preferred employee work force. Here, conversely, the Employer’s preference was consistent with its settled practice for the same type of work, and was accompanied by other factors [collective-bargaining agreement and past and current practice] which favored the award of work to the Employers’ Carpenter-represented employees. By contrast, in the instant case, there are only two factors supporting an award to Iron Workers-represented employees, and one of those factors (interunion agreement) is entitled to comparatively little weight.

In sum, we find that the work in dispute should be assigned to the Employer’s Carpenter-represented employees. In making this determination, we are awarding the disputed work to employees represented by the Carpenters, but not to that labor organization or its members. This determination is limited to the controversy that gave rise to this proceeding.

#### DETERMINATION OF DISPUTE

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

1. Employees of Goebel Forming, Inc., represented by United Brotherhood of Carpenters and Joiners of America, Chicago and Northeast Illinois District Council of Carpenters, are entitled to perform the installation of metal embeds attached to the structural steel of the building at 540 West Madison Street, Chicago, Illinois.

2. Bridge, Structural and Reinforcing Iron Workers, Local Union No. 1 of the International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, AFL-CIO, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Goebel Forming, Inc. to assign the disputed work to employees represented by it.

3. Within 14 days from this date, Bridge, Structural and Reinforcing Iron Workers, Local Union No. 1 of the International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, AFL-CIO, shall notify the Regional Director for Region 13 in writing whether it will refrain from forcing Goebel Forming, Inc., by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

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contrast, in the instant case, the factors are decidedly in favor of an award to the Carpenter-represented employees. Chairman Battista and Member Schaumber express no view as to whether *Acoustics & Specialties* was correctly decided.

Dated, Washington, D.C. November 28, 2003

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Robert J. Battista, Chairman

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Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER WALSH, dissenting in part.

The majority errs in its final analysis of two key factors relevant to determining the appropriate assignment of the disputed work.<sup>1</sup> Consequently, the majority also errs in awarding the disputed work to employees represented by Carpenters, rather than to employees represented by Iron Workers.

#### The Factor of Collective-Bargaining Agreements

Even though there is no provision in the contract between Goebel and Carpenters that expressly or specifically refers to the work in dispute, my colleagues find that this factor favors an award to Carpenters-represented employees, and they cite *Electrical Workers Local 134 (Pepper Construction Co.)*, 339 NLRB No. 22, slip op. at 3 (2003), in support of their finding. However, as I pointed out in a personal footnote in *Pepper Construction*, “the fact that [the Employer] applied a . . . contract to its employees who were assigned the disputed work is insufficient to establish that the contract itself covers the disputed work and supports awarding the disputed work to those employees.” *Id.* at fn. 7. Inasmuch as the Goebel-Carpenters collective-bargaining agreement does not refer to the work in dispute, under my position in *Pepper Construction*, this factor does not favor an award to either group of employees.

Although the *Pepper Construction* panel majority did not accept this view, it is firmly rooted in Board precedent. See, e.g., *Teamsters Local 174 (Airborne Express)*, 340 NLRB No. 20, slip op. at 4 (2003) (Chairman Battista; Members Schaumber and Walsh) (“Neither [collective-bargaining] agreement specifically covers the work in dispute”; factor of collective-bargaining agreements “does not favor awarding the work to either group of employees”); (*Graphic Communications Local 508M (S. Rosenthal & Co.)*, 330 NLRB 405, 407 (1999). (“[A]s neither collective-bargaining agreement clearly and unambiguously covers the work in dispute, this factor does

<sup>1</sup> The majority correctly determines that the dispute is properly before the Board for determination, and that the factors of Board certifications, economy and efficiency of operations, and relative skills and training are not helpful to resolving the dispute.

not favor an award of the work to either group of employees.”); *Communications Workers Local 11-C (Rosenthal & Co.)*, 312 NLRB 531, 532 (1993) (“Neither collective-bargaining agreement specifically mentions the work in dispute . . . or appears to specifically cover the work in dispute to the exclusion of the other Union”; factor of collective-bargaining agreements held “inconclusive”); *Teamsters Local 470 (Philco-Ford Corp.)*, 203 NLRB 592, 594 (1973) (“The Board will rely on a contract’s provision if the assignment of the work in dispute is made in clear and unambiguous terms in that contract.”).<sup>2</sup>

My colleagues contend that the fact that Goebel has traditionally assigned embed work to its Carpenters-represented employees somehow leads to the conclusion that its collective-bargaining agreement with the Carpenters clearly covers the work in dispute. Such an interpretation ignores the fact that whether the collective-bargaining agreement clearly and unambiguously covers the dispute is in fact a separate factor, apart from the employer’s past practice. I decline to accept my colleague’s invitation to combine the factors in this manner.

In addition, my colleagues’ analysis of the factor of collective-bargaining agreements is inconsistent with their decision earlier this month in *Airborne Express*, supra. In that case, the work in dispute consisted of certain “line haul” work that an air carrier had contracted out to the employer’s employees, who were represented by a union and working under the terms of a collective-bargaining agreement. For the previous 6 years, the employer’s employees had performed other “line haul” work for the same air carrier. In addressing the merits of the dispute, my colleagues correctly analyzed the factor of collective-bargaining agreements separate and apart from the evidence concerning the employer’s past practice. My colleagues properly concluded that because the contract did not “specifically cover” the disputed work, the factor of collective-bargaining agreements did not favor an award to the employer’s employees. 340 NLRB

<sup>2</sup> The cases cited by the majority do not represent persuasive contrary authority. *Carpenters Local 210 (Component Assemblies Systems)*, 327 NLRB 1, 2 (1998), is distinguishable because there, unlike here, the collective-bargaining agreement in question contained a jurisdictional clause. Similarly, in *Laborers Local 72 (Ball Corp.)*, 269 NLRB 227, 228 (1984), the collective-bargaining agreement contained a provision prohibiting the subcontracting of unit work except under limited circumstances. That leaves only *Painters Local 91 (Frank M. Burson, Inc.)*, 265 NLRB 1685, 1686 (1982). Burson does not even mention whether there was any kind of scope-of-work provision in the parties’ collective-bargaining agreements. Nor does it recognize the basic distinction between “contracts [that] cover workers who [perform the disputed work]” and “contracts [that] specifically cover[] the work in dispute.” *Pressman Local 1 (American Bank Note Co.)*, 202 NLRB 501, 504 (1973). Accordingly, Burson should not be followed here.

No. 20, slip op. at 4. My colleagues should reach the same conclusion here.

Finally, my colleagues argue that the analysis of the collective-bargaining agreement factor should vary depending on whether the employer has contracts with two unions or with only one of them: “In sum, where there are two contracts, the Board looks to whether one of them gives a superior claim. However, where, as here, one union has a contract with the assigning employer and the other does not, and that contract has been applied to cover that work, it is appropriate to consider these facts.”

The cases, however, do not draw this distinction. On the contrary, the Board has applied the “specifically covered” analysis not only in “two contract” cases, but also in “one contract” cases as well. Thus, in *Longshoremen Local 1329 (Sprague & Son)*, 280 NLRB 1302, 1304 (1986), the Board stated:

The Employer has no collective-bargaining agreement with Local 1329. While the Employer currently has a collective-bargaining agreement with Fuel Handlers, and while the employees covered by such agreement have unloaded bulk cargo at the Employer’s terminal in the past, the agreement does not specifically cover the disputed work. We therefore find that the factor of collective-bargaining agreements is inconclusive. [Emphasis added.]

To the same effect, see *Electrical Workers Local 3 (U.S. Information Systems)*, 324 NLRB 604, 606 (1997) (employer party to contract with Communications Workers, but not with Electrical Workers; although for many years the employer had been assigning cable tray installation work to employees represented by Communications Workers, “it was not established that the contract necessarily covered cable tray installation work”; factor of collective-bargaining agreements held “not helpful to a determination”); *Iron Workers Local 118 (Kaweah Construction)*, 297 NLRB 1040, 1042 (1990) (employer party to contract with Millwrights, but not with Iron Workers; although the employer had been assigning work in question to employees represented by Millwrights for 40 years, “the Employer has not cited any provision of the contract specifically covering the disputed work”; factor of collective-bargaining agreements held “not helpful to a determination”).

#### The Factor of Interunion Agreement

Although my colleagues recognize that “certain language” in the October 1, 1968 interunion agreement “arguably pertains to the disputed work,” they accord relatively little weight to this factor for two reasons. First, my colleagues note that the application of the interunion agreement to the facts of this case is disputed by the parties. However, there is no merit in the Carpenters’ con-

tion that the agreement supports its claim to the disputed work. The agreement states that the “installation of curb angles attached to steel and not attached to the form is the work of Iron Workers.” Therefore, under the plain terms of the agreement, the disputed work of installing metal embeds attached to structural steel is the work of Iron Workers.

Second, my colleagues note that Goebel has not historically adhered to the terms of the 1968 agreement. However, this fact does not militate against giving significant weight to the interunion agreement. The reason the Board considers interunion agreements to be a relevant factor in resolving jurisdictional disputes is to “encourag[e] unions to settle such disputes by agreement, a desirable policy.” *Wood, Wire & Lathers Local 68 (Acoustics & Specialties, Inc.)*, 142 NLRB 1073, 1079 (1963). In order for this objective to be accomplished, the Board must necessarily focus on giving effect to the terms of the interunion agreement, not on whether a particular employer has decided to adhere to it. Indeed, in *Acoustics & Specialties*, the Board expressly recognized that an interunion agreement may “cause an employer to divide his work between the various crafts differently than before the agreement.” *Id.* In fact, in that case, the Board gave considerable weight to the interunion agreement even though the employers had not “historically adhered to it.” (The agreement had been negotiated only months before the jurisdictional dispute arose.) Here, as stated above, the clear terms of the interunion agreement support an award of the disputed work to employees represented by Iron Workers.

#### Conclusion

In *Machinists Lodge 1743 (J.A. Jones Construction)*, 135 NLRB 1402 (1962), the Board set forth the following criteria to be considered in the making of an affirmative award under the Supreme Court’s decision in *NLRB v. Electrical Workers Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961):

The Board will consider all relevant factors in determining who is entitled to the work in dispute, e.g., the skills and work involved, certifications by the Board, company and industry practice, *agreements between unions* and between employers and unions, awards of arbitrators, joint boards, and the AFL–CIO in the same or related cases, the assignment made by the employer, and the efficient operation of the employer’s business. [135 NLRB at 1410–1411. Emphasis supplied.]<sup>3</sup>

<sup>3</sup> As this quotation from the Board’s seminal 10(k) decision makes clear, “agreements between unions” is a factor separate and apart from the factor of “agreements . . . between employers and unions.” Cases

In the instant case, several of the relevant factors are not helpful to resolving the dispute. Thus, neither Union is the certified bargaining representative of the Employer's employees; neither Union has a collective-bargaining agreement with the Employer covering the work in dispute; both groups of employees possess the necessary skills and training; and an award to either group of employees would not materially affect the economy and efficiency of the Employer's operations.

In this state of balance, it is appropriate to give greater weight to the factors of area practice and the interunion agreement, which favor an award to Iron Workers-represented employees, than to the factors of employer preference and past practice, which favor an award to Carpenters-represented employees. Although the Board normally accords employer preference considerable weight, it has consistently maintained that an employer's assignment of work "cannot be made the touchstone in determining a jurisdictional dispute." *Carpenters Local 1102 (Don Cartage Co.)*, 160 NLRB 1061, 1078 (1966). Indeed, resort to such a mechanistic approach would violate the Supreme Court's directive in *Columbia Broadcasting*, supra. Here, the Employer's preference is supported only by the factor of its own past practice. Significantly, it presented no evidence that a contrary assignment will adversely affect its operations. Indeed, the Employer's participation in this case was minimal. It did not file the charge, did not make a formal appearance at the hearing, and did not file a brief. In these circumstances, the Employer's preference merits little weight.

There is case support for this view. In *Ironworkers Local 380 (Stobek Masonry, Inc.)*, 267 NLRB 284, 287 fn. 8 (1983), the Board refused to award the disputed work in accordance with the employer's preference, stating:

In the instant case, the Employer based its preference for Laborers on convenience. It presented no evidence that a contrary assignment will adversely affect its operations nor did it support its preference with considerations of skill, area practice, or economy and efficiency. *Indeed, the Employer's participation in the instant case was minimal. The Employer never filed charges. At the hearing, it called no witnesses, introduced no exhibits, and cross-examined no witnesses. Furthermore, the Employer left the hearing before its close and filed no brief.*

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relied on by the majority, however, blur this distinction and erroneously fail to give weight to interunion agreements to which an employer was not a party. To the extent such cases are inconsistent with *J.A. Jones*, they should be overruled.

*[The] Employer's preference merits little weight in these circumstances. [Emphasis added.]*

Historically, the Board has given considerable weight to voluntary agreements between the unions resolving jurisdictional disputes. *Acoustics & Specialties*, supra (relying on interunion agreement, Board awarded disputed work to lathers, although employer preference favored carpenters). See also *Carpenters Local 690 (Walter Corp.)*, 151 NLRB 741, 747-748 (1965) (relying on interunion agreement, Board awarded disputed work contrary to employer preference); *Don Cartage*, supra, 160 NLRB at 1076-1082 (relying on interunion agreement, Board awarded disputed work contrary to employer preference, stating that "the Board has always looked with favor upon the voluntary efforts by unions to adjust their jurisdictional differences"). The Board's practice is in complete harmony with the fundamental policies of Section 10(k) of the Act, as interpreted by the Supreme Court. See *Carey v Westinghouse Electric Corp.*, 375 U.S. 261, 266 (1964) ("Section 10(k) not only tolerates but actively encourages voluntary settlements of work assignment controversies between unions.") In accord with this precedent, and in furtherance of the policy encouraging unions to avoid jurisdictional disputes through voluntary agreement, I would give special weight to this factor and award the embed work to employees represented by Iron Workers.

Dated, Washington, D.C. November 28, 2003

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Dennis P. Walsh,

Member

NATIONAL LABOR RELATIONS BOARD



