

PLAN FOR SETTLEMENT OF JURISDICTIONAL DISPUTES
IN THE CONSTRUCTION INDUSTRY

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August 15, 2013

VIA FACSIMILE

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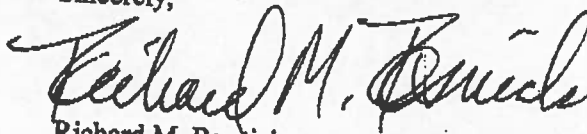
Dennis Mead
Bess TESTLAB, Inc.
991 George Street
Santa Clara, CA 95054

RE: CA 7/3/13

Gentlemen:

Attached is a copy of Arbitrator Greenberg's original decision in the above-referenced case.

Sincerely,



Richard M. Resnick
Administrator and Counsel to the Plan

RCOD 08/16/13 AM 9:22

Enclosure

Jurisdictional

**PLAN FOR THE SETTLEMENT OF JURISDICTIONAL
DISPUTES IN THE CONSTRUCTION INDUSTRY**

Arbitration between:

Bess TESTLAB, Inc.

and

Skanska, Shimmock, Herzog JV

and

International Union of Operating Engineers

and

Laborers' International Union of North America

regarding an alleged impediment to job progress at the Santa Clara
VTA-Silicon Valley Berryessa Extension project in Santa Clara
County, California.

Case No. CA 7/3/13 IJP

BEFORE: PAUL GREENBERG, Arbitrator

Appearances:¹

For International Union of Operating Engineers:

John Gregory, *Director-Jurisdiction, Washington, D.C.*

For Laborers' International Union of North America:

Brendan P. O'Sullivan, *International Representative - Construction Department,
Washington, D.C.*

DECISION AND ORDER

This case is brought by Laborers' International Union of North America (LIUNA or Laborers') as an "impediment to job progress" dispute under the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry ("Plan") and its Procedural Rules and Regulations ("Procedural Rules"). A hearing into this dispute was held at the Plan offices in Washington, D.C., on August 15, 2013, with representatives of LIUNA and International Union of Operating Engineers (IUOE or Operating Engineers) participating. There was agreement that

¹ Although notified of the hearing, neither Bess TESTLAB, Inc., nor Skanska, Shimmock, Herzog JV participated.

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all parties are stipulated to the Plan through Article 12 ("Jurisdictional Disputes") of a project labor agreement (PLA) applicable to the construction of the "C700 Line, Track, Stations and Systems Design Build Contract (DB11002F), Silicon Valley Berryessa Extension Project." Laborers' Exhibit (LX) 3. Because all parties are signatory to the PLA, and the PLA includes Plan stipulation language, it was agreed the Plan and this Arbitrator properly have jurisdiction over this matter.

BACKGROUND

A. The Project Labor Agreement

The project labor agreement was entered into in December 2011 between the Santa Clara Valley Transportation Agency (VTA) and the Santa Clara-San Benito Counties Building and Construction Trade Council. It is applicable to a 10 mile extension of the BART system from Fremont, CA, to Berryessa, CA (near San Jose). Both IUOE Local 3 and LIUNA Local 270 are signatory to the PLA.

As noted, Article 12 of the PLA covers any jurisdictional disputes that may arise on the project:

12.1 The assignment of Covered Work will be solely the responsibility of the Contractor performing the work involved; and such work assignments will be in accordance with the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry (the "Plan") or any successor Plan.

12.2 All jurisdictional disputes on this Project, between or among the building and construction trades Unions and the Contractors parties (*sic*) to this Agreement, shall be settled and adjusted according to the present Plan established by the Building and Construction Trades Department or any other plan or method of procedure that may be adopted in the future by the Building and Construction Trades Department. . . .

LX 3.

Under Section 3.3 of the PLA, the prime contractor on the VTA BART project agrees neither it nor any contractor or subcontractor (of any tier) will subcontract work on the Berryessa Extension to any firm that does not become signatory to the PLA. In addition, the PLA includes the following requirement applicable to subcontracted work:

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3.5 Subcontracts. With regard to any Contractor or Subcontractor that is independently signed to any Schedule A Agreement,^[2] this Agreement shall in no way supersede or prevent the enforcement of any subcontracting clause contained in such Schedule A Agreement. Any such subcontracting clause in a Schedule A Agreement shall remain and be fully enforceable between each craft union and its signatory employers and no provision of this Agreement shall be interpreted and/or applied in any manner that would give this Agreement precedence over subcontracting obligations and restrictions that exist between craft Unions and their respective signatory employers under a Schedule A Agreement.

LX 3.

- B. **Skanska, Shimmock, Herzog JV's subcontracting of work to Bess TESTLAB, and the resulting grievances, appeals to the Plan, etc.**

Skanska, Shimmock, Herzog JV (SSH) has a contract to perform work on the Berryessa Extension. SSH has subcontracted a portion of its work to Bess TESTLAB, Inc., including excavating work that will be performed by workers operating truck- or trailer-mounted vacuum excavators.

On May 9, 2012, Bess TESTLAB wrote to Laborers' Local 270, advising Local 270 that the company had signed the PLA and intended to be covered by the LIUNA master labor agreement. The letter indicated Bess TESTLAB expected to be bound to the LIUNA master labor agreement only with respect to its PLA-covered work on the BART extension to Berryessa. LX 1. Soon thereafter, in June 2012, Bess TESTLAB provided a work assignment letter to Local 270 stating excavation work using truck- or trailer-mounted vacuum excavators would be assigned to workers represented by LIUNA.

In a letter dated March 04, 2013, Bess TESTLAB again wrote to Laborers' Local 270, assigning the operation of the vacuum excavators to workers represented by LIUNA. The letter indicates this assignment is consistent with Bess TESTLAB's historical practice.

Sometime soon afterward, it appears IUOE Local 3 filed a grievance against SSH, alleging that SSH had violated various articles of the Local 3 master labor agreement (negotiated

² Pursuant to the "Definitions" section of the PLA, Article 1:

"Schedule A" means the local master labor agreement of a Union signatory to this Agreement and which is attached hereto as Appendix C.

Emphasis supplied.

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between Local 3 and United Contractors; Associated General Contractors of California; Industrial Contractors UMIC; and Northern Alliance of Engineering Contractors).³ Significantly, this master agreement (at Section 05.04.00 and 05.04.02) states:

With respect to on-site work covered by this Agreement, that is, work done or to be done at the site of the construction, alteration, painting or repair of a building, structure or other work:

* * * *

That if an Individual Employer shall subcontract on-site work as herein defined in Section 02.05.00, such Subcontractor shall state in writing that such Subcontractor agrees to be bound by and comply with the terms and provisions of this Agreement in the performance of his/her subcontract and agrees to execute a subcontracting terms and conditions Agreement as provided in Attachment "A" of this Agreement.

IUOE Exhibit (OEX) C.

IUOE Local 3's grievance was presented to the AGC/Operating Engineers Board of Adjustment on June 4, 2013. The minutes of the meeting around found at LX 3. According to the minutes, IUOE Local 3

... presented evidence and testimony that the work performed by the subcontractor [Bess TESTLAB] is covered under the Master Construction Agreement and that no Operating Engineers were performing the work on the project.

Id. (emphasis added).

According to the minutes of the Board of Adjustment meeting, SSH and Bess TESTLAB participated in the meeting, and argued SSH had complied with the subcontracting provisions of "the Agreement":⁴

It is the SSH's position that it properly bound the subcontractor, Bess Test Systems, Inc., to the terms and conditions of the Agreement and is in

³ This first grievance was not included in the materials presented to this Arbitrator, but the resulting decision issued June 4, 2013, by the AGC/Operating Engineers Board of Adjustment was provided.

⁴ In the minutes of the Board of Adjustment meeting, only the IUOE Local 3 master agreement is mentioned, and there is no reference to the PLA. In context, therefore, I assume the reference to the "agreement" is a reference to the Local 3 master labor agreement, and not the PLA.

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compliance of the subcontracting provisions of the Agreement. It is the Bess Test Systems' [position] that they utilized workers from another Union to perform this work. SSH presented evidence and testimony that it bound the subcontractor. Bess Test Systems presented testimony of the work and their craft work assignment.

Id.

The Board of Adjustment issued a prospective remedy only in its June 4, 2013, decision:

Based on the evidence presented, the subcontractor Bess Test Systems, Inc., pursuant to its subcontract with SSH, JV whereby it is bound to the terms and conditions of the Operating Engineers Local 3 Northern California Master Construction Agreement for the project, is directed to utilize the Job Placement Procedures for any work covered under the Super Sucker Vacuum Truck (Classification No. 8868) of the Northern California Construction Master Agreement for any work performed on or after July 1, 2013 on the Silicon Valley Berryessa Extension project located in Santa Clara County.

Id.

In a letter to Laborers' Local 270 dated June 25, 2013, Bess TESTLAB restated its intention to continue its assignment of "truck or trailer mounted vacuum excavators" to LIUNA-represented workers. With regard to work that might be performed using a Super Sucker Vacuum Truck, Bess TESTLAB indicated it was considering adding this equipment to its fleet. Bess TESTLAB stated the company "will be more than willing to put a signatory agreement in place with the Operators in the future should the need arise."

LIUNA wrote to the Plan Administrator on July 3, 2013, invoking the Plan's "impediment to job progress" provisions. LIUNA identified the work in dispute as "operation of truck or trailer mounted vacuum excavators." LX 1. In turn, the Plan Administrator wrote to IUOE General President James Callahan, alerting him to the LIUNA filing. The LIUNA charge was docketed as Case No. CA 7/3/13. *Id.*

On July 8, 2013, President Callahan (acting through Director of Jurisdiction John Gregory) wrote to IUOE Local 3, advising Local 3 that the filing of a grievance over a work assignment constituted an impediment to job progress, and directing Local 3 to "withdraw any grievance and process any jurisdictional dispute under the PLA through the Plan." *Id.*

On August 5, 2013, IUOE Local 3 filed a new grievance against SSH, alleging SSH had violated the labor agreement by not obtaining Bess TESTLAB's signature on the "Subcontracting Terms and Conditions Agreement" form found as Attachment "A" to the IUOE Local 3 master

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agreement. The copy of the grievance included in the record was addressed to SSH, but it appears a copy also was filed with AGC of California. As a remedy, IUOE Local 3 requested that

... until this dispute is resolved, you [SSH] withhold sufficient monies from Bess Testlab, Inc. to cover this violation and that you *make the Union whole for lost wages and fringe benefits* including 25% liquidated damages based upon all hours worked, to be determined through the use of certified payroll records, payroll audit and/or other appropriate means. The amount due shall be subject to increase as long as the violation continues and should be paid into the Training Fund as provided in section 05.06.02.

LX 1 (emphasis added). On August 6, a representative of AGC of California notified both SSH and Bess TESTLAB that the matter would be considered at an AGC/Operating Engineers Board of Adjustment meeting scheduled for Tuesday, September 10, 2013. LX 1.

On August 8, 2013, LIUNA General President Terry O'Sullivan advised the Plan Administrator that it appeared IUOE Local 3 was ignoring the directive to withdraw the grievance. The Administrator corresponded with President Callahan on August 12, retaining the original CA 7/3/13 docket number and asking whether IUOE Local 3 was intending to continue pursuing its concern through the grievance process, in which case LIUNA's "impediment to job progress" charge would be referred to a Plan arbitrator. When the Plan Administrator was advised that IUOE Local 3 wanted to proceed with this Plan proceeding, this Arbitrator was selected to hear the case.

ISSUE PRESENTED

Whether Operating Engineers Local 3's grievance against SSH and Bess TESTLAB constitutes an "impediment to job progress" under the Plan and its Procedural Rules? If so, what shall be the remedy?

DISCUSSION

Article VI §2 of the Plan provides:

Recognizing that it is in the best interests of the parties to this Agreement, the Department, on behalf of itself and the General Presidents of each of the affiliated National and International Unions, reaffirms its desire to eliminate work stoppages, slowdowns and *other impediments to job progress* and its intent to comply with the provisions of the Plan

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prohibiting jurisdictional strikes and agrees to enforce these provisions by direction and action of their respective National and International offices.

Emphasis added.

The Plan's Procedural Rules (Article III §3) state:

3. Impediments to job progress shall include, but not be limited to:

a. Filing a grievance under a collective bargaining agreement, or under a local plan for the settlement of jurisdictional disputes not recognized by the Department, where an issue is a case, dispute or controversy involving a jurisdictional dispute or assignment of work by a stipulated contractor, or by a stipulated subcontractor. Provided, that it shall not be considered an impediment to job progress if the responsible contractor or Union is not stipulated to the Plan or a grievance is filed over the failure of the responsible contractor to conduct a pre-job or markup meeting when required to do so under the terms of the applicable collective bargaining agreement.

b. Filing an unfair labor practice charge with the National Labor Relations Board, or appropriate Canadian equivalent, as determined by the Administrator, or action in any court against a stipulated employer or a stipulated National or International Union, or local affiliate thereof, where an issue is a case, dispute or controversy involving a jurisdictional dispute or assignment of work. Provided, that it shall not be considered an impediment to job progress if the responsible contractor is not stipulated to the Plan.

Simply stated, the underlying goal of the Plan is provide a single, exclusive, comprehensive forum for adjudicating construction industry jurisdictional disputes. Once the parties are properly stipulated to the Plan, the Plan largely preempts alternative means for challenging jurisdictional assignments. This includes actions under grievance procedures or the filing of unfair labor practice charges that implicate jurisdictional claims. The Procedural Rules clearly indicate the proceedings listed are merely illustrative, and are not exclusive.

A party believing there may be a violation of this provision may seek an expedited hearing before the Plan. The Plan provides the following directive to arbitrators hearing "impediment" cases:

The sole issue at the hearing shall be whether or not a violation of this Article has in fact occurred, and the Arbitrator shall have no authority to consider any matter in justification, explanation or mitigation of such

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violation or to award damages. . . . The Arbitrator may order cessation of the violation of this Article and other appropriate relief, and such decision shall be served on all parties by facsimile upon issuance.

Plan, Article VI §2(e).

For its part, Operating Engineers asserts the IUOE Local 3 grievance against SSH and Bess TESTLAB is not jurisdictional in nature, but merely is an effort to compel SSH to comply with the subcontracting requirements of the PLA and the IUOE Local 3 master labor agreement. As noted *supra*, Section 3.5 of the PLA includes express language stating the PLA "shall in no way supersede or prevent the enforcement of any subcontracting clause" contained in any of the local union master agreements.

Stated differently, Operating Engineers seems to be saying, "In filing a grievance, we are not challenging anyone's work assignment - at least not yet. All we want is for Bess TESTLAB to become signatory to our master labor agreement (at least for purposes of this job), which SSH has promised pursuant to the subcontracting clause of the IUOE Local 3 labor agreement."

Admittedly, the language found in the PLA is somewhat circular and possibly contradictory. On the one hand, the terms of a PLA ordinarily take precedence over any contrary provisions in local labor unions, providing employers on PLA-covered jobs a somewhat uniform and streamlined set of work rules. Further, the PLA at issue in this case includes text binding signatory parties to the Plan, which also ordinarily takes precedence over any contrary provisions of local labor agreements. On the other hand, the PLA includes the language (at Section 3.5) suggesting the PLA *does not* supersede or implicate the enforcement of subcontracting language in the respective master labor agreements of the various construction locals. Of course, the underlying goal of such subcontracting language is the preservation of work opportunities - *i.e.*, work assignments.

In this Arbitrator's view, Operating Engineers' claim that its grievance activity is not related to a jurisdictional claim simply is not credible.

First, there is the language referring to work and craft assignments found in the June 4 minutes of the Board of Adjustment proceeding. The minutes indicate Local 3 was complaining that Bess TESTLAB was performing "covered" work at the project (*i.e.*, work claimed by IUOE), but "no Operating Engineers were performing the work on the project." In this Arbitrator's view, this clearly suggests Local 3's goal was not merely a signature on a document; instead Local 3 fundamentally was contesting Bess TESTLAB's craft assignment. The jurisdictional nature of the proceeding is reinforced by the Board's June 4 order, which did not call for Bess TESTLAB to sign a document but instead directed SSH to insure that *operating engineers* were called out to operate equipment (specifically, the Super Sucker Vacuum Truck) on PLA-covered work. This was a jurisdictional award, plain and simple.

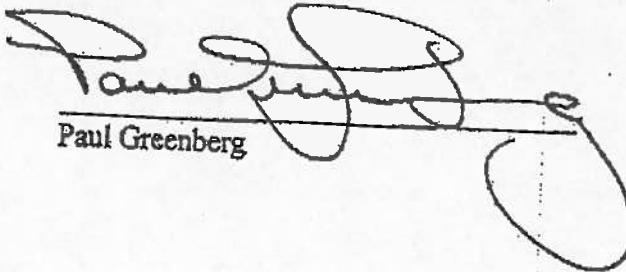
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Similarly, although Local 3's August 5 grievance is structured to give the appearance that IUOE merely is looking for a signature on a document, the remedy sought is an order directing SSH to withhold funds to "make the Union whole for *lost wages and fringe benefits*." Emphasis added. Again, the remedy requested by IUOE Local 3 plainly *presumes* that work has been mis-assigned by SSH or Bess TESTLAB (and thus "lost"), without invoking the provisions of PLA Article 12 that would allow for an orderly proceeding to determine proper jurisdictional assignments.

Additionally, I note the inherent difficulty of reconciling the subcontracting provisions of the IUOE master agreement (and the PLA language purporting to preserve such subcontracting provisions) with the PLA's requirement that jurisdictional disputes be resolved through the Plan standards. Before there can be a finding that work has been improperly subcontracted, there must be a predicate finding that work falls within the jurisdiction of a particular craft. As a practical matter, the collective bargaining agreements of the various construction crafts include jurisdictional claims that frequently overlap. Much of the time – and certainly in this instance – an attempt to compel compliance with subcontracting language on a PLA-covered project cannot be resolved without a proper jurisdictional hearing.

For these reasons, I find the grievance brought by IUOE Local 3 presents a jurisdictional issue, and therefore is barred under the Plan. IUOE Local 3 therefore is directed to withdraw its grievance under its master labor agreement immediately. If IUOE Local 3 wishes to challenge Bess TESTLAB's craft assignments, it must do so pursuant to Article 12 of the PLA.

This Decision addresses *only* Laborers' "impediment to job progress" challenge. It does not reflect an opinion on the merits of any underlying jurisdictional dispute that may exist among the parties, now or in the future.



Paul Greenberg

August 15, 2013
Washington, D.C.

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FACSIMILE COVER SHEET

August 15, 2013

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FROM: Richard M. Resnick

RE: CA 7/3/13

THIS TRANSMISSION CONSISTS OF 10 PAGE(S) PLUS A COVER PAGE. IF THERE ARE ANY PROBLEMS WITH THIS TRANSMISSION, PLEASE CONTACT RICHARD RESNICK OR ASSISTANT VERA C. FORBES AT (202) 785-9300. THANK YOU.