BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION THIRTEEN

IN THE MATTER OF:	)	
	)	
MOORE LANDSCAPES, INCORPORATED,	)	
	)	
Employer,	)	
	)	
and	)	
	)	
INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 150, AFL-CIO,	)	
	)	
Respondent,	)	
and	)	
	)	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 703,	)	Case No. 13-CD-800
	)	Case No. 13-CD-801
Respondent,	)	
	)	
and	)	
	)	
LABORERS' INTERNATIONAL UNION, LOCAL 4,	)	
	)	
Party-in-Interest,	)	
	)	
and	)	
	)	
UNITED UNION OF ROOFERS, WATER-PROOFERS & ALLIED WORKERS, LOCAL 11,	)	
	)	
Party-in-Interest.	)	

POST-HEARING BRIEF OF MOORE LANDSCAPES, INC.

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POST-HEARING BRIEF OF MOORE LANDSCAPES, INC.

I. STATEMENT OF THE CASE

This proceeding arises from a jurisdictional dispute concerning the performance of rooftop landscape work at a construction site located at 949 S. Wells in Chicago, Illinois (known

as the "Roosevelt Collection"). [1] Moore Landscapes, Inc. ("Moore" or the "Employer") assigned the disputed work to members of the International Union of Operating Engineers, Local 150, AFL-CIO ("Local 150") and the International Brotherhood of Teamsters, Local 703 ("Local 703"). Local 150 and Local 703 are the certified joint representatives of Moore's landscape construction employees. These employees are covered by a multi-employer collective bargaining agreement among Local 150, Local 703 and the Illinois Landscape Contractors Bargaining Association (the "ILCBA"), to which Moore is bound by virtue of its membership in the ILCBA.

The United Union of Roofers, Waterproofers & Allied Workers, Local 11 ("Local 11" or the "Roofers") and Laborers International Union, Local 4 ("Local 4" or the "Laborers") subsequently claimed the right to perform the disputed work at the Roosevelt Collection site. Moore has no collective bargaining agreement or relationship with the Roofers or the Laborers. In response to the competing claims by the Roofers and the Laborers, Local 150 and Local 703 submitted a letter to Moore setting forth their continued claims to the disputed work and intention to engage in any and all means, including picketing, to enforce and protect their work assignment if Moore reassigned any of the disputed work to members of the Roofers or the Laborers.

On June 25, 2009, Moore filed unfair labor practice charges with Region 13 of the National Labor Relations Board (the "Board" or the "NLRB"), alleging that Local 150 and Local 703 had violated Section 8(b)(4)(D) of the National Labor Relations Act (the "Act"). (Bd. Exhs.

[1] A formal record of the proceeding was made. References to the transcript of the proceeding are designated as "Tr. ___." Board Exhibits are designated as "Bd. Exh. ___." Exhibits entered by Moore are designated as "Er. Exh. ___." Exhibits entered by Local 150 and Local 703 are designated as "Local 150/703 Exh. ___." Exhibits entered by the Roofers are designated as "Roofers Exh. ___." The Laborers did not appear at or introduce evidence in the 10(k) hearing.

1(a), 1(d).) The charges allege that Local 150 and Local 703 unlawfully threatened to picket or strike the Roosevelt Collection site with an object of forcing Moore to assign work to employees represented by Local 150 and Local 703, rather than employees of any other labor organization, trade, class or craft.

On July 2, 2009, the Regional Director issued a consolidated Notice of Hearing pursuant to Section 10(k) of the Act to determine the jurisdictional dispute concerning the assignment of the following work: Installation of the green grid and green roof system, general planting and retaining wall work at the Roosevelt Collection site. (Bd. Exh. 1(g).) The hearing was held before Hearing Officer Adriana Lipczynski on July 14, 15 and 16, 2009. The Laborers did not appear at the hearing. The day prior to the hearing, the Laborers sent a letter to Region 13 disclaiming interest in the work which they had claimed at the Roosevelt Collection site. (Bd. Exh. 3.) Therefore, the jurisdictional dispute currently involves only employees represented by the Roofers, Local 150 and Local 703.

This brief is submitted on behalf of Moore in support of its position that: (1) this dispute is properly before the Board for a determination under Section 10(k) of the Act, and (2) based upon a consideration of the relevant factors, the disputed work must be awarded to employees represented by Local 150 and Local 703, and not to members of the Roofers. As will be shown, reasonable cause exists to believe that Section 8(b)(4)(D) has been violated. Local 150 and Local 703 have used proscribed means to enforce their claims to the disputed work; there are competing claims to the disputed work between employees represented by the Roofers, Local 150 and Local 703; and the parties have not agreed on a method for the voluntary adjustment of the dispute. In addition, awarding the disputed work to employees represented by Local 150 and Local 703 is supported by all of the following factors typically considered by the Board in 10(k)

proceedings: (1) certifications and collective bargaining agreements, (2) employer preference, (3) employer past practice, (4) area and industry practice, (5) economy and efficiency of operations, (6) relative skills and training of employees, and (7) gain or loss of employment.

II. STATEMENT OF FACTS

A. Stipulations

The parties stipulated to the following facts at the 10(k) hearing:

1. Moore is an Illinois corporation engaged in commercial landscape construction and maintenance (Bd. Exh. 2, ¶ 6);

2. During the past calendar year, Moore has received and/or purchased goods and materials valued in excess of $50,000 indirectly from points located outside the State of Illinois (Bd. Exh. 2, ¶ 6);

3. Local 150, Local 703 and Local 11 are labor organizations within the meaning of Section 2(5) of the Act (Bd. Exh. 2, ¶¶ 3-5); and

4. Moore is not failing to conform to an order or certification issued by the Board determining the bargaining representative for the employees performing the work in dispute (Bd. Exh. 2, ¶ 7).

B. Moore's Business and Operations

Moore has been engaged in the commercial landscape construction business in the Greater Chicago metropolitan area since 1948. (Tr. 19-21.) Landscape construction encompasses all types of landscape work performed on commercial sites, including, but not limited to, installation of drainage systems and filter fabrics; spreading and grading of topsoil and other growth media; planting; watering, inspection and maintenance of plants; seeding and sodding; installation of retaining walls and pavers; installation of site furnishing such as benches, bike racks, trellises and bollards; and all related tasks. (Tr. 19-21, 82-87; *see* Exh. 2, p. 2 and Er. Exh. 5, p.7.) Moore performs an average of fifteen to twenty landscape construction projects per year in connection with commercial developments such as condominiums, multi-use buildings,

hospitals, parks and zoos. (Tr. 19-22.) The dollar amount of Moore's projects ranges from $10,000 to a couple of million dollars. (Tr. 21-22.) At the time of the 10(k) hearing, Moore employed approximately one hundred ninety employees. (Tr. 22.)

C. Moore's ILCBA Membership And Collective Bargaining Relationships

Moore is one of fifteen landscape construction companies which are members of the ILCBA. (Tr. 22-23, 25-26; Er. Exh. 1.) Moore has been a member of the ILCBA for over twenty years. (Tr. 23.) Moore's President, Eric Moore, has served as President of the ILCBA since 2003, and has served on the ILCBA's negotiating committee since the mid-1980s. (Tr. 17-18, 23-25.) The ILCBA negotiates and administers collective bargaining agreements with the unions representing the member companies' bargaining unit employees. (Tr. 23-26.) All of the ILCBA members, including Moore, are bound to the ILCBA's collective bargaining agreements by virtue of their membership in the ILCBA. (Tr. 24-26, 31-32.)

The ILCBA traditionally has negotiated two collective bargaining agreements covering landscape construction employees. One agreement is between the ILCBA and Local 150 and Local 703, as the joint collective bargaining representatives of a multi-employer unit comprised of employees in the following classifications: plantsmen, lead plantsmen, equipment mechanics, shop helpers, truck drivers, landscape helpers, water truck operators and installers. This agreement sometimes is referred to as the "Plantsmen Agreement." (Tr. 22, 26-27; Er. Exhs. 2 and 4, p. 1.) The ILCBA has negotiated successive Plantsmen Agreements with Local 150 and Local 703 since mid-2004, when the Board certified them as the joint representatives of the above-described employees following a Board-conducted secret ballot election. (Tr. 28-30; Er. Exhs. 2-5.) [2] Over one hundred landscape construction companies, including the ILCBA

[2] During the period from the 1990s to the Board's certification of Local 150 and Local 703 in 2004, Local 707 of the National Production Employees Union represented the ILCBA member companies'

members, are bound by the Plantsmen Agreement. (Tr. 34-35, 269-272; Local 150/703 Exh. 1.) Moore has approximately twenty five (25) employees covered by the Plantsmen Agreement. (Tr. 39.)

The other agreement covering the ILCBA member companies' landscape construction employees is between the ILCBA and Local 150. It applies to employees working as landscape equipment operators and sometimes is referred to as the "Operators Agreement." (Tr. 35-36; Er. Exh. 5, p. 2.) The ILCBA has negotiated successive Operators Agreements with Local 150 since at least the late 1960s. (Tr. 38-39; *see* Tr. 269.) Approximately three hundred companies, including the ILCBA members, are bound by the Operators Agreement. (Tr. 39, 272-275; Local 150/703 Exh. 2.) Moore has approximately six (6) employees covered by the Operators Agreement. (Tr. 40.)

The ILCBA never has had any collective bargaining relationship or agreement with the Roofers or the Laborers. Moore similarly never has had any such relationship or agreement with the Roofers or the Laborers. (Tr. 40-41, 479-480.)

D. Moore's Subcontract For The Roosevelt Collection Project

1. Overview of the Project and Moore's Work

The Roosevelt Collection is a new, multi-use development consisting of condominiums (which have been converted to apartments), a theater, retail space, restaurants and parking facilities. (Tr. 42-43,162-170; Er. Exh. 20.) The general contractor for the Roosevelt Collection project is Walsh Construction Company ("Walsh"). (Tr. 43.) On April 7, 2009, Moore signed a Subcontract Agreement to perform all of the landscaping work at the Roosevelt Collection site as

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employees in what basically were the same classifications as those covered by the Plantsmen Agreement. For many years before that, including throughout the 1980s, these employees were represented by Local 703, which has been representing landscape employees since at least 1965. The ILCBA was a party to successive collective bargaining agreements with Local 703 and Local 707, respectively, covering these employees. (Tr. 32-34, 297.)

described in attached Exhibit A, entitled "Scope, Clarifications, Alternates and Unit Prices." (Tr. 43-44, 46; Er. Exh. 6; *see* Tr.125-126.) The value of the Subcontract Agreement to Moore is in excess of $1.5 million. (Tr. 46.)

Moore's landscaping work under the Subcontract Agreement includes all of the following:

1. Furnishing and installing a Green Grid roof system (including the Green Grid Modules and plants) at the roof of the restaurants inside the plaza, the roof of the theater complex, and the roofs of the east and west loft buildings (Tr. 46-47; Er. Exh. 6, Exhibit B, p. 3, items 1-4);

2. furnishing and installing a separate green roof system (referred to as a "built-up" system) at the loft level L3 balconies for the east and west loft buildings (Tr. 47-48, 151; Er. Exh. 6, Exhibit B, p. 2, item 36);

3. providing labor and materials for all new trees at the plaza and loft levels and all plantings as listed on the plant lists and drawings, including annuals for the plaza level planters and all plantings at the Grand Stair (Tr. 48-49; Er. Exh. 6, Exhibit B, p. 1, items 3-4, and p. 2, items 24-25, 28);

4. providing soil and mulch for all plants and trees on the project (Er. Exh. 6, Exhibit B, p. 2, item 26);

5. providing maintenance of all plant materials during the construction of the landscaping up until acceptance of each area (Tr. 50; Er. Exh. 6, Exhibit B, p. 2, item 30);

6. furnishing and installing StoneWear planters at the plaza level (Tr. 49; Er. Exh. 6, Exhibit B, p. 2, item 20);

7. furnishing and installing Wasau Tile Bollards at the plaza level (Tr. 51; Er. Exh. 6, Exhibit B, p. 2, item 21);

8. furnishing and installing GrassCrete Pavers at the street level along the north end of the site (Tr. 51; Er. Exh. 6, Exhibit B, p. 2, item 22);

9. providing precast modular block at the loft level (Tr. 49; Er. Exh. 6, Exhibit B, p. 2, item 27);

10. furnishing and installing metal screen trellises at the L3 Loft balconies (Tr. 50-51; Er. Exh. 6, Exhibit B, p. 2, item 23); and

11. furnishing and installing various site furnishings, including benches, trash receptacles and bike racks at the plaza level (Tr. 50; Er. Exh. 6, Exhibit B, p. 1, items 17-19). [3]

Under the Subcontract Agreement, Moore is responsible for repairing and/or replacing any scope of work items damaged by Moore's negligence. (Er. Exh. 6, Exhibit B, p. 1, item 6.) In addition, Moore must provide a two year warranty for all plant materials after issuance of substantial completion and a one year replacement warranty on all replacements made during the warranty period. (Tr. 138; Er. Exh. 6, Exhibit B, p. 2, item 29, 34.)

2. The Green Grid System

The Green Grid system at the Roosevelt Collection site was manufactured by Westin Solutions. (Tr. 75.) It consists of two-foot by four-foot plastic trays, each four inches in depth, containing plant material that was planted off-site. The pre-planted trays are installed on the rooftop over a protective slip sheet in a grid pattern to form an environmentally-friendly "green roof." (Tr. 71-72, 136, 178-180, 343.) The Green Grid system covers approximately 58,000 square feet of rooftop space at the Roosevelt Collection site. (Tr. 177.)

Prior to installation of the Green Grid system, the roof is inspected and tested by a roofing contractor to ensure that the roof is "watertight." (Tr. 70; *see* Tr. 430-431.) Installation of the Green Grid system includes the following steps:

1. The roof is set up to receive the trays and related planting materials. This includes marking-off a safety zone around the perimeter of the roof in accordance with OSHA requirements and laying several sheets of protective filter fabric and plywood on which to place pallets containing the trays and a related conveyor system to move materials on the rooftop. (Tr. 178-179, Er. Exh. 16, Moore Landscapes Tab, Roosevelt Collection photographs 9-11, 15.)

[3] *See also*, landscape plans for the Roosevelt Collection project (Er. Exh. 20) and related testimony of Moore's Project Manager, Kevin Coe (Tr. 162-170).

2. Pallets containing the trays are hoisted by crane to rooftop staging areas using a method that is designed to protect the roof. Specifically, the crane cable is left taut so that ninety percent of the weight of the pallets is borne by the cable. Employees then unload the trays onto wagons with oversized rubber wheels, taking care to ensure that the wagons are not overloaded. The staging areas and rooftop are constantly swept or blown to maintain a clean surface on which to transport and place the trays. (Tr. 185-186, 175-176, 179-180, 77; Er. Exh. 16, Roosevelt Collection photographs 9, 11-12, 14.)

3. A protective slip sheet is laid on top of the areas of the roof where the trays will be installed. The slip sheet is an off-green fabric that comes in large rolls. It is rolled out on the roof and cut to the appropriate size. It is not attached to the roof in any way. (Tr. 71, 179, 186-187; Er. Exh. 16, Roosevelt Collection photographs 13-14.)

4. The trays are manually placed on top of the slip sheet in a grid pattern, using appropriate safety precautions. (Tr. 70-72, 179-181, 184-185; Er. Exh. 16, Roosevelt Collection photographs 13-14, 16-17.)

5. From the time the trays arrive at the site, throughout the installation process, and up to the date of substantial completion, the trays must be inspected for insects, fungus and diseases, and maintained through appropriate watering and application of necessary insecticides and fungicides by certified applicators. The installation process itself is expected to span a period of three to four weeks on the Roosevelt Collection project. Substantial completion is negotiated between the landscape subcontractor and the general contractor and is expected to be "a couple of months" on the Roosevelt Collection project. (Tr. 71-74, 78, 147, 181, 427-428; Er. Exh. 16, Roosevelt Collection photograph 18; Tr. 50; Er. Exh. 6, Exhibit B, p. 2, item 30.) [4]

6. Plants that have been damaged or displaced during the transportation or installation process must be repaired or re-planted on-site. Plants that

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[4] Lee Keenan, the Executive Vice President of Countryside Industries, an established landscape construction contractor with substantial experience with all types of green roofs, testified that maintenance is "one of the most vital components" of the overall rooftop construction installation process. He noted that:

> "[E]ven in a green grid tray system that is planted at another location and brought to the site, it's typically planted about two days in advance of being shipped to the site. So it's not as if these plants are fully established and you're simply setting a tray system out that's been grown in for six months. … And that first three to four … weeks of getting those plants established in that tray is one of the more vital parts of it. If you can't do it at that point, you're playing catch up the rest of the time. You may not see it in these tray systems right away …, but you will see the results if it's not maintained properly in the those first few weeks." (Tr. 225-228; Tr. 215-222.)

have died must be replaced on-site. (Tr. 72-73, 147, 187-188; Er. Exh. 6, Exhibit B, p. 1, item 6.)

3. The Built-Up System

The built-up system at the Roosevelt Collection site was manufactured by American Hydrotech, Inc. (Tr. 75-76; Er. Exh. 15.) It consists of multiple layers or components that are installed on top of each other to form a rooftop garden. (Tr. 74-76; Er. Exh. 15, p. 8.) The layers of a Hydrotech built-up system typically include: (1) the roof deck, (2) the roofing membrane, (3) a root barrier, (4) optional insulation, (5) an optional moisture mat, (6) a drainage/retention/ aeration element (referred to as a "drainage mat"), (7) a system filter (referred to as "filter fabric"), (8) growing media, and (9) plants. (Tr. 75-76, 154; Er. Exh. 15, p. 8.)

The roof must pass inspection and Moore must receive clearance from the general contractor before installing the built-up system at the Roosevelt Collection site. (Tr. 70, 77, 430-431.) Moore's work with respect to the built-up system includes the following:

1. The roof is set up to receive the necessary materials, which are hoisted by crane to rooftop staging areas using the same procedures and safety precautions applicable to the installation of the Green Grid system. (Tr. Tr. 77, 173, 175-176, 178-180, 185-186; Er. Exh. 16, Roosevelt Collection photographs 2-3, 8.)

2. A drainage retention layer (also called a "drainage mat" or "dimple board"), consisting of three-foot by five-foot sheets, is placed on top of the insulation layer. The drainage mat comes in rolls and is cut with a scissor or knife to the appropriate size. The drainage mat has three functions: aeration, water retention and drainage. It permits "air circulation for the roots which is better for the plants"; it "take[s] the water off the roof … at a proper speed … so that the plants can use it"; and it holds water "up there long enough for the plants to use it but not too long to drown out the plants." (Tr. 77, 85, 176, 206, 510; Er. Exh. 15, p. 8.)

3. Filter fabric immediately is placed on top of the drainage mat. It also comes in rolls and is cut to the appropriate size. The filter fabric allows water to penetrate through to the drainage layer, while blocking fine particles of the soil media that is installed above it. This prevents clogging of the draining system which could jeopardize the health of the plants. (Tr. 85-86, 205-206, 209, 510-511; Er. Exh. 15, p. 8.)

4. The soil media immediately is placed on top of the filter fabric, spread and graded to the proper depth. The soil media must have a well balanced structure and low weight; the type and thickness of the growing media ultimately determine the plant choice for the project. (Tr. 77, 128, 190-191, 209; Er. Exh. 15, p. 8.)

5. The plant material (*e.g.,* a succulent green vegetation called "seedum") is planted in the soil media. (Tr. 77, 80.)

6. The plant material must be inspected, watered and maintained during the course of the project and through the date of substantial completion. (Tr. 78, 71-74, 147, 181, 189-190, 428; Tr. 50; Er. Exh. 6, Exhibit B, p. 2, item 30.)

7. Plants that have been damaged must be repaired or replaced on-site. (Er. Exh. 6, Exhibit B, p. 1, item 6; *see* Tr. 72-73, 147, 187-188.)

4. The Retaining Walls/Planters

The retaining walls (also referred to as "raised planters") are constructed on-site from base blocks and retaining wall segments and are filled with soil and plant material, including trees, shrubs and plants. (Tr. Tr. 79-80, 173-175; Er. Exh. 16, Roosevelt Collection photographs 4, 6-8.) After the necessary materials are received and staged on the roof, the foundation for the retaining walls is made by cutting-out two inches of the previously-installed four-inch layer of insulation. The base stone or block is set inside the cut-out area and the raised walls are constructed by dry-laying retaining wall blocks on top of the base. (Tr. 79, 171-175; Er. Exh. 16, Roosevelt Collection photographs 1-7.)

The remaining steps of the retaining wall/planter installation process are very similar to those involved in installing the built-up system. A drainage layer is installed, followed by a filter fabric, the placement, spreading and grading of soil, and the planting of trees and shrubs. (Tr. 79-81, 175-177, 190-191; Er. Exh. 16, Roosevelt Collection photograph 8.) The drainage layer and filter fabric serve the same purposes as those used for the built-up system. (Tr. 79-81, 176-177.) The plant material must be inspected, watered and maintained during the course of the

project and through the date of substantial completion. (Tr. 81; Er. Exh. 6, Exhibit B, p. 2, item 30.) Plants that have been damaged must be repaired or replaced on-site. (Er. Exh. 6, Exhibit B, p. 1, item 6.)

E. <u>The Work In Dispute</u>

The disputed work being claimed by Local 150/Local 703 and the Roofers at the Roosevelt Collection site includes the following components of the Green Grid system, the built-up system, and the planters:

1. With respect to the Green Grid system, the disputed work involves the placement of the pre-planted trays. (Tr. 153, 277, 295, 300, 463.) The Roofers are not claiming any other work related to the Green Grid system. (Tr. 153.)

2. With respect to the built-up system, the disputed work involves the installation of all of the layers above the roof membrane (including the root barrier, insulation, moisture mat, drainage mat, and filter fabric), through the partial placement of the growing media. (Tr. 153-155, 277, 294-295, 300, 426.) "Partial placement" means placing small bags of growing media or the growing media itself "only to the extent to hold [down] what's on the roof." (Tr. 154-155.) The Roofers are not claiming the spreading or grading of the growing media; any planting work; any inspection, monitoring or maintenance of the plant material, including watering or application of pesticides or other treatments; or any other work related to the built-up system. (Tr. 426-427.) Local 150 and Local 703 are not claiming the installation of the roof membrane. (Tr. 294-295, 301.) However, they are claiming all of the other work relating to the installation and maintenance of the built-up system. (Tr. 276-277, 293-296, 300-301.)

3. With respect to the planters, the disputed work involves the installation of the root guard and insulation inside the planters. (Tr. 152, 293-294, 300.) Although the Roofers also are claiming the right to waterproof the planters, Local 150 and Local 703 are not claiming this work. (Tr. 294, 301.) The Roofers are not claiming any other work related to the planters, including installation of the soil. (Tr. 152.) However, Local 150 and Local 703 are claiming all such work. (Tr. 293-294, 300-301.)

At the hearing, the Roofers also made it clear that they are not claiming any of the other work being performed by Moore at the Roosevelt Collection site, including work related to the

pavers, installation of precast modular blocks, construction of the retaining walls, or installation of bollards, trellises and site furnishings. (Tr. 152-158, 425-427, 472-474.) Local 150 and Local 703, on the other hand, made it clear that they generally are claiming all such work for their members. (Tr. 276-277, 292-296, 299-303.)

F. Moore's Assignment Of The Roosevelt Collection Work

Moore assigned all of the landscape construction work covered by the Roosevelt Collection Subcontract Agreement – including the disputed work and the non-disputed work – to employees represented by Local 150 and/or Local 703. (Tr. 40-41, 49-51.) Local 150 and Local 703 are the Board-certified representatives of Moore's plantsmen, lead plantsmen, landscape helpers and installers. (Tr. 28-30; Er. Exh. 3.) Moore has had a longstanding collective bargaining relationship with Local 150 and Local 703. It has been bound by successive Plantsmen Agreements since mid-2004 and successive Operators Agreements since the late 1960s. (Tr. 35-36, 38-39; Er. Exh. 2, 4-5.)

Moore historically has performed all of its landscape construction work, including rooftop work similar to the disputed work in this case, with Local 150 and/or Local 703-represented employees covered by the Plantsmen Agreement, the Operators Agreement, and their respective predecessor agreements. (Tr. 40-41.) Moore specifically has used employees represented by Local 150 and/or Local 703 to install and maintain at least eighteen green grid and built-up rooftop systems (besides the Roosevelt Collection project) since 2002. These systems covered over 300,000 square feet of roofs and other elevated structures. (Tr. 93-99, 191-202; Er. Exh. 16, data sheets and photographs for Moore Landscapes' rooftop projects.) [5]

[5] All of the photographs of the Roosevelt Collection site contained in Employer Exhibit 16 were taken in 2009 when Moore's employees were performing the work shown therein. If any of the photographs have dates other than 2009, it relates solely to the fact that the camera was not adjusted to reflect the correct dates on which the photographs were taken. (Tr. 171-172.)

Moore typically performs this work with crews consisting of an equipment operator represented by Local 150 under the Operators Agreement, and one or two plantsmen and several landscape helpers represented jointly by Local 150 and Local 703 under the Plantsmen Agreement. (Tr. 38.) The equipment operator serves as the crew foreman, who is responsible for aiding, assisting and directing the crew members in the performance of their duties. The equipment operator also may function as a landscape plantsman on a limited basis when not needed to perform his responsibilities as an operator. (Tr. 38; Er. Exh. 5, pp.10-11.)

The disputed work at the Roosevelt Collection site is covered by Moore's collective bargaining agreements with Local 150 and Local 703. (Tr. 81-83, 87-91.) Article 7, Section 1 of the Operators Agreement generally defines the work covered by the Agreement as the operation of the equipment listed therein "on all commercial landscape construction projects." (Tr. 90-91; Er. Exh. 5, p. 7.) Article 7, Section 1(b) specifically states as follows:

> This Agreement specifically includes, but is not limited to, the performance of landscape work on walls, rooftops, other elevated structures and over-structure, including, but not limited to, the placement and/or installation of all layers of vegetative roof covers, tray systems and related components, drainage materials, root barriers, reservoir sheets, moisture retaining materials, separation fabrics, protection blankets, insulation, washed stone or gravel, drain inspection chambers, soil, planting media, growth media, mulch, trees, bushes, plants, edging materials, other landscape materials, retaining walls and site furniture.

(Tr. 90-91; Er. Exh. 5, p. 8.)

Article III of the Plantsmen Agreement generally defines the covered scope of work to include "all work historically performed in the landscape construction industry at or on construction sites,…" (Tr. 87-88; Er. Exh. 2, p. 2.) It also contains specific language covering various elements of the work involved in installing green grid and built-up rooftop systems, including, but not limited to:

> [T]he installation and watering of plant materials, … the utilizing of liquid and dry fertilizers and chemicals, … soil preparation, … construction of retaining walls and related gravel work, … irrigation work, … miscellaneous clean up functions associated with all such work, the placing of soil and other landscape materials, applying finish landscape materials on subgrade prepared by others, and the transporting of materials and equipment necessary to perform such work.

(Tr. 87-89; Er. Exh. 2, p. 2.) This work also is included within the job descriptions for lead plantsmen, plantsmen, installers and landscape helpers set forth in the Plantsmen Agreement. (Tr. 28; Er. Exh. 2, pp. 3-7.)

Nothing in the Plantsmen Agreement limits the covered scope of work to a specific location (*e.g.*, at ground-level or above-ground). (Tr. 89; Er. Exh. 2, pp. 2-3.) Furthermore, testimony presented at the 10(k) hearing establishes that the disputed work performed by Moore on the roofs at the Roosevelt Collection site – including installation of drainage mats, installation of filter fabric, placement of soil media, and installation of planters – is the same as work regularly performed by Moore's Local 150 and Local 703-represented employees on ground-level landscape construction projects. (Tr. 82-87.) These employees regularly deal with drainage issues in connection with turf areas, planting beds and tree pits on ground-level projects to "[make] sure the plant has enough water but not too much" (Tr. 82); regularly install filter fabric on ground-level projects to "keep the silt out of the drain tile" (Tr.83); regularly deal with soil specifications and mixtures and the placement, grading and preparation of the soil for the plant material on ground-level projects; and regularly install planters on ground-level projects. (Tr. 83-85,87.) [6]

[6] This also is true with respect to all of the related work to be performed by Moore in connection with the installation of the green grid system and built-up rooftop system at the Roosevelt Collection site, including grading the soil, installing the plant material, and maintaining and inspecting the plants. It is the same work that Moore's Local 150 and Local 703-represented employees regularly perform on ground-level landscape construction projects. (Tr. 84-87.)

Moore's President was involved in negotiating the Plantsmen and Operators Agreements. He testified that the parties to those Agreements never thought they needed to spell out the locations (*e.g.*, rooftops and other elevated structures) where covered work is to be performed "because the interpretation always has been historically that [the Agreements] cover all landscape work no matter where we're doing it." (Tr. 91.) However, because of the recent issues with other trades claiming rooftop work, the parties "thought it best, even though we didn't think it was necessary, to start spelling it out more clearly …" (Tr. 91.) That it why the parties included language specifically addressing landscape work on rooftops and other elevated structures in Article 7 of the recently-negotiated Operators Agreement. (Tr. 90-92; Er. Exh. 5, p. 8.) The parties plan to include similar clarifying language in the scope of work provision in the successor to the current Plantsmen Agreement, which expires on December 31, 2009. (Tr. 92.) There was no reason to do so when the parties negotiated the current Plantsmen Agreement in late 2006 because Moore and other landscape contractors regularly were performing rooftop landscape construction projects without any competing claims by the Roofers. (Tr. 92-93, 94-99; Er. Exhs. 16, 17.)

It is Moore's preference to perform the disputed work at the Roosevelt Collection site with employees represented by Local 150 and Local 703. (Tr. 52.) These employees possess the skills and experience needed to perform the work involved in installing the green grid system, the built-up system, and the raised planters. (Tr. 99-105, 189-191.) This includes skills and experience relating to landscape drainage, including proper installation methods (Tr. 100-101); installation of filter fabrics (Tr. 101); installation of planting media, including proper depth and grade depending on the plant material involved (Tr. 101-102, 191); planting techniques (Tr.

102); and plant maintenance, including watering techniques and how to spot and treat problems with plants (Tr. 102-103, 189-190).

The job descriptions in the Plantsmen Agreement show that lead plantsmen, plantsmen, installers and landscape helpers must be able to perform these and other duties related to Moore's work at the Roosevelt Collection site. (Tr. 28; Er. Exh. 2, pp. 3-7.) Moore's Local 150 and Local 703-represented employees regularly receive hands-on experience and on-the-job training in the skills needed to perform their duties, including those associated with the installation of green grid and built-up rooftop systems. (Tr. 105-106.) They also are provided with more formal, classroom-style training and opportunities to develop their skills and receive related promotions and pay increases. (Tr. 106-114.)

The Plantsmen Agreement contains specific provisions designed to incent and reward employees who develop and expand their relevant job skills. (Tr. 106-107; Er. Exh. 2, pp. 5-6, 8-9.) For example, after completing three full seasons as a landscape helper, an employee is eligible for promotion to the plantsmen trainee or installer trainee classifications if he or she demonstrates proficiencies in certain areas, including plant identification, horticulturally sound planting techniques, and plan reading and job layout. (Tr.107-108; Er. Exh. 2, pp. 5-6.) The Plantsmen Agreement also refers to a Certified Landscape Technician Program through the Illinois Landscape Contractors Association ("ILCA"), the state trade association for landscape contractors, and another entity called "PLANET." (Tr. 108-110; Er. Exh. 2, pp. 8-9.) The program consists of training sessions conducted by the employer or the ILCA and a series of related written and hands-on tests covering such topics as grading, drainage, planting, plant sensitivity, plant identification, plant maintenance, and safety. (Tr. 108-110.) The employer

pays for the cost of the certification program if the employee passes. Upon passing, the employee receives a promotion and $1.00 per hour pay raise. (Tr. 109; Er. Exh. 2, pp.8-9.)

In February 2009, Hydrotech, the manufacturer of the built-up system at the Roosevelt Collection site, provided in-house training for several of Moore's employees, including Rodrigo Valerio, a Local 150-represented equipment operator who is one of the working foremen on the Roosevelt Collection project. (Tr. 111-112.) The training covered all aspects of the Hydrotech system, including the components and proper installation methods. (Tr. 111, 203.)

In March 2009, Moore sent several employees to a one-day green roof safety training course conducted by the Construction Safety Council under the joint sponsorship of the ILCA and Local 150. The Moore attendees included Mr. Valerio and Phillip Drogos, another Local 150 equipment operator working as a foreman on the Roosevelt Collection project. (Tr. 112-116, 142; Er. Exhs. 18, 19.) The training covered all aspects of green roof work, including fall protection, cranes and rigging, and satisfied all of the related OSHA requirements. (Tr. 114; Er. Exh. 18.)

Pursuant to its Subcontract Agreement with Walsh, Moore is contractually committed to comply with OSHA and all related regulations in the performance of its work; to provide a job specific safety plan and attend a safety meeting with Walsh's safety personnel before commencing work; and to participate in a mandatory on-site safety and loss prevention program. (Er. Exh. 6, Section 7.12, p. 5, Exhibit B, item 6, and Insurance Bids and Requirements, p. 7.) Moore also is required to conduct pre-job conferences each morning with all of its crews working at the Roosevelt Collection site. The conferences address safety and logistical issues related to the job tasks to be performed each day, including "what has to be done, what could go

wrong, and how do you prevent it or help it from not going wrong." Every employee must sign a form, each day, verifying that he has participated in the pre-job conference. (Tr. 183-184.)

Moore's skilled and trained crews of Local 150 and Local 703-represented employees are able to competently perform all of Moore's work on the Roosevelt Collection project, including (1) the disputed work (*i.e.*, installation of the Green Grid system, the built-up system and the planters); (2) related non-disputed work (*e.g.*, receipt and staging of the materials on the jobsite, spreading and grading the growth media, installing the rooftop plants, maintaining the plants throughout the installation process, and repairing or replacing damaged plants); and (3) all of the other non-disputed work on the project (*e.g.*, installing ground-level plants and trees, bollards, precast modular block, metal trellises and site furnishings). (Tr. 116-117.) This creates substantial economies and operational efficiencies for Moore and the overall project. (Tr. 116-123, 203-205; *see* Tr. 324-326, 337-338.)

Because employees represented by Local 150 and Local 703 can perform all of Moore's work on the project, it does not have to involve other trades to complete the work. As Moore's President noted: "[I]t's one cohesive team, … able to do the whole process." (Tr. 119; *see* Tr. 117.) Therefore, Moore can avoid the "scheduling nightmare" associated with Moore's "doing part of the project," then calling "another trade … to come in and do their thing [while Moore is] held off," and "then hav[ing] to come back again." (Tr. 118-119.)

Moore is able to respond quickly and effectively to the schedule changes and disruptions that frequently occur on construction sites by moving its employees to another part of the project. As a result, Moore can keep the employees working and avoid idle time. (Tr. 117-119, 203-204.) This is true with respect to the equipment operators covered by the Operators Agreement, as well as the classifications of employees covered by the Plantsmen Agreement. (Tr. 118-119.)

The Operators Agreement specifically permits Moore to assign the equipment operators to perform the responsibilities of a leadman, crew leader or working foreman and to require them to function as landscape plantsmen when they are not needed to perform their equipment operator's responsibilities. (Er. Exh. 5, Article 7, Section 6, pp. 10-11.) As Mr. Moore explained:

> [U]nder our contract Local 150 understands that we're not out there excavating like an excavating company with the guys on a machine eight hours a day. It just doesn't happen these days, typically these projects are not that big. So, we need that operator to be doing .. multi-tasking more or less. So, we're allowed to use him to help out on other things. So, if there is a half a day of work on the ground with the skid steer, … loading things up to the roof and that's all that's needed that day, he can go up to the roof and help out. He can go to the plaza and plant or whatever we're doing, instead of moving him to another project or shutting him down that day which doesn't help him at all either.

(Tr. 118.)

If Moore was required to subcontract some or all of the disputed work to the Roofers, it would substantially increase Moore's costs and reduce its profits. The wage and benefit package for Roofers is about double the cost of that provided for in the Plantsmen Agreement. (Tr. 120-121.) The Roofers also have higher insurance costs. (Tr. 121.) Moore would lose the benefit of the overhead recovery associated with using its own employees to perform the work. (Tr. 121.) In addition, Moore likely would have to pay a profit mark-up to the roofing contractor. (Tr. 121-122.) All of this would adversely affect Moore's ability to effectively compete for work against contractors with lower cost structures. (Tr. 122.)

Finally, if Moore was unable to perform the disputed work at the Roosevelt Collection site with its Local 150 and Local 703-represented employees, approximately five or six of such employees would be laid off. (Tr. 122.) Given the length of the Roosevelt Collection project and Moore's overall workload, the layoffs likely would be for the rest of the 2009 landscape

season. The affected employees would be "looking at maybe coming back to work … next spring." (Tr. 123.)

G. Area and Industry Practice Regarding Assignment of Rooftop Landscape Work

Eric Moore presented extensive testimonial and documentary evidence regarding the area and industry practice with respect to the assignment of rooftop landscape construction work, including the installation of green grid and built-up systems, by landscape construction companies. Mr. Moore has served as Moore's President for the past four years. (Tr. 17-18.) He has worked for Moore in various supervisory, managerial and executive positions, since 1981. (Tr. 17-19.) Mr. Moore has served as the President of ILCBA and has been a member of the ILCBA's negotiating committee since the mid-1980s. (Tr. 23-25.) He also is a past President of the ILCA and served on its Board of Directors for approximately eight years. (Tr. 109-110.)

Mr. Moore testified that unionized landscape construction companies across the State of Illinois, including ILCBA and non-ILCBA members, historically have performed green rooftop projects using employees represented by Local 150 and Local 703. (Tr. 116; Tr. 95-99; Er. Exhs. 16-17.) Despite his many years of experience in the industry, Mr. Moore has no knowledge of any landscape construction company in the Chicago area which has a collective bargaining agreement with the Roofers. (Tr. 42.) In addition, although Moore and other landscape construction companies have been performing rooftop projects for many years, he was not aware of the Roofers claiming any part of that work until the summer of 2008. (Tr. 92-93.)

Since the fall of 2008, Mr. Moore has been involved in collecting information regarding green roof projects in the Chicago area performed by landscape contractors with employees represented by Local 150 and Local 703. (Tr. 95-96.) Fourteen landscape contractors responded to Mr. Moore's request by providing data sheets and photographs (where available) of green roof

projects performed by their respective companies. Mr. Moore compiled the information and inserted it in a three-ring binder with a separate tab for each responding company. (Tr. 95-99; Er. Exh. 16.) The fourteen responding companies, alone, have performed a total of one hundred nineteen rooftop projects (including green grid and built-up systems), covering nearly one million square feet of planted area, with employees covered by their collective bargaining agreements with Local 150 and/or Local 703. (Tr. 97-99; Er. Exh. 17.) [7]

H. The Roosevelt Collection Jurisdictional Dispute

1. The Roofers' Competing Claim for the Work and Related Proceedings Before the Joint Conference Board

Moore started its work on the Roosevelt Collection project on or about April 6, 2009. (Tr. 52, 161.) On April 8, 2009, the Roofers sent a letter to the Chicago & Cook County Building and Construction Trades Council (the "Construction Trades Council") stating that the Roofers had met with Local 150's Business Representative to "try to resolve the issue of the 'green roofing'" at the Roosevelt Collection site; that no resolution was accomplished; that the "Operators and Teamsters [were] performing the green roofing work"; and that "in order to protect the work of Roofers Local #11," it was requesting a step two meeting with the Construction Trades Council and the Joint Conference Board ("JCB") under the JCB's Standard Agreement for the resolution of jurisdictional disputes (the "Standard Agreement"). (Tr. 53-54; Er. Exh. 7; Local 150/703 Exh. 3.) [8]

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[7] Mr. Moore's testimony was supported by that of representatives of several of the responding companies: Lee Keenan, the Executive Vice President of Countryside Industries (Tr. 216-229); Karen Morby, currently an Estimator/Project Manager for Robert Ebl, Inc. and previously a Senior Project Manager for DR Church Landscape (Tr. 243-263); John Joestgen, currently a Sales Representative for Hayden Landscape Contractors and previously an owner of Hawthorn Landscape (Tr. 308-319); and Dan Nitzche, the President and former General Manager of Walsh Landscape, Incorporated (Tr. 328-335).

[8] The April 8, 2009 letter references the Roofers' request to "reopen" the step two jurisdictional meeting. According to Roofers' Business Agent, Art Lucas, he originally initiated a jurisdictional

By letter dated April 17, 2008, the Roofers requested a step 3 jurisdictional meeting with the Construction Trades Council and the JCB. (Tr. 54-55; Er. Exh. 8.) In response, the JCB informed Local 150, Moore and the Roofers that it had scheduled an arbitration hearing under the Standard Agreement for April 23, 2009, to resolve the "jurisdictional dispute between the Operating Engineers and Local 150 over green roofing at the Roosevelt Collection Project …" (Tr. 55-56; Er. Exh. 9.) The arbitration hearing was not conducted on April 23rd. According to Mr. Lucas, he "thought [the parties] had reached an agreement," so he "pulled [the grievance] off the table" on April 21, 2009. (Tr. 444-447; Tr. 56-57, 445-447; Er. Exhs. 21-22.) [9]

Moore had agreed to use an apprentice and journeyman roofer, through Dessent Roofing, to assist with the completion of specific and limited work relating to the built-up green roof system, specifically, the installation of the drainage layer and the placement of rooftop planting media on the third floor terrace. (Tr. 522-523; Er. Exh. 23.) According to Moore's President, he was "under the impression that there were some talks perhaps going on between 150, 703 and the roofers as far as some type of way we could … work in harmony on these projects." (Tr. 523-524.) Moore entered into this temporary arrangement "to enable the work at the site to proceed without interruption while the affected Unions and contractor associations continue[d] to discuss

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grievance regarding Moore's assignment of the green roof work at the Roosevelt Collection site to employees represented by Local 150 and Local 703 in June 2008. (Tr. 379-381; Local 150/Local 703 Exh. 3.) Step 1 and step 2 grievance meetings were held between the Roofers and Local 150 during the first week of June 2008. (Tr. 381-384, 430-440.) No representatives of Moore or Local 703 participated in these meetings. (Tr. 439-440.) The grievance did not proceed to arbitration. (Tr. 440.) According to Mr. Lucas, he believed that the grievance was resolved because Local 150 allegedly stated that it was not claiming the green roof work at the Roosevelt Collection site. (Tr. 385.) He then "reopened" the dispute in April 2009 when he learned that members of Local 150 and Local 703 were performing that work. (Tr. 440; Er. Exh. 7.)

[9] Mr. Lucas admitted that he did not work on the alleged agreement; that he was not a party to the discussions that resulted in the alleged agreement; and that he did not know the exact terms of the alleged agreement. (Tr. 444-445.)

a possible resolution to the larger jurisdictional dispute." (Er. Exh. 23; Tr. 523-525.) In a confirmatory e-mail dated May 6, 2009, Moore expressly stated that "in reaching this agreement, [it was] not admitting that the Roofers Union or any of its members [had] a valid jurisdictional claim to the subject work or any other landscape work to be done at the Roosevelt Collection site" and that it was "not waiving its right to claim all such work for its employees who [were] represented by Local 150 and Local 703." (Er. Exh. 23; Tr. 525.)

The work that was the subject of the above-referenced agreement lasted about two days. (Tr. 523.) Thereafter, Moore continued its work at the Roosevelt Collection site – specifically, the retaining walls on the east terrace – exclusively with its Local 150 and Local 703 employees. (Tr. 523, 525.) As a result, the Roofers reinstated their jurisdictional grievance regarding the green roof work in late May 2009. (Tr. 442.) After unsuccessful step 1 and step 2 meetings between Local 150 and the Roofers, the JCB scheduled the grievance for an arbitration hearing on June 5, 2009. (Tr. 57-58, 442-443; Er. Exh. 10.) On June 6, 2009, Arbitrator Steven Biereg issued a decision awarding the Roofers the installation of the following components of the green roofing system at the Roosevelt Collection site: membrane, moisture guard, growing media, flat pavers, drainage mat, and insulation. [10]

[10] By letter dated June 4, 2009, the Laborers informed the JCB of their belief that a portion of the work in question belonged to the Laborers and requested the right to participate in the arbitration as an "Interested Party." (Tr. 58-60.) The Laborers participated in the arbitration hearing, along with the Roofers and Local 150. (Roofers Exh. 2.) Arbitrator Biereg awarded the Laborers the following components of the work at the Roosevelt Collection site: retaining walls and planting of plants. (Roofers Exh. 2; Tr. 288-291.) However, as previously noted, the Laborers submitted a letter to Region 13 disclaiming interest in this work the day before the 10(k) hearing. (Bd. Exh. 3.)

It is Moore's position that the Standard Agreement is not binding on it or Local 703 and that the Hearing Officer improperly admitted Arbitrator Biereg's arbitration decision (Roofers Exh. 2) into evidence at the 10(k) hearing over the valid hearsay and relevance objections of Moore, Local 150 and Local 703. (Tr. 288-291.) For the reasons asserted at the hearing (as discussed further above and in Section III.B.9. below), the Board should disregard the arbitration decision when deciding whether this jurisdictional dispute is properly before it and determining the merits of the dispute.

Moore did not attend the arbitration hearing or participate in any of the grievance proceedings conducted in connection with the Roosevelt Collection project. (Tr. 61, 526.) Moore has not stipulated to, or otherwise agreed to be bound by, the JCB's Standard Agreement or the related decision issued by Arbitrator Biereg. (Tr. 62-63.) Local 703 similarly did not attend the arbitration hearing or any of the grievance proceedings relative to the Roosevelt Collection project. (Tr. 62, 299, 303-304.) Local 703 was not listed as an addressee or recipient on any of the JCB's related letters or notices and was not sent a copy of Arbitrator Biereg's decision. (*See* Er. Exhs. 7-11; Roofers Exh. 2; Tr. 303-304.) It is Local 703's position that it was not subject to Arbitrator Biereg's jurisdiction and, accordingly, it has no intention of complying with his decision. (Tr. 299, 303-304.)

The Standard Agreement pursuant to which Arbitrator Biereg conducted the arbitration hearing is between The Construction Employers' Association (the "Association") and the Construction Trades Council. (Local 150/703 Exh. 3.) The preamble to the Standard Agreement states that that it shall constitute a part of all agreements between Employers which are members of the Association and Labor Unions which are members of the Construction Trades Council. (Local 150/703 Exh. 3, p. 1.) Moore and the ILCBA are not, and never have been, members of the Association. (Tr. 522.) Local 703 is not, and never has been, a member of the Construction Trades Council. (Tr. 298.) Furthermore, the ILCBA's collective bargaining agreements with Local 150 and Local 703 do not incorporate the Standard Agreement or any other procedure for the resolution of jurisdictional disputes. (Tr. 61-62, 298; *see* Er. Exhs. 2, 4, 5.)

2. Subsequent Events and Local 150/703's Threat to Picket

On June 15, 2009, approximately one week after Arbitrator Biereg issued his decision, Walsh provided Moore with seventy-two hours notice that it would be forced to exercise its right

to complete the work contracted to Moore at the Roosevelt Collection site (including, specifically, the Green Grid at the theater and the drainage mat, filter fabric and soils at the plaza planters) if Moore failed to comply with the terms of the Subcontracting Agreement requiring it to perform the work with "the appropriate union labor." (Tr. 65-66; Er. Exh. 13; *see* Er. Exh. 6, Exhibit A, Section 6.7.) Moore replied to Walsh by letter dated June 18, 2009, copies of which were sent to Local 150 and Local 703. (Tr. 67-68; Er. Exh. 14.) Moore expressed its position that it was not bound by Arbitrator Biereg's decision; noted that Moore was carefully exploring ways of complying with Walsh's directive regarding the completion of its work at the Roosevelt Collection site; and requested Walsh's assistance by maintaining flexibility, an open line of communication and a neutral position as the ongoing jurisdictional dispute played itself out. (Er. Exh. 14.)

On June 23, 2009, Local 150 and Local 703 sent a letter to Moore:

1. Reminding Moore that it had "historically and traditionally assigned all of its roof-top construction work to members of Local 150 and Local 703 under the terms of the collective bargaining agreement that is jointly administered by Local 150 and Local 703";

2. noting that the Roofers and the Laborers recently had "claimed jurisdiction over all of the roof-top landscape construction work at the Roosevelt Collection project";

3. advising Moore that "Local 150 and Local 703, as the joint bargaining representatives of the Moore employees, also claim[ed] this disputed work at the Roosevelt Collection project"; and

4. informing Moore that "if [it] reassign[ed] *any* of the roof-top construction work currently being performed by members of Local 150 and/or Local 703 at the Roosevelt Collection project to members of the Roofers or the Laborers, Local 150 and Local 703 will engage in any and all means, including picketing, to enforce and preserve their historical and traditional work assignment."

(Tr. 63-64, 278, 301-302; Er. Exh. 12.)

Moore took the threat to picket seriously. (Tr. 65, 130.) Upon receipt of the June 23rd letter containing the threat, Moore contacted its labor attorney to discuss the letter and Moore's options. (Tr. 64.) It also contacted Walsh to let it know what was going on, keep it "up to speed," and see if it had any suggestions. (Tr. 65.) After considering its options, Moore decided to file for a 10(k) hearing so that the Board could resolve the jurisdictional dispute. (Tr. 67.) It filed the predicate unfair labor practice charges against Local 150 and Local 703 on June 25, 2009. (Bd. Exhs. 1(a), 1(d).) Moore thereafter continued to perform the disputed work at the Roosevelt Collection site with employees represented by Local 150 and Local 703 under the Plantsmen Agreement and the Operators Agreement. (Tr. 68-69.) Moore is scheduled to complete the disputed work in October 2009. (Tr. 69.)

III. ARGUMENT

A. This Dispute Is Properly Before The Board For Determination Under Section 10(k) Of The Act

1. Legal Standard Governing Applicability of Section 10(k)

Before the Board may proceed with a determination of a jurisdictional dispute pursuant to Section 10(k) of the Act, it must be satisfied that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a method for the voluntary adjustment of the dispute. The Board requires that there be reasonable cause to believe (1) that a labor organization has used proscribed means to enforce its claim to the work in dispute, and (2) that there are competing claims to the disputed work between rival groups of employees. *Local 624, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (T. Equipment Corporation)*, 322 NLRB 428, 429 (1996); *Lancaster Typographical Union No. 70 (C.J.S. Lancaster)*, 325 NLRB 449, 450 (1998); *Laborers International Union of North America, AFL-CIO (Eshbach Brothers, LP)*, 344 NLRB 201, 202 (2005).

The Board consistently has held that in a 10(k) proceeding it is not charged with finding that a violation of Section 8(b)(4)(D) did in fact occur, but only that reasonable cause exists for finding such a violation. *Laborers Local 210 (Concrete Cutting & Breaking, Inc.)*, 328 NLRB No. 182 (1999); *Construction and General Laborers District Council of Chicago and Vicinity, Local 1006 (Central Blacktop Co., Inc.)*, 292 NLRB 57, 59 (1988). Thus, conflicts in testimony need not be resolved in order for the Board to proceed to a determination of the merits of the dispute. *Construction and General Laborers District Council of Chicago and Vicinity, Local 1006, supra*, at 59; *Local 150, IUOE (Martin Cement Co.)*, 284 NLRB 858, 860 n. 3 (1987).

2. There Is Reasonable Cause to Believe That Local 150 and Local 703 Violated Section 8(b)(4)(D) of the Act

The evidence presented at the hearing clearly establishes the existence of reasonable cause to believe that Section 8(b)(4)(D) has been violated. There are competing claims for the disputed work by roofing employees represented by the Roofers and by landscape construction employees represented by Local 150 and Local 703. The Roofers' claim for the disputed work is established by the testimony of Business Agent, Art Lucas, and the Roofers' efforts to secure an award of the disputed work through grievance and arbitration proceedings under the JCB's Standard Agreement. The competing claims for the disputed work are established by the testimony of Local 150's Vice President, James McNally, and Local 703's Secretary-Treasurer, Thomas Stiede, along with their joint letter to Moore dated June 23, 2009. (Er. Exh. 12.)

The Roofers may assert that Local 150 disclaimed the disputed work in June 2008 or in connection with the JCB arbitration hearing that was conducted on June 5, 2009. (*See* Tr. 385, 387; Roofers Exh. 2.) However, it is undisputed that employees represented by Local 150 and Local 703 consistently performed the disputed work at the Roosevelt Collection site. They started the disputed work in April 2009; they continued to perform that work both before and

after the June 5th arbitration hearing; and they were performing that work as of the date of the 10(k) hearing. (Tr. 68-69.) Local 150's written claim for the disputed work, as set forth in the June 23rd letter, post-dates any alleged disclaimer of the work by Local 150. Furthermore, Local 703 consistently has claimed the right to perform the disputed work for its members and there is absolutely no evidence that Local 703 ever disclaimed interest in that work. (*See* Tr. 440.) Therefore, there can be no doubt that Moore was faced with competing claims for the disputed work when it filed the underlying unfair labor practice charges on June 25, 2009.

Local 150 and Local 703 used proscribed means to enforce their claims to the disputed work. In the June 23rd letter, they threatened to engage in jurisdictional picketing at the Roosevelt Collection site if Moore reassigned any of the disputed work to members of the Roofers or the Laborers. (Er. Exh. 12.) The threat was a real one; it was perceived as such by Moore; and it placed Moore in the middle of the unions' jurisdictional dispute. (Tr. 63-64, 278, 301-302.) There is no evidence that the threat was a sham or product of collusion. To the contrary, the evidence establishes that the June 23rd letter was an arm's length communication, made at a point when Moore was considering reassigning the work to the Roofers because of the decision issued by Arbitrator Biereg on June 6th and the related pressure being applied by Walsh. (Tr. 65-68; Er. Exhs. 13-14.) *See International Association of Machinists and Aerospace Workers, Local 724, AFL-CIO (Holt Cargo Systems, Inc.)*, 309 NLRB 377, 379 n. 6 (1992).

Although Moore's President acknowledged that Moore's collective bargaining agreements with Local 150 and Local 703 contain a no-strike clause, he noted that "contracts are broken." (Tr. 130.) Furthermore, it is well established that "the existence of a no-strike clause in a union's collective-bargaining agreement does not provide a basis for finding that a threat by that union is

a sham." *Lancaster Typographical Union No. 70, supra*, 325 NLRB at 451, citing *Teamsters Local 6 (Anheuser-Busch)*, 270 NLRB 219, 220 (1984).

3. There Is No Agreed-Upon Alternative Procedure for Resolving This Dispute That is Binding on all Parties

The undisputed evidence presented at the hearing clearly demonstrates that at least two of the parties to this dispute – Moore and Local 703 – are not bound by any voluntary method for the adjustment of jurisdictional disputes, including the grievance and arbitration procedures set forth in the JCB's Standard Agreement:

1. The Standard Agreement was entered into by and between the Construction Employer's Association ("Association") and the Chicago & Cook County Building and Construction Trades Council ("Council"), and purports to be a part of all agreements between employers which are members of the Association and unions which are members of the Council. Neither Moore nor the ILCBA is a member of the Association. Local 703 is not a member of the Council. (Tr. 522, 298; Local 150/703 Exh. 3.)

2. The ILCBA's collective bargaining agreements with Local 150 and Local 703 do not incorporate the Standard Agreement or any other procedure for the resolution of jurisdictional disputes. (Tr. 61-62, 298; *see* Er. Exhs. 2, 4, 5.)

3. Neither Moore nor Local 703 attended the JCB arbitration hearing on June 5th or participated in any of the grievance proceedings conducted in connection with the Roosevelt Collection project. (Tr. 61, 299, 303-304, 526; *see* Er. Exhs. 7-11 and Roofers Exh. 2.)

4. Neither Moore nor Local 703 has stipulated to, or otherwise agreed to be bound by, the Standard Agreement or the arbitration decision issued thereunder. (Tr. 62-63, 299, 303-304.)

The Roofers appear to be claiming that Moore and Local 703 are bound by the Standard Agreement because they participated in a pre-arbitration grievance meeting at the Roosevelt Collection site. However, it is undisputed that the only meeting attended by representatives of Moore and Local 703 occurred in early May 2009, at a time when there was no pending

jurisdictional grievance. The Roofers had withdrawn their previously-filed grievance on April 21, 2009, and did not reinstate the grievance until late May 2009. (Tr. 442, 444-447; Tr. 56-57; Er. Exhs. 21-22.) Moore's President testified that he attended the rooftop meeting in early May 2009, as a good faith gesture to attempt to discuss ways in which Local 150, Local 703, the Roofers, the roofing contractors, and the landscaping contractors could work in harmony on rooftop construction projects. He did not believe that his attendance at this meeting constituted participation in the JCB's grievance procedures. (Tr. 523-526.)

Furthermore, even assuming *arguendo* that a jurisdictional grievance had been pending in early May 2009, and that Moore and Local 703 had knowingly participated in the above-referenced meeting as part of the related grievance proceedings, that conduct would not bind Moore or Local 703 to the Standard Agreement. Article VII, Paragraph 10 of the Standard Agreement contains the following provision regarding the affect of participating in an arbitration hearing:

> Any interested party present at the hearing, whether making a presentation or not, by such presence shall be deemed to accept the jurisdiction of the arbitrator and to agree to be bound by its decision and further agrees to be bound by the Standard Agreement, for that case only if not otherwise bound.

(Local 150/703 Exh. 3, p. 8.) However, there is no similar provision regarding participation in the pre-arbitration steps of the JCB grievance process. And rightfully so, since such a provision would unnecessarily restrict and inhibit settlement discussions among the interested parties that could produce a prompt and effective resolution of the dispute.

Finally, although Local 703 and Local 150 are joint representatives of the employees covered by the Plantsmen Agreement, there is no basis for concluding that Local 150 serves as Local 703's agent for matters relating to the administration of the Agreement, let alone extra-contractual matters such as the resolution of jurisdictional disputes. There similarly is no basis

for concluding that Local 150's obligation to comply with the Standard Agreement, as a result of its membership in the Construction Trades Council, should be extended to Local 703 – a separate legal entity which is not a member of the Council, which has not agreed to be bound by the Standard Agreement or submitted to the JCB's jurisdiction, and whose collective bargaining agreements do not incorporate the terms of the Standard Agreement. Indeed, reaching such a conclusion would fly in the face of fundamental principles of contract law, agency law and due process.

B. Upon Consideration Of The Relevant Factors The Board Must Award The Disputed Work To Employees Represented By Local 150 And Local 703

1. Legal Standard Governing Resolution of Jurisdictional Disputes

Section 10(k) of the Act requires the Board to resolve jurisdictional disputes by making an affirmative award of the disputed work after consideration of various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting),* 364 U.S. 573, 586 (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 particular case." *Construction and General Laborers District Council of Chicago and Vicinity, Local 1006 (Central Blacktop Co., Inc.), supra*, 292 NLRB at 59; *Machinists Lodge 1743 (J.A. Jones Construction),* 135 NLRB 1402, 1410 (1962). The relevant factors include: (1) certifications and collective bargaining agreements, (2) employer preference, (3) employer past practice, (4) area and industry practice, (5) economy and efficiency of operations, (6) relative skills and training of employees, and (7) gain or loss of employment. *See International Association of Machinists and Aerospace Workers, Local 724, AFL-CIO (Holt Cargo Systems, Inc.),* 309 NLRB 377 (1992); *Lancaster Typographical Union No. 70, supra*, 325 NLRB at 449; *Local 624, United*

Brotherhood of Carpenters and Joiners of America, AFL-CIO (T. Equipment Corporation), 322 NLRB 428 (1996).

2. Certifications and Collective Bargaining Agreements

Local 150 and Local 703 are the Board-certified joint representatives of Moore's landscape construction labor force, including lead plantsmen, plantsmen, landscape helpers and installers. Moore has longstanding collective bargaining relationships with Local 150 and Local 703. It historically has been bound to the ILCBA's Plantsmen Agreement with Local 150 and Local 703, the ILCBA's Operators Agreement with Local 150, and their respective predecessor agreements. In contrast, the Roofers are not the certified bargaining representative of any of Moore's employees and neither Moore nor the ILCBA has any collective bargaining relationship or agreement with the Roofers.

The Operators Agreement expressly refers to the disputed rooftop work. (Tr. 90-91; Er. Exh. 5, p. 8.) The Plantsmen Agreement does not expressly reference rooftop work. However, its scope of work provision generally encompasses the disputed work and specifically covers various elements of the work involved in installing green grid systems, built-up systems and planters. (Tr. 87-89; Er. Exh. 2, p. 2-3.) This work also is included in the job descriptions for lead plantsmen, plantsmen, installers and landscape helpers set forth in the Plantsmen Agreement. (Tr. 28; Er. Exh. 2, pp. 3-7.) The evidence presented at the hearing establishes that the parties have interpreted the Plantsmen Agreement as covering the disputed work. Employees covered by the Plantsmen Agreement were assigned and have been performing the disputed work. Furthermore, Moore and other landscape construction contractors traditionally have performed all types of rooftop construction projects using employees covered by the Plantsmen Agreement. (Tr. 91-99; Er. Exhs. 16, 17.)

The Board has found that where an employer is signatory to a collective bargaining contract with only one of the unions claiming the disputed work and the employees employed under that contract were performing the disputed work, the "collective bargaining agreement factor" favored awarding the work to employees represented by the union with the contractual relationship, even though the contract did not expressly refer to the work in dispute. *Electrical Workers Local 134 (Pepper Construction Co.)*, 339 NLRB 123, 125 (2003); *Iron Workers Local 1 (Goebel Forming, Inc.)*, 340 NLRB 1158, 1161 (2003); *United Association, Local 447 (Rudolph & Sletten, Inc.)*, 350 NLRB 276, 279 (2007). In *Iron Workers Local 1*, for example, the Board concluded that the collective bargaining agreement factor favored awarding the disputed work to Carpenters-represented employees where the employer's contract with the Carpenters did not expressly refer to the work in dispute, but the parties to the contract, by their conduct, had shown their mutual intention to apply the contract to the work, and where the employer had no contract at all with the rival union. 340 NLRB at 1161. In so doing, the Board stated that "[i]f 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 will consider those facts in its decision." *Id.*

The Roofers may attempt to support their claim to the disputed work by directing the Board to the jurisdictional provisions of their Standard Working Agreement with the Chicago Roofing Contractors Association, Inc. (the "Roofers Agreement). (Roofers Exh. 4, Article II, pp. 2-5, 73-80). However, the above-cited Board decisions demonstrate that any such attempt would be fruitless because the assigning employer, Moore, is not bound by the Roofers Agreement. As such, the Roofers Agreement is irrelevant to the Board's assessment of the collective bargaining agreement factor and award of the disputed work.

Under the facts of the present case – including the Board's certification of Local 150 and Local 703, Moore's collective bargaining agreements with Local 150 and Local 703, the terms of those Agreements, the parties' conduct regarding the performance of rooftop work under those Agreements, and the absence of any contractual relationship or agreement with the Roofers – the certification and collective bargaining agreement factors favor an award of the disputed work to employees represented by Local 150 and Local703.

3. Employer Preference

Moore prefers to continue is current practice of assigning the disputed work to employees represented by Local 150 and Local 703. (Tr. 52.) As noted above, Moore has established collective bargaining relationships and agreements with Local 150 and Local 703. Moore's Local 150 and Local 703-represented employees possess the skills and experience needed to perform the disputed work. In addition, assigning the disputed work to these employees is most economical and creates operational efficiencies that benefit Moore, the employees, and the construction projects on which they work. Moore's preference and current work assignment favor an award of the disputed work to employees represented by Local 150 and Local 703. *Lancaster Typographical Union No. 70, supra*, 325 NLRB at 451; *International Association of Machinists and Aerospace Workers, Local 724, supra,* 309 NLRB at 380.

Moore admits that it temporarily assigned limited and discrete portions of the disputed work to an apprentice and journeyman roofer employed by a roofing contractor working on the Roosevelt Collection site. (Tr. 522-523, 131-133, 148.) However, it is undisputed that the assignments were of very short duration and were made in contravention of Moore's continuously expressed preference to use its Local 150 and Local 703-represented employees. The assignments were made in response to the Roofers' repeated claims for the work, in an effort

to avoid interruption of Moore's work on the Roosevelt Collection site and related damage to Moore's relationship with Walsh, while the unions attempted to resolve the ongoing jurisdictional dispute. (Tr. 522-525; Er. Exh. 23; *see* Er. Exh. 14.) Furthermore, Moore informed the Roofers, in writing, that by assigning work to roofing employees, it was not admitting that the Roofers or any of its members had a valid jurisdictional claim to any of the work to be done at the Roosevelt Collection site and that it was not waiving its right to claim all such work for its Local 150 and Local 703-represented employees. (Tr. 525; Er. Exh. 23.) Accordingly, these temporary assignments should have no bearing on the Board's assessment of any of the relevant 10(k) factors, including employer preference.

4. Employer Past Practice

The evidence establishes that Moore's assignment of the disputed work to employees represented by Local 150 and Local 703 was consistent with it past practice of assigning rooftop landscape construction work to such employees. It is undisputed that Moore had completed at least eighteen prior rooftop projects (including the installation of green grid systems, built-up systems and planters) exclusively with Local 150 and Local 703-represented employees. (Tr. 93-99, 191-202; Er. Exh. 16.) Accordingly, this factor also favors an award of the disputed work to employees represented by Local 150 and Local 703. *Bloomsburg Graphic Communications Union, Local No. 732-C (Haddon Craftsmen, Inc.)*, 308 NLRB 1190, 1192 (1992); *International Association of Machinists and Aerospace Workers, Local 724, AFL-CIO*, *supra*, 309 NLRB at 380.

5. Area and Industry Practice

Moore presented extensive evidence establishing that the area and industry practice is for landscape construction contractors to install green grid and built-up rooftop systems with

employees represented by Local 150 and Local 703. This evidence included data sheets, photographs and supporting testimony from Mr. Moore and four other experienced landscape construction contractors with details regarding one hundred nineteen projects, going back to 2002, on which such work was performed by Local 150 and Local 703-represented employees. The Roofers failed to produce sufficient, competent evidence to refute or counterbalance Moore's evidence.

Most of the evidence regarding area and industry practice presented through Roofers' Business Agent, Art Lucas, lacked foundation and was hearsay, vague, conclusory and irrelevant. (Tr. 390-414; Roofers Exhs. 5, 6.) Mr. Lucas generally testified to several rooftop projects allegedly completed by roofing contractors in 2007, 2008 and 2009. However, he failed to testify specifically that the related work was performed by employees represented by the Roofers. He also failed to provide sufficient details regarding the particular work involved in each of the projects. It is unclear, at best, whether the projects involved the performance of disputed work. Cross-examination revealed that several of the photographs introduced through Mr. Lucas did not, in fact, show disputed work. (*See* Tr. 429, 457-458.) These are fatal flaws in the Roofers' evidence.

The letters from roofing contractors that the Hearing Officer permitted the Roofers to introduce through Mr. Lucas suffer from similar defects. (Tr. 412-414; Roofers Exh. 6.) The letters do not describe the work performed on the listed projects and, therefore, fail to establish that it was disputed work. Relatedly, several of the letters refer only to "green roof" projects, without specifying the type of green roof involved. (*See* Roofers Exh. 6, pp. 2, 3, 5, 7, 8.) However, the Roofers themselves acknowledge that there are several different types of green roofs, and that only one type (*i.e.*, vegetative roofs) are at issue in this case. (Tr. 342-343, 427-

427.) Furthermore, several of the letters fail to state whether the work was performed by employees represented by the Roofers. (*See* Roofers Exh.6, pp. 1, 3, 5, 6, 7, 8.) Therefore, they do not constitute evidence of a practice of performing disputed work with Roofers-represented employees.

The greater, more detailed, and more specific evidence of area and industry practice presented by Moore's witnesses favors an award of the disputed work to employees represented by Local 150 and Local 703.

6. Economy and Efficiency of Operations

The evidence demonstrates that Moore's Local 150 and Local 150-represented employees possess the skills and experience required to perform all of the disputed and non-disputed work at the Roosevelt Collection site. This fact, combined with Moore's established crew structure and the flexibility afforded by the Plantsmen and Operators Agreements, creates substantial economies and efficiency of operations. Moore can avoid the delays and other inefficiencies associated with scheduling work to be performed on-site by multiple trades. It also can move employees to different parts of the project when necessary due to changing schedules and production requirements, which keeps the employees working and avoids idle time. (Tr. 99-105, 189-190; Tr. 116-123, 203-205; *see* Tr. 324-326, 337-338.) If Moore were required to relinquish the disputed work to the Roofers, these efficiencies would be lost and it would incur increased costs associated with higher wage, benefit and insurance costs, lost overhead recovery, and an added profit mark-up from a roofing contractor. (Tr.120-122.)

Employees represented by the Roofers can perform only discrete and limited portions of the work included in Moore's Subcontract Agreement. The Roofers do not perform – and do not claim in this proceeding – the vast majority of the work being performed by Moore at the

Roosevelt Collection site. They admittedly would have to subcontract all of the non-disputed work, including the work necessary to complete the installation of the green grid system, the built-up system and the planters, to a landscape contractor. This specifically includes installing soil in the planters, building the related retaining walls, spreading and grading the soil in the built-up system, installing the plants, and maintaining the plants. (Tr. 152, 426-427, 473-476.) In contrast, Moore's Local 150 and Local 703-represented employees comprise a cohesive unit that can perform all of the disputed work, the complementary work needed to complete the disputed work, and the other non-disputed work to be done at the site.

The economy and efficiency of operations factor favors an award of the disputed work to Moore's Local 150 and Local 703-represented employees. *See Laborers International Union of North America, AFL-CIO (Eshbach Brothers, LP)*, supra, 344 NLRB at 204 ("We find that, on balance, because the Laborers are performing other work on the project, aside from the disputed work, the factor of economy and efficiency of operations favors an award of the disputed work to those employees."); *International Association of Machinists and Aerospace Workers, Local 724, AFL-CIO, supra*, 309 NLRB at 380 ("The Employer observes that it can use its [Local 724] mechanics to perform the work in dispute as well as the related maintenance and repair work. The Local 1556-represented employees … cannot be cross-utilized in this way. We find that the factor of economy and efficiency of operations favors an award of the disputed work to employees represented by Local 724.").

7. Relative Skills and Training of Employees

The evidence establishes that Moore's Local 150 and Local 703-represented employees possess the skills necessary to perform all of the disputed and non-disputed landscape construction work at the Roosevelt Collection site as a result of regular on-the-job training,

formal classroom training, regular performance of similar work on rooftop and ground-level projects, attendance at a training course conducted by the manufacturer of the built-up system at the Roosevelt Collection site, attendance at a rooftop OSHA training course, and daily pre-job conferences at the Roosevelt Collection site. (Tr. 99-116, 183-184, 189-191.) Moreover, Moore's Local 150 and Local 703-represented employees actually have installed at least eighteen green grid and/or built-up rooftop systems, in addition to those at the Roosevelt Collection site. (Tr. 93-99, 191-202; Er. Exh. 16.) There is no evidence in the record of any problems with the quality of their workmanship on any of these projects.

The Roofers provided testimony regarding an extensive apprenticeship program, which includes a six-hour class on "green roofing." (Tr. 340-343.) However, the testimony did not describe the content of the class. There is no evidence establishing that the class includes training with respect to the installation of the specific types of vegetative green roofs at issue in this case. (Tr. 342-343, 426-427.) What is clear, however, is that the Roofers' apprenticeship program does not include any training on landscaping or horticultural subjects such as spreading or grading of soil, planting, and plant maintenance. (Tr. 426-427, 475.)

The testimony presented at the hearing shows that the disputed work does not require technical roofing skills or experience. As described by one of the Roofers' own witnesses, Michael Herlihy, the disputed work relating to the installation of a built-up system involves a series of steps requiring: (1) using a broom or watering hose to make sure that the surfaces are clean; (2) using a scissors or knife to cut the rolls or sheets of root guard, insulation, drainage mat and filter fabric to the appropriate dimensions; (3) rolling out or loose-laying these materials in the appropriate layers; (4) bringing in the growth media, typically with a rubber-wheeled cart; and (5) dropping the growth media in place as needed. (Tr. 505-516.) These are basic skills

possessed by Moore's Local 150 and 703-represented employees, who have utilized them in the installation of many green grid and built-up systems since 2002. These employees also possess the complementary landscaping and horticultural skills and experience, which the Roofers' members admittedly do not possess, that are critical to the creation of a viable living rooftop environment. (Tr. Tr. 84-85, 104, 232-237, 259-262, 321-338.) Therefore, the relative skills factor favors awarding the disputed work to employees represented by Local 150 and Local 703.

The Hearing Officer improperly permitted the introduction of the following two documents over the objections of the attorneys for Moore and Local 150/Local 703:

1. An unsigned letter, dated July 31, 2008, from Allen M. Sopko, Roof Systems Manager, Firestone Building Products Company, to Mike Herlihy, Ollson Roofing Company, regarding "Lowe's 79th and Cicero – Garden Installation": The letter recommends Ollson Roofing for the installation of "Garden Roofing Modules" on the Lowe's project. It states that "a landscaper may be able to install the Garden Roofing Modules," but notes that "they may not be equipped to make necessary repairs" should "any issues occur during installation." It also expresses the opinion that "the roofer is more equipped to ensure that the waterproof integrity of the roof will remain intact during the installation."

2. A letter, dated July 31, 2008, from Dave Daley, Air-Barrier and Waterproofing Manager, Henry Company-Midwest, to "whom it may concern," regarding "Henry Green Roof Systems": The letter states that no one other than a Henry Company Authorized Roofing or Waterproofing Contractor is authorized to install a Henry Guaranteed Green Roof. It also states that Roofing and Waterproofing Contractors are the only trades that have installers with the correct skill set and experience to install Green Roof Systems.

(Tr. 493-497; Roofers Exhs. 9, 10.)

The letters lack foundation; they contain multiple levels of hearsay; and they are irrelevant to the Board's 10(k) determination. The purported authors of the letters did not testify at the 10(k) hearing. The letters do not relate to the Roosevelt Collection project; there is no evidence in the record establishing that any Firestone or Henry products are being used on the

Roosevelt Collection project; and the letters provide no details regarding the projects to which they relate so as to be able to compare them to the Roosevelt Collection project. The letters miss the mark because they speak generally to the qualifications of roofing contractors to install the manufacturer's products. They do not address the relevant issue in this case, namely, the relative qualifications of employees represented by the Roofers, Local 150 and Local 703 to perform the disputed work. Repairing roofs is not part of the disputed work. Furthermore, both of the letters are dated July 31, 2008, and there is no evidence that they reflected the views of the authors almost a full year later, when they were introduced at the 10(k) hearing. For all of these reasons, the Board should disregard these letters when making an award of the disputed work in this case.

8. Gain or Loss of Employment

The undisputed evidence establishes that reassignment of the disputed work to the Roofers would result in potentially long-term layoffs for approximately five or six of Moore's Local 150 and Local 703-represented employees. Reassignment also would result in loss of work hours or the creation of idle time for the employees who continue to perform non-disputed work on the Roosevelt Collection project because they no longer would have the ability to move to the disputed work when their non-disputed work was postponed or reduced due to scheduling changes or other disruptions at the site. Accordingly, this factor favors an award of the disputed work to employee represented by Local 150 and Local 703.

9. Other Considerations

a. Prior arbitration awards

The Roofers were permitted to introduce a copy of Arbitrator Biereg's June 6, 2009 decision over the hearsay and relevancy objections of the attorneys for Moore and Local 150/Local 703. (Tr. 288-289; Roofers Exh. 2.) According to the Roofers' attorney, the

arbitration decision was relevant to "what work was being claimed." (Tr. 290.) However, witnesses for the Roofers, Local 150 and Local 703 already had testified, at length, regarding the work that was the subject of their competing claims. The Board should not consider the arbitrator's decision when determining the merits of the jurisdictional dispute.

Neither Moore nor Local 703 attended the arbitration hearing; they were not bound to the JCB's Standard Agreement; and the arbitrator had no jurisdiction to issue a decision that was binding on either of them. Furthermore, the factors to be considered by an arbitrator when resolving a jurisdictional dispute under the Standard Agreement are substantially different from, and are inconsistent with, the Board's established 10(k) factors. (*See* Local 150/703 Exh. 3, Article VI, pp. 4-5.) For example, the Standard Agreement does not include the certification, collective bargaining agreement, employer preference, and employer practice factors that are central to the Board's 10(k) analysis. The Standard Agreement gives primary and potentially controlling weight to agreements between the unions and prior decisions of record, without regard to either (1) the desires of the employees as expressed in the context of a Board-conducted secret ballot election and evidenced by a Board certification and history of collective bargaining, or (2) the preference of the employer. Moreover, it is well established that an arbitrator's award of disputed work is not binding on the Board and a contrary determination by the Board will supersede the arbitrator's decision. *Miron Constr. Co., Inc. v. Int'l Union of Operating Eng'rs, Local 139*, 44 F.3d 558, 564 (7th Cir. 1995); *Chauffers & Helpers Local Union No. 50 v. McCartin-McAuliffe Mech. Contractor, Inc.*, 708 F.2d 313, 315 (7th Cir. 1983).

b. Rooftop liability and warranty issues

The Roofers appear to be attempting to support their claim for the disputed work based, in part, on the argument that they need to control the installation process in order to minimize the roofing contractors' exposure to litigation and potential liability, under the terms of their warranties, for damage to the roof caused by employees of the landscape contractors. Mr. Lucas testified, at length, regarding prolonged warranty-related litigation resulting from damage to a roof at McCormick Place in Chicago, Illinois. (*See* Tr. 352-359.) [11] However, this argument has no merit or relevance to the Board's award of the disputed work.

The liability and warranty issue does not bear on any of the relevant 10(k) factors. It is simply about protecting the roofing contractors from warranty claims that are an inevitable part of doing business on construction sites where other trades also are working. Such matters typically are addressed through extensive warranty, indemnification and insurance provisions in the contract documents between the project owner, the general contractor, and the subcontractors working on the project. (Tr. 143-147, 433-435; Er. Exh. 6, Sections 7-10.) Any damages or liability arising out of the performance of the work will be determined and allocated in accordance with the negotiated terms of the parties' contract documents. A party's potential exposure to such damages or liability is not a relevant consideration in awarding the disputed work.

This is demonstrated by the lack of logical consistency in the Roofers' position. The Roofers appear to be arguing that the disputed work should be awarded to the employees of a roofing contractor because the contractor potentially could become embroiled in costly litigation

[11] Interestingly, on cross-examination, Mr. Lucas acknowledged that the landscape contractor who allegedly caused the damage to the roof did not employ members of Local 150 or Local 703. Instead, it employed members of the Laborers. (Tr. 450-451.) Therefore, the Roofers cannot use what allegedly happened at McCormick Place as a basis for claiming that employees represented by Local 150 and/or Local 703 lack the skills and experience required to install green roof systems.

if the work was done by the employees of a landscape contractor and there was damage to the roof. However, there is a similar potential for damage to the roof when performing non-disputed work, such as spreading and grading the soil and installing and maintaining the plants. Nevertheless, the Roofers are not claiming any of that work at the Roosevelt Collection site. (Tr. 432-433.) The Roofers also acknowledge that many other trades perform post-roof-installation work on construction sites (*e.g.*, electricians and HVAC contractors), and that they too can damage the roof. Yet, the Roofers are not using that fact as a basis for claiming jurisdiction over their work on the site. (Tr. 436-437.) Therefore, they should not be able to use it to support their claim for the disputed work in this case either.

c. Roofing licensing statute

In response to a question by the Roofers' attorney, Moore's President stated that Moore does not have a roofing license. (Tr. 139.) [12] Moore's lack of a roofing license is not relevant to the Board's 10(k) determination. The Board has held that state licensing statutes are not a factor for awarding disputed work where (1) they concern only the employer's, as opposed to the employees', qualifications to perform the work, or (2) the applicability of the statute to the disputed work is unclear and the Board would be required to make an interpretation of the statute. Specifically, the Board will not rely on licensing requirements unless the record contains a "definitive interpretation" by the State concerning the application of the requirements to the particular work in dispute. *Sheet Metal Workers Local 17 (Park L. Davis Co.)*, 296 NLRB 14, 17 (1989); *Local 103, International Brotherhood of Electrical Workers (Lucent Technologies, Inc.)*, 333 NLRB 828, 831 (2001); *United Association, Local 447, AFL-CIO, supra*, 350 NLRB at 281 n. 8. Both of these circumstances are present here.

[12] Initially, it bears noting that the Roofers failed to present any evidence or argument on this issue at the 10(k) hearing. Therefore, they should be precluded from advancing a related argument in their post-hearing brief.

The Illinois Roofing Industry Licensing Act (225 ILCS 335/1 *et. seq*.) makes it unlawful "to engage in … business … as a roofing contractor without having been duly licensed under the provisions of this Act." 225 ILCS 335/9(1). The licensing requirements apply specifically to "roofing contractors" and not to "such contractor's employees." 225 ILCS 335/2(e); *see* 225 ILCS 335/3. Furthermore, there has not been a definitive interpretation regarding the application of the Act to the disputed work by any authoritative Illinois state agency or court. No such interpretation was referenced by the Roofers, let alone offered into evidence, at the 10(k) hearing. Accordingly, under established Board precedent, the Illinois Roofing Licensing Act is irrelevant to a determination of this dispute.

IV. CONCLUSION

For the reasons set forth above, Moore submits that the Board should find that this jurisdictional dispute is properly before it and should make an affirmative award of the disputed work on the Roosevelt Collection project to employees represented by Local 150 and Local 703, and not to employees represented by the Roofers.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I, Kenneth A. Jenero, an attorney of record in this case, certify that I E-Filed the foregoing POST-HEARING BRIEF OF MOORE LANDSCAPES, INC. with the Office of the Executive Secretary of the National Labor Relations Board prior to 11:59 Eastern Time on August 24, 2009, and that I contemporaneously served a copy of the POST-HEARING BRIEF on the following attorneys of record by electronic mail:

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