UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

Paul F. Pedersen Company d/b/a Pedersen Company,	)	
	)	
Employer/Charging Party,	)	
	)	
and	)	
	)	
International Union of Operating Engineers, Local 150, AFL-CIO,	)	
	)	
Respondent,	)	
	)	Case Nos. 13-CD-802; 13-CD-803
and	)	
	)	
International Brotherhood of Teamsters, Local 703,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
United Union of Roofers, Water-Proofers, And Allied Workers, Local No. 11,	)	
	)	
Party-In-Interest,	)	

POST-HEARING BRIEF OF IUOE, LOCAL 150 AND IBT, LOCAL 703

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STATEMENT OF THE CASE

On or about July 6, 2009, Pedersen Company ("Pedersen," "Employer," or "Company"), filed unfair labor practice charges with the National Labor Relations Board, Region 13, alleging that the International Union of Operating Engineers, Local 150, AFL-CIO ("Local 150"), and the International Brotherhood of Teamsters, Local 703 ("Local 703"), violated Section 8(b)(4)(D), 29 U.S.C. § 158(b)(4)(D), of the National Labor Relations Act (the "Act"). The Regional Director found merit to the charges. On or about July 16, 2009, Region 13 issued a Notice of Hearing.

On July 30 and 31, 2009, Region 13 conducted a hearing pursuant to Section 10(k) of the Act, 29 U.S.C. § 160(k). Post-hearing briefs were originally scheduled to be due on August 7, 2009. On August 3, 2009, the parties filed a Joint Request for Extension of Time to File Post-Hearing Briefs. On August 4, 2009, the Board granted the Motion and extended the submission date to September 8, 2009. Local 150 and Local 703 now file this brief in support of their position that the Board should award the disputed work to Local 150 and Local 703.

STATEMENT OF FACTS

Local 150 and Local 703 are labor organizations as that term is defined in Section 2(5) of the Act, 29 U.S.C. § 152(2) (Bd. Ex. 2, Stipulation ¶ 3). Local 150 and Local 703 jointly represent employees working in the landscape industry throughout northern Illinois (Bd. Ex. 2, Stipulation ¶¶ 9, 10; Tr. 182, 233). Local 150 and Local 703 are signatory to over 100 joint collective bargaining agreements with landscape contractors (Tr. 188; Local 150/703 Ex. 2).

Pedersen is a commercial landscape contractor and has been in business since 1994 (Bd. Ex. 2, Stipulation ¶ 4; Tr. 37). Pedersen is also a statutory employer and is bound to the terms of a joint collective bargaining agreement with Local 150 and Local 703 covering its non-equipment operator landscape employees (Bd. Ex. 2, Stipulation ¶¶ 4, 10; Tr. 43-44). At no time

has Pedersen been signatory to a collective bargaining agreement with the United Union of Roofers, Water-proofers and Allied Workers, Local No. 11 ("Roofers' Union") (Bd. Ex. 2, Stipulation ¶ 11; Tr. 54). Pedersen is currently working on two landscape construction projects: Southwest Middle School and Benito Juarez High School.

Southwest Middle School is a brand new public school, located at 3510 W. 55th Street in Chicago, Illinois (Tr. 55). The general contractor on the project is F.H. Paschen/Nielson ("Paschen") (id.). Paschen subcontracted all the landscape and related work on the project to Pedersen (Tr. 63-64). Only the modular green roof is in dispute in this case (Tr. 64).

A modular green roof system is comprised of a series of plastic trays that are two feet by four feet (2x4) in length and width and 3½ to 4 inches in depth (Tr. 65). The trays contain a special light-weight soil mixture (id). Each tray contains ten plants that are pre-planted by a vendor prior to delivery to the jobsite (Tr. 66). Each tray weighs between 50 and 60 pounds (Tr. 85). The trays are delivered to the jobsite on pallets (Tr. 68). The landscape contractor, in this case Pedersen, cannot begin a roof-top landscape construction project until the roof has been tested for water tightness and has been "turned over" from the roofing contractor back to the general contract (Tr. 74-78). To install a modular tray system, the landscape contractor rolls out a "slip sheet" to protect the roof (Tr. 66, 70-71). The slip sheet is a heavy woven fabric that is delivered on a large roll in 20-foot widths (Tr. 70); the rolls themselves hold 100 to 200 feet of sheeting (Tr. 87). The fabric is cut off the rolls using scissors (Tr. 88). The trays are then placed atop the slip sheet next to one another, so that from above it looks like one big surface area of plants (Tr. 71). Pedersen guarantees the plant materials in the trays for one year (Tr. 72). As a result, Pedersen begins a maintenance schedule, including watering and fertilizing, the moment it receives the pre-planted trays (Tr. 72). The Southwest Middle School subcontract calls for the installation of 11,080 square feet of modular green roofing trays (Tr. 67). In context of the larger

project, roughly 25 percent to 30 percent of roof at the Southwest Middle School will be covered with modular trays (Tr. 66).

Benito Juarez High School ("Juarez High School" or "Juarez") is an existing high school; the Chicago Board of Education is adding a brand new section, as well as an add-on to the high school (Tr. 84). Juarez High School is located at 2150 South Laflin in Chicago, Illinois (Tr. 90). In contrast to Southwest Middle School, nothing can be pre-planted at Juarez High School (Tr. 94). Pedersen is creating a roof-top garden (id.). That is, Pedersen is installing a green roof atop the finished roof at the school (Tr. 96). The green roof is installed by first framing the ultimate garden area with aluminum-4 inch edging (Tr. 96-7). Then, a water retention mat is placed to protect the roof membrane (Tr. 98). The water retention mat is a fabric; it also used to retain moisture and nutrients for the plants (id.). The next layer is the filter fabric (Tr. 100). The filter fabric is designed to prevent materials in the next layer, gravel, from falling into the water retention mat (Tr. 101). One inch of gravel is then spread atop the filter fabric (Tr. 102). Then four inches of light-weight soil is spread and graded (Tr. 103-04). All of the elements of this so-called built-up system are designed to contribute to the success of the plant material (Tr. 114).

Once the layers are installed, the plant material is planted in a pre-designed pattern (Tr. 105). Pedersen works with the landscape architect on plant selection (Tr. 106). Pedersen will install 14,000 plants at Juarez High School (Tr. 107). Pedersen purchases the plants at a nursery and keeps them alive until they are planted (Tr. 105). Pedersen is responsible for the inspection, care, and maintenance of the plant material from the time it purchases the plants at the nursery, through life of the project, and continues for an additional calendar year, since Pedersen warranties the plant materials for one year (Tr. 108). Pedersen is required to replace any and all plants that do not survive the warranty period (Tr. 109).

Pedersen began working on the Southwest Middle School project in late May/early June, 2009 (Tr. 82). Pedersen had not commenced work on the Juarez High School project at the time of the Section 10(k) hearing; Paul Pedersen, Company President, testified that work was scheduled to begin in September 2009 (Tr. 110). Pedersen assigned all the landscape construction work at Juarez High School and Southwest Middle School to members of Local 150 and Local 703 (Tr. 82, 110). Thereafter, the Roofers' Union made a competing claim for the roof-top landscape construction work (Bd. Ex. 2, Stipulation ¶ 6; Tr. 205). On July 9, 2009, Local 150 and Local 703 threatened to picket Pederson if it reassigned any of the disputed work to members of the Roofers' Union (Bd. Ex. 2, Stipulation ¶8; Tr. 116). Notwithstanding the competing claims and corresponding threats to picket, it remains Pedersen's preference to continue using members of Local 150 and Local 703 to perform the disputed work at Juarez High School and Southwest Middle School (Tr. 82, 110).

DISPUTED WORK

At the outset of the hearing, the parties stipulated to the description of the disputed work; specifically:

> The dispute involves rooftop work at Benito Juarez High School and Southwest Middle School sites, beginning above the waterproofing membrane. At the Southwest Middle School site, the dispute is related to the placement of preplanted vegetative modular trays and related components above the waterproofing membrane. At the Benito Juarez High School site, Roofers Local 11 does not claim any work after the placement of growth media, including the grading thereof.

ARGUMENT

I. The Board Has Jurisdiction to Make a Determination of this Dispute Pursuant to Section 10(k).

The Board must proceed with a determination of the dispute pursuant to Section 10(k) of the Act if: (1) there are competing claims for the work in question; (2) there is reasonable cause to believe that Section 8(b)(4)(D) has been violated; and, (3) the parties have not agreed on a

method for the voluntary adjustment of the dispute. Laborers' Int'l Union of North America, Local 113 (Super Excavators, Inc.), 327 NLRB 113, 114 (1998). In this case, the parties have all stipulated that there are competing claims for the work (Bd. Ex. 2, Stipulation ¶ 6); the parties did not stipulate to the second and third elements. Regardless, the evidence demonstrates that there is reasonable cause to believe that Section 8(b)(4)(D) was violated and that the parties have *not* agreed on an alternative method to resolve this dispute. The Board should proceed to the merits and make an award of the disputed work to Local 150 and Local 703.

A. There Is Reasonable Cause to Believe that Section 8(b)(4)(D) Has Been Violated.

A threat to engage in conduct proscribed by Section 8(b)(4)(D) constitutes a violation of the statute. Robbins Plumbing & Heating Contractors, Inc., 261 NLRB 482, 487 (1982). "In a Section 10(k) proceeding, the Board is not charged with finding that a violation did, in fact occur, but only that reasonable cause exists for finding such a violation." Local 7, Empire State Regional Council of Carpenters (UBC and Five Brother, Inc.), 344 NLRB 910, 911 (2005). Thus, in order to proceed to the merits in this case, the Board need only find reasonable cause to believe that Local 150 and Local 703 threatened to engage in activity proscribed by Section 8(b)(4)(D).

"It is well established that as long as a Union's statement, on its face, constitutes a threat to take proscribed action, the Board will find reasonable cause to believe the statute has been violated, in the absence of affirmative evidence that the threat was a sham or the product of collusion." Local 3, IBEW (Alliance Elevator Co.), 352 NLRB 1947 (2008). In June 2009, officials from Local 150 and Local 703 learned that the Roofers' Union had made a claim for work being performed by Pedersen at Southwest Middle School and Juarez High School (Tr. 205-06). In response, on July 6, 2009, Local 150 and Local 703 sent a joint letter to Pedersen in which the Unions advised "that they would engage in any and all means, including

picketing, to enforce and preserve their current work assignment for roof-top construction work at the Benito Juarez High School and Southwest Middle School sites, if that work was reassigned to members of the" Roofers' Union (Bd. Ex. 2 Stipulation ¶ 8; Bd. Ex. 3; Tr. 116). Under Alliance Elevator, the July 6th letter from Local 150 and Local 703 is sufficient to establish reasonable cause to believe that Section 8(b)(4)(D) was violated.

At no point at the hearing did counsel for the Roofers' Union specifically argue that the element of "reasonable cause to believe that Section 8(b)(4)(D) was violated" was lacking.[1] The Roofers' Union did, however, present evidence about the existence of a no-strike clause—presumably to suggest that the Unions' threat to picket was a "sham." Notably, the "Board has rejected the argument that a strike threat was a sham simply because it would have violated a no-strike clause." Alliance Elevator, 352 NLRB 1947, citing, Bricklayers (Cretex Construction Services), 343 NLRB 1030, 1032 fn. 5 (2004). On this record, there is reasonable cause to believe that Section 8(b)(4)(D) was violated.

B. All Parties Have Not Agreed on an Alternative Method to Resolve this Dispute.

"In order for an agreement to constitute an agreed-upon method for the voluntary adjustment, all parties to the dispute must be bound to that agreement." International Union of Elevator Constructors, Local 2 (Kone, Inc.), 349 NLRB 1207, 1210 (2007). At the outset of the hearing, the Roofers' Union moved to quash the Notice of Hearing because it argued there was "an agreed upon method for the voluntary adjustment [of the dispute] that applies to the work in dispute on the Benito Juarez High School job site and the Southwest Middle School" (Tr. 10). Specifically, the Roofers' Union identified the dispute resolution mechanism as the Joint Conference Board's Standard Agreement Procedures (Tr. 11). For the reasons explained below,

[1] In fact, at the outset of the hearing, counsel for the Roofers' Union moved to quash the notice of hearing based *only* on the alleged existence of an alternative method to resolve the parties' jurisdictional dispute.

all parties did not agreed to submit all disputes arising at Juarez High School and Southwest Middle School to the Joint Conference Board ("JCB") for resolution. Therefore, neither the JCB proceedings nor the resulting arbitration awards from Arbitrator Cox should prevent the Board from proceeding to the merits of this dispute.

C. Local 703 Did Not Agree to Submit *Any* Jurisdictional Disputes to the JCB.

"In order to determine if the parties are bound [to an alternative procedure], the Board carefully scrutinizes the agreements at issue." Laborers Int'l Union of North America (Anderson Interiors, Inc.), 353 NLRB No. 62 (2008), slip op. at 10. The JCB was established by the Standard Agreement entered into by the Construction Employer's Association and the Chicago & Cook County Building & Construction Trades Council (Local 150/703 Ex. 4). The purpose of the JCB is to resolve, according to the procedures set forth in the Standard Agreement, jurisdictional disputes arising between employers and unions that are bound to the Standard Agreement (id., p. 1).

A *union* is bound to the Standard Agreement only if it is an affiliate of the Chicago and Cook County Building and Construction Trades Council (150/703 Ex. 4, Article VII). In this case, Local 703 is not a member of, or otherwise affiliated with, the Chicago and Cook County Building Trades (Tr. 233-36). The Roofers' Union also introduced into evidence an unsigned project labor agreement that adopted the terms of the Standard Agreement. Tom Stiede, Secretary-Treasurer of Local 703, testified that Local 703 was not signatory or bound to that project labor agreement (Tr. 246). Even Art Lucas, Business Representative for the Roofers' Union, conceded that Local 703 was not a party to, or bound by, the project labor agreement (Tr. 331-32). Thus, there is no evidence in this record that Local 703 agreed to submit jurisdictional disputes arising at the Juarez High School or Southwest Middle School projects to the JCB or a JCB arbitrator for resolution.

D. Pedersen Did Not Agree to Submit Jurisdictional Disputes Arising at the Southwest Middle School to the JCB for Resolution.

An Employer can be required to submit jurisdictional disputes to the JCB if its subcontract with the general contractor requires it to submit jurisdictional disputes arising on that project to the JCB for resolution. Pedersen's subcontract with the Public Building Commission of Chicago for the Southwest Middle School project *did not* contain language requiring Pedersen to submit jurisdictional disputes to the JCB (Tr. 115). Pedersen's subcontract with the Chicago Board of Education for the Juarez High School project did require Pedersen to submit jurisdictional disputes to the JCB. However, as explained above, Local 703 did not likewise agree to submit disputes arising at Juarez High School to the JCB. Thus, *all* parties did not agree on the JCB procedures for resolving jurisdictional disputes arising at Juarez High School.

There are only two other ways in which an *employer* can become bound to the Standard Agreement. First, the Standard Agreement provides that an *employer* may be bound to the Standard Agreement if it is signatory to a collective bargaining agreement containing language that adopts or incorporates the Standard Agreement (see 150/703 Ex. 4, Article VII, p. 5; see also Article VIII, Paragraph 4, "Any Association that incorporates Joint Conference Board stipulation language into their collection bargaining agreement will automatically have representation on the Joint Conference Board"). In this case, there is *no* language in the parties' collective bargaining agreement that adopts or incorporates the Standard Agreement or any other JCB procedures for purposes of resolving jurisdictional disputes (Tr. 115; *cf.* Employer Ex. 4). Moreover, Pedersen never agreed to follow or be bound by the JCB's Standard Agreement at the Southwest Middle School jobsite, nor did it ever stipulate to the terms of the Standard Agreement for purposes of that project (Tr. 115-16). And, at no time did Pedersen ever agree to follow or be bound by any decisions rendered by a JCB arbitrator relative to this dispute concerning the Southwest Middle School project (id.). Thus, Pedersen was not bound to the Standard Agreement for the Southwest

Middle School project through its collective bargaining agreement or through any other agreement or stipulation.

Second, Article VII, Paragraph 10, provides, "[a]ny 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 so bound" (150/703 Ex. 3). On July 14, 2009, an arbitration hearing was convened in response to a grievance filed by the Roofers' Union with the JCB regarding the work being performed by Pedersen at Juarez High School and Southwest Middle School (Tr. 208-09). No representatives from Pedersen or Local 703 attended the July 14th JCB arbitration hearing (Tr. 170-71, 230-31, 236). Therefore, based on their absence from the hearing, neither Pedersen nor Local 703 can be deemed to have accepted the jurisdiction of the arbitrator pursuant to Article VII, Paragraph 10, of the Standard Agreement. On this record, there is simply no basis to conclude that Pedersen was bound to the Standard Agreement for purposes of the Southwest Middle School project. And, there is no basis to conclude that Local 703 was bound to the Standard Agreement for purposes of the Juarez High School project or the Southwest Middle School project.

E. Arbitrator Cox Confirmed that Local 703 Was Not Bound to the Standard Agreement at Either Project and that Pedersen Was Not Bound to the Standard Agreement at the Juarez High School Project.

In this case, the Roofers' Union initiated jurisdictional proceedings against Local 150 and Local 703 with the JCB regarding the work being performed at Juarez High School and Southwest Middle School. Those proceedings culminated in the issue of two arbitration awards from JCB Arbitrator James R. Cox (Roofers' Exs. 4 and 5). With respect to the Juarez High School project, Arbitrator Cox held that "Local 703 is not a member of the Chicago Building Trades Council and is not stipulated to the Joint Conference Board" (Roofers' Ex. 4 at p. 2). In

addition, Arbitrator Cox sustained Pedersen's assignment of the disputed landscape work to employees represented by Local 150 at the Juarez High School project (id. at p. 3).

In the Southwest Middle School case, Arbitrator Cox found that Pedersen's subcontract with the Public Building Commission of Chicago did not contain any "references to any mechanisms for resolving work jurisdiction claims and no mention of the Multi-Project Labor Agreement" (Roofers' Ex. 5 at 2). Therefore, Arbitrator Cox concluded that neither he nor the JCB had jurisdiction over Pedersen for purposes of the Southwest Middle School project. Since he concluded that Pedersen was not stipulated to the Standard Agreement, JCB Arbitrator Cox did not have to reach the question of whether Local 703 was also stipulated to the Standard Agreement. Although based on his holding in the companion case (Juarez High School), it is likely JCB Arbitrator Cox would have likewise held that Local 703 was not stipulated to the Standard Agreement at Southwest Middle School, had he considered the question. In any event, since neither the general contractor nor Pedersen was stipulated to the Standard Agreement for purposes of the Southwest Middle School project, Arbitrator Cox held that neither he nor the Joint Conference Board had "jurisdiction to make a determination of [the] dispute" (id.).

Thus, Arbitrator Cox specifically held that Local 703 was *not* stipulated to the Standard Agreement in the Juarez High School case and also held that Pedersen was *not* stipulated to the Standard Agreement in the Southwest Middle School case. Despite these findings, the Roofers' Union inexplicably offers the decisions from Arbitrator Cox as evidence that *all* parties to this dispute (Pedersen, Local 150, Local 703, and the Roofers' Union) are bound to an alternative method to resolve this jurisdictional dispute, i.e. the JCB's Standard Agreement. Yet, the decisions plainly stand for the proposition that all parties to the two pending jurisdictional disputes were not bound to the Standard Agreement for purposes of each project.

F. Local 703 Is Not Bound to the Standard Agreement By Virtue of Its Joint-Employer Status.

The Roofers' Union argues, however, that Local 703 is bound to the Standard Agreement merely because it represents the Pedersen employees jointly with Local 150 (Tr. 11). The Roofers' Union is wrong. The Roofers' Union raised the same argument in a recent case involving a similar jurisdictional dispute between the same unions now pending before the Board, Moore Landscapes, Inc., 13-CD-800 and 13-CD-801. In that case, the Roofers' Union argued in its Post-Hearing Brief (at p. 17, n. 3) that "[t]he term 'joint representative' is a legal term of art, whereby any component party in a joint representative setting *may* bind other representatives" (emphasis added). Whether one joint representative *may* bind another representative is irrelevant to the question of whether Local 150 did, in fact, bind Local 703 to the Standard Agreement. The Roofers' Union presented no evidence that Local 150 had authority to bind Local 703 to the Standard Agreement. Significantly, there is no language in the Local 150/Local 703 joint collective bargaining agreement that adopted or incorporated the Standard Agreement. In addition, in the case cited by the Roofers' Union to support this argument, United Automobile, Aerospace and Agricultural Implement Workers of America (Douglas Aircraft Co.), 296 NLRB 970, n. 4 (1989), the Board found "it unnecessary to address the agency issue" because both the international union and the local union maintained the same unlawful 8(b)(1)(a) provision in its constitution and by-laws, respectively. There is no authority that one joint representative is automatically bound to any instrument entered into by the other joint representative.

Even in the unfair labor practice context, there is no bright-line rule providing that one joint representative is automatically responsible for the conduct of the other joint representative. For example, in United Mine Workers of America (Garland Coal & Mining Co.), 258 NLRB 56 (1981) (another case cited by the Roofers in the Moore case), the Board held, in the context of an

unfair labor practice charge, that the local union and district union were legal entities apart from the international union and that the international union was "not automatically responsible for the acts of its affiliates." In Sheet Metal Workers (Reno Employers Council), 168 NLRB 893, 898 (1967), the Board found joint liability only after finding that the international union engaged in affirmative conduct and "made common cause" with the offending local union. The analysis of joint representative liability focuses on the *conduct* of each joint representative.

There is no evidence in this record that Local 150 had authority to bind Local 703 to the Standard Agreement, that Local 150 made any representations to any third parties that it had the authority to bind Local 703 to the Standard Agreement or that Local 150, in fact, bound Local 703 to the Standard Agreement. Local 703 is not bound to the Standard Agreement and never agreed to submit any jurisdictional disputes arising at the Juarez High School and Southwest Middle School job sites to the JCB for resolution (Tr. 236). Even assuming Local 703 is bound to the Standard Agreement, there is still no evidence that Pedersen was bound to the Standard Agreement for purposes of the Southwest Middle School project. All four parties have not agreed on an alternative method to resolve the disputes at Juarez High School and Southwest Middle School. The Board should therefore deny the Roofers' Union's motion to quash and proceed to the merits of the dispute.

II. The Board Should Award the Disputed Work to Local 150 and Local 703.

Section 10(k) requires the Board to make an affirmative award of disputed work after giving due consideration to various factors. Ironworkers Local 380 (Stobeck Masonry, Inc.), 267 NLRB 184 (1983). The Board's 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.), 292 NLRB 57 (1988).

A. Employer Preference and Past Practice Favor an Award to Local 150 and Local 703.

The Board normally accords employer preference considerable weight. Stobeck Masonry, Inc., 267 NLRB at 287, fn. 8. Accordingly, the Board will make an award to the union-represented employees to whom the employer prefers to assign, and has in the past assigned, the disputed work. Machinists Lodge 776 (Lockheed Martin), 352 NLRB 402 (2008); see also IUOE, Local 150 (All American), 296 NLRB 933, 936 (1989); Machinists, Lodge 837 (McDonnell Douglass Corp.), 242 NLRB 913 (1979). In discerning "employer preference" in a Section 10(k) analysis, the Board relies on the general contractor's as well as the subcontractor's preference. Laborers Local 1030 (Exxon Chemical), 308 NLRB 706, 708 (1992).

Pedersen began work at the Southwest Middle School project in late May/early June 2009 (Tr. 82). Pedersen assigned the disputed landscape work in that case to employees represented by Local 150 and Local 703 (Tr. 81). It is Pedersen's preference to continue using employees represented by Local 150 and Local 703 on the Southwest Middle School project (Tr. 82). At the time of the Section 10(k) hearing, Pedersen had yet to begin work at Juarez High School (Tr. 110). Work on that project was scheduled to begin September 2009, with an expected completion date in the middle of October 2009 (id.). It is Pedersen's intention to use employees represented by Local 150 and Local 703 at the Juarez High School project (id.). And, it is Pedersen's preference to use employees represented by Local 150 and Local 703 for all of the work in the Juarez High School project (id.).

The Roofers' Union is attempting, however, to negate the Employer's preference by arguing that Pedersen does not have a roofing license from the State of Illinois (Tr. 162). This argument is a non-starter for several reasons. First, the Roofers' Union did not articulate or develop this argument in their opening statement of position. Garg v. Potter, 521 F.3d 731, 736 (7th Cir. 2008) (undeveloped arguments are waived). In fact, the Roofers' Union did not even

cite the provision of Illinois law (statutory or regulatory) that relates to licensure of roofing contractors. Second, and perhaps more importantly, "the Board does not rely on licensing requirements where 'the applicability of the regulation is unclear' and the Board would be required 'to make an interpretation of the regulation.'" United Association, Local 447 (Rudolph & Sletten, Inc.), 350 NLRB 276, 281 (2007). As explained above, the Roofers' Union failed to identify the provision of Illinois law at issue. Moreover, "the record does not contain a 'definitive interpretation' by the State concerning the applicability of the state licensing requirements to the work in dispute." Id., citing, IBEW, Local 103 (Lucent Technologies), 333 NLRB 828, 831 (2001). Thus, under Rudolph & Sletten, the absence of a state license does not trump "employer preference." This factor favors an award of the work to Local 150 and Local 703.

B. Certifications And Collective Bargaining Agreements Favor an Award to Local 150 and Local 703.

When one of the competing unions has a current agreement with the employer and the other does not, this factor favors an award to the employees covered by the agreement. International Longshoremen's Associations (Coastal Cargo), 323 NLRB 570, 572-3 (1997); see also International Union of Elevator Constructors, Local 91 (Otis Elevator Co.), 340 NLRB 94, 96 (2003) ("Although both Unions' collective bargaining agreements arguably cover the work in dispute, the collective bargaining agreement that is relevant is the one that has been negotiated with the employer who has the ultimate control over the assignment of the work").

This factor applies even when the collective bargaining agreement between the employer and the union only "arguably" covers the disputed work. For example, in United Association, Local 447 (Rudolph & Sletten, Inc.), 350 NLRB 276, 279 (2007), the employer's collective bargaining agreement with the carpenters union contained general language arguably covering the work in dispute, employees employed under the agreement had performed similar work, the

parties to the agreement considered the work in dispute to be covered by the agreement and the employer had no collective bargaining agreement with either of the rival unions: the plumbers and electricians. On those facts, the Board held that the "collective bargaining" factor favored an award of the work to employees represented by the carpenters. Id.

On June 8, 2004, Local 150 and Local 703 were certified as the joint exclusive bargaining representatives of Pedersen's employees working in the following classifications: working foremen, lead plantsmen, plantsmen, truck drivers, water truck operators, mechanics, landscape construction laborers, installers, and helpers (Bd. Ex. 4). The ILCBA (to which Pedersen belongs) is currently signatory to a joint collective bargaining agreement with Local 150 and Local 703 (Tr. 43, 44, Employer Ex. 1). The parties' joint collective bargaining agreement covers the landscape work in dispute in this case (Tr. 132, Employer Ex. 1, Article III and Article VI, Section 6). Specifically, Article III provides:

> The scope of work covered by this Agreement shall include but not be limited to all work historically performed in the landscape construction industry at or on construction sites, including the installation and watering of plant materials,…construction of retaining walls and related gravel work,…brick paving,…the installation of playground equipment and other landscape structures,…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.

Thus, the collective bargaining agreement specifically covers "applying finish landscape materials in subgrade prepared by others…" There is no limitation in the contract on the type of subgrade on which finish landscape materials may be applied (Tr. 133). The scope of work clause defines the types of tasks that are covered by the agreement regardless of where they are performed (Tr. 133, 238). That the collective bargaining agreement does not specifically mention "roof-top" construction is immaterial since all parties to the contract understood roof-top landscape construction to be covered by the collective bargaining agreement (Tr. 120, 195,

237-240). In contrast, Pedersen is not, and has never been, signatory to a collective bargaining agreement with the Roofers' Union (Bd. Ex. 2, Stipulation ¶ 11; Tr. 54). Therefore, the collective bargaining agreement entered by the Roofers' Union (Roofers' Ex. 7) is irrelevant to this factor (Tr. 299-304). The "certifications and collective bargaining" factor favors an award of the work to Local 150 and Local 703.

C. Area and Industry Practice Favor an Award to Local 150 and Local 703.

Where a majority of employers in the relevant area assign the work to one of the competing groups, that group is favored, even if there are occasional deviations from that norm. Teamsters Local 79 (Electric Machinery Co.), 194 NLRB 898 (1972); Operating Engineers Local 158 (E.C. Ernst), 172 NLRB 1667 (1968). Importantly, the Board is reluctant to disturb an established area practice. Stobeck Masonry, Inc., 267 NLRB 284.

In this case, the Employer presented evidence of 119 elevated vegetative projects completed in the Chicago metropolitan area by 15 different contractors using employees represented by Local 150 and Local 703: Church Landscape, Countryside, Damgaard, Hawthorn Landscape, Hayden Landscape, Kinsella Landscape, Landscape Concepts, Moore Landscapes, Inc., Pedersen Company, Robert Ebl, Siteworks Construction, Twin Oaks Landscaping, Walsh Landscape, and Beary Lanscape (Tr. 268; Employer Ex. 13[2]). The 119 projects identified in the binder represent just under one million square feet of roof-top landscape construction projects performed by contractors using members of Local 150 and Local 703 (Employer Ex. 13). The Board must not disturb this clear industry practice. (Stobeck Masonry, Inc.), 267 NLRB 284. And, as explained above, even some occasional deviations from the normal area practice (Tr. 310-11) are not sufficient to warrant an assignment to the Roofers. Electric Machinery Co.,

[2] Employer Ex. 13 was a summary of projects identified in a large binder that was also presented at the hearing. The Hearing Officer did not enter the binder into evidence, but did allow counsel for the Employer to make an offer of proof (Tr. 263-270).

194 NLRB 898 (1972). The "area and industry practice" factor favors an award of the work to Local 150 and Local 703.

D. Skills, Safety, and Training Favor an Award to Local 150 and Local 703. Training Favors Local 150.

Pedersen is a landscape contractor; the Company installs green areas, regardless of location (Tr. 139). Employees performing roof-top landscape construction need to know how to deal with live plants; they need to know how to handle organic materials, whether it is a big tree or ground cover; and they need to know how to water and maintain the organic material (Tr. 138). The employees also need knowledge of drainage systems (id.). The skills required to install a garden on a roof-top are the same as the skills necessary to install a garden at ground level (Tr. 139). It is not necessary to possess roofing skills and experience in order to install a roof-top garden (id.). See Laborers' International Union of North America, Local 423, 183 NLRB 895, 899 (1970) (although the laying of a pipeline for an electrical utility is "incidental to electrical work" such work is not really electrical work because it does not require a knowledge of the intricacies of electrical circuitry). Paul Pedersen testified that his employees represented by Local 150 and Local 703 possess the skills and experience necessary to perform roof-top landscape construction work (Tr. 140).

Pedersen's employees have the necessary skills because they have received the proper training. Formal training is preferable to on-the-job training. Award of work goes to the union with more formal training. Construction & General Laborers' District Council of Chicago and Vicinity (Henkels & McCoy), 336 NLRB No. 108, slip opinion at 2 (2001). The 150/703 joint collective bargaining agreement provides incentives to Pedersen's employees to increase their knowledge and skills (Tr. 141, 282-84). In addition, Pedersen's employees participate in OSHA training at the local community college (Tr. 143). On March 16, 2009, Local 150 and the Illinois Landscape Contractors Association ("ILCBA") co-sponsored a green roof safety training course

(Tr. 145). Two of Pedersen's employees attended that training; both worked on the Southwest Middle School project (Tr. 145-46). Several Pedersen employees also attended an OSHA training class sponsored by the Fox Valley Associated General Contractors (Tr. 153-4). Finally, Pedersen holds "tool box" meetings once a week at which safety issues are discussed (Tr. 157).

The Roofers' Union presented evidence about the OSHA training its apprentices receive. Conspicuously absent from the Roofers' Union's case was any evidence particular to the installation of green roofs. Employees represented by Local 150 and Local 703 plainly have the skills and experience to perform the disputed work and the training received by the employees represented by Local 150 and Local 703 is tailored specifically to roof-top landscape construction. This factor favors an award of the work to employees represented by Local 150 and Local 703.

E. Economy and Efficiency Favors an Award to Local 150 and Local 703.

The Board favors assignments that promote the efficient and economical performance of the work. Electrical Workers Local 222 (KTVU), 272 NLRB 648 (1984). In assessing economy and efficiency, the Board considers various factors including fragmentation of the work process and the potential for idle time and delay. Iron Workers Local 6 (Kulama Erectors), 264 NLRB 166 (1982); Laborers' District Council (Anjo Construction), 265 NLRB 186 (1982). Along these lines, the Board favors awarding work to the group of employees who are "already on site and available to perform other work for the employer in addition to the disputed work . . ." Local 7, Empire State Regional Council of Carpenters (UBC and Five Brother, Inc.), 344 NLRB 910, 914 (2005). That is, efficiency is promoted when disputed work is assigned to employees who are performing other aspects of the project—particularly when the disputed work is incidental to other work being performed on the project. Construction & General Laborers' District Council

of Chicago and Vicinity (Henkels & McCoy), 336 NLRB No. 108, slip op. at 2 (2001); Machinists District 118 (Meredith Printing), 243 NLRB 892 (1979).

As explained above, Pedersen has been hired to install roof-top gardens at the Southwest Middle School and Juarez High School. The installation of the modular trays (Southwest Middle School) and the various layers of the built-up system (Juarez High School) are simply the initial phases of broader landscape projects. The maintenance and care of the plant material begins the moment Pedersen receives the material from the vendor and continues for one year after installation by virtue of the warranty. Art Lucas, Business Representative for the Roofers' Union, testified that the Roofers' Union is not claiming the final grading of the dirt, the planting, or the maintenance of the plants (Tr. 308). Paul Pedersen testified that it is more efficient to use employees represented by Local 150 and Local 703 because they can perform all aspects of a roof-top construction project (including maintenance) and can also perform ground-level landscape construction if there are delays on the roof-top (Tr. 158). Pedersen explained that it would be inefficient for him to subcontract the disputed work to a roofing contractor (Tr. 159). Subcontracting work that Pedersen can now perform in-house would increase costs and create scheduling issues and would reduce Pedersen's "comfort" level (id.). Paul Pedersen currently knows what tasks his employees can perform because he knows how they have been trained (id.). Subcontracting the work to a roofing contractor would mean less supervision from Pedersen and create a risk that the employees performing the disputed work did not have the skills and experience necessary to perform the work (id.). This factor favors an award of the work to employees represented by Local 150 and Local 703.

F. The Likelihood of Job Loss Favors an Award to Local 150 and Local 703.

The Board will consider the potential for loss of jobs when making an award of the work. Newark Typographical Union (Mid-Atlantic Newspapers), 220 NLRB 4, 7 (1975); see also Iron

Workers Local 40 (Unique Rigging), 317 NLRB 231, 233 (1995) ("we find the potential adverse impact on the Employer's current employees favors an award of the work in dispute to those employees"). At the time of the Section 10(k) hearing, the Southwest Middle School project was 99.9 percent complete (Tr. 83). As explained above, the Juarez High School project had yet to begin. Paul Pedersen testified that he intended on using one crew of five employees on that project (Tr. 110-11). Paul Pedersen also testified that those five employees would not be able to work for a month if he was not permitted to assign the disputed work to his employees (Tr. 161). The likelihood of job loss militates against awarding the disputed work to the Roofers.

CONCLUSION

For all the above-stated reasons, Local 150 and Local 703 respectfully request the Board make an affirmative award of the disputed work to Local 150 and Local 703.

Dated: September 8, 2009

Respectfully submitted,

s/Bryan P. Diemer
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CERTIFICATE OF SERVICE

On September 8, 2009, Local 150 and Local 703 e-filed their Post-Hearing Brief with the Executive Secretary of the National Labor Relations Board. The undersigned further certifies that he caused a copy of the foregoing *Post-Hearing Brief of IUOE, Local 150 and IBT, Local 703* to be served upon:

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