

**BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION THIRTEEN**

IN THE MATTER OF:)	
)	
INTERNATIONAL UNION OF OPERATING)	
ENGINEERS, LOCAL 150, AFL-CIO,)	
)	
Respondent,)	
and)	
)	
INTERNATIONAL BROTHERHOOD OF)	Case No. 13-CD-802
TEAMSTERS, LOCAL 703,)	
)	Case No. 13-CD-803
Respondent,)	
and)	
)	
PEDERSEN COMPANY,)	
)	
Charging Party/Employer,)	
and)	
)	
UNITED UNION OF ROOFERS, WATER-)	
PROOFERS & ALLIED WORKERS,)	
LOCAL 11,)	
)	
Party-in-Interest.)	

POST-HEARING BRIEF OF PEDERSEN COMPANY

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POST-HEARING BRIEF OF PEDERSEN COMPANY

I. STATEMENT OF THE CASE

This proceeding arises from jurisdictional disputes concerning the performance of rooftop landscape work at the following construction sites: The Southwest Area Middle School located at 3510 West 55th Street, Chicago, Illinois ("SWAMS"), and the Benito Juarez High School located at 2150 S. Laflin Street, Chicago, Illinois ("Benito Juarez"). (See Bd. Exh. 2 – Stipulations.)¹ Paul F. Pedersen Company, d/b/a Pedersen Company ("Pedersen" or the

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 Pedersen

"Employer"), assigned the disputed rooftop 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"). (Tr. 81-82, 110.) Local 150 and Local 703 are the certified joint representatives of Pedersen's landscape construction employees. (Bd. Exh. 2, ¶ 9; Bd. Exh. 4; Tr. 43-47.) 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 Pedersen is bound by virtue of its membership in the ILCBA. (Bd. Exh. 2, ¶ 10; Er. Exhs. 1-3; Tr. 43-44, 50-51, 252-253.)

The United Union of Roofers, Waterproofers & Allied Workers, Local 11 ("Local 11" or the "Roofers") subsequently claimed the right to perform the disputed work at the SWAMS and Benito Juarez sites. (Bd. Exh. 2, ¶¶ 6.) Pedersen has no collective bargaining agreement or relationship with the Roofers. (Bd. Exh. 2, ¶ 11; Tr. 54, 253-254.) In response to the claims by the Roofers, Local 150 and Local 703 notified Pedersen of their continued competing claims to the disputed work and intention to engage in any and all means, including picketing, to enforce and protect their work assignment if Pedersen reassigned any of the disputed work to members of the Roofers. (Bd. Exh. 2, ¶ 8; Bd. Exh. 3.)

On July 6, 2009, Pedersen 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), 1(d).) The charges allege that Local 150 and Local 703 unlawfully threatened to picket or strike the SWAMS and Benito Juarez worksites with an object of forcing Pedersen to assign work to employees represented by Local 150 and Local 703, rather than employees of any other

Company are designated as "Er. Exh. ____." Exhibits entered by Local 150 and Local 703 are designated as "Respondents Exh. ____." Exhibits entered by the Roofers are designated as "Roofers Exh. ____."

labor organization, trade, class or craft. On July 16, 2009, the Regional Director issued a consolidated Notice of Hearing pursuant to Section 10(k) of the Act to determine the jurisdictional disputes concerning the disputed rooftop work at the SWAMS and Benito Juarez sites. (Bd. Exh. 1(g).) The hearing was held before Hearing Officer Cathy Brodsky on July 30 and July 31, 2009.

This post-hearing brief is submitted on behalf of Pedersen in support of its position that: (1) these disputes are properly before the Board for 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 disputes. 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. Pedersen's Business And Operations

Pedersen is an Illinois corporation which has been engaged in commercial landscape construction and maintenance in Chicago and the surrounding six-county area since 1994. (Bd. Exh. 2, ¶ 4; Tr. 37-39, 41.) Pedersen's customers include general contractors, developers,

municipalities, public works departments and school districts. (Tr. 39.) Pedersen performs approximately seventy-five landscape construction projects per year in connection with commercial developments such as office parks, multi-use buildings, fire stations, libraries and schools. (Tr. 39, 41.) At the time of the 10(k) hearing, Pedersen employed approximately twenty-five employees. (Tr. 41.)

B. Pedersen's ILCBA Membership And Collective Bargaining Relationships

Pedersen is one of fifteen landscape construction companies which are members of the ILCBA. (Bd. Exh. 2, ¶ 10; Tr. 43-44, 203, 251-252; Er. Exh. 1, Exh. A.) Pedersen has been a member of the ILCBA since 1994. (Tr. 43.) The ILCBA negotiates and administers collective bargaining agreements with the unions representing the member companies' bargaining unit employees. (Tr. 43, 186-188, 203-204, 250.) All of the ILCBA members, including Pedersen, are bound to the ILCBA's collective bargaining agreements by virtue of their membership in the ILCBA. (Bd. Exh. 2, ¶ 10; Tr. 43-44, 50-51, 252-253.)

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. 43-46, 186-187; Er. Exh. 1, p. 1.) The ILCBA has negotiated successive Plantsmen Agreements with Local 150 and Local 703 since mid-2004, when they were certified as the joint representatives of the above-referenced employees following a Board-conducted secret ballot election. (Bd. Exh. 2, ¶ 9; Bd. Exh. 4; Tr. 43-47; Er. Exhs. 1-2.) Approximately one hundred ten landscape construction

companies, including the ILCBA members, are bound by the Plantsmen Agreement. (Tr. 188-192; Respondents Exh. 2.) Pedersen has between fifteen and eighteen employees covered by the Plantsmen Agreement. (Tr. 53.)

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. 50, 187-188; Er. Exh. 3, p. 2.) Over three hundred forty companies, including the ILCBA members, are bound by the Operators Agreement. (Tr. 187-192; Respondents Exh. 3.) Pedersen's landscape equipment operators have been covered by the Operators Agreement since 1994. (Tr. 53.) Pedersen has three employees covered by the current Operators Agreement. (Tr. 53.)

The ILCBA never has had any collective bargaining relationship or agreement with the Roofers. Pedersen similarly never has had any such relationship or agreement with the Roofers. (Bd. Exh. 2, ¶ 11; Tr. 54, 253-254.)

C. Pedersen's Subcontract For The SWAMS Project

1. Overview of the Project and Pedersen's Work

SWAMS is a new public middle school. (Tr. 55.) The general contractor for the SWAMS project is F.H. Paschen, SN Nielsen & Assoc. ("Paschen"). The owner of the project is the Public Building Commission of Chicago. (Tr. 55; Er. Exh. 4, p. 1.) On July 23, 2008, Pedersen signed a Subcontract Agreement to perform all of the ground-level and rooftop landscaping work at the SWAMS site as described in attached Schedule A. (Tr. 63-65, 79-81; Er. Exh. 4, Schedule A.)² The subcontract price is \$475,000, which is on the large end of the spectrum for Pedersen. (Tr. 63; Er. Exh. 1, p. 1.)

² Pedersen's President testified that there are three items listed on Schedule A that Pedersen did not perform on the SWAMS project: the flexible sheet roofing, metal flashing and trim, and roof accessories.

Pedersen's work under the SWAMS Subcontract Agreement includes all of the following:

1. Furnishing and installing a Green Grid modular roof system, including the green roof modules, green roof growth media, green roof plantings, green roof slip sheets, etc. (Tr. 63-65; Er. Exh. 4, p. 22, item 81; *see* Er. Exh. 6);
2. providing and installing all miscellaneous modular green roof components and accessories, including watering, weeding, herbicides, fungicides, insecticides, replanting, and repair work (Tr. 63-65; Er. Exh. 4, p. 22, item 82; *see* Er. Exh. 6, § 3.4);
3. furnishing and planting all shade trees, ornamental trees, shrubs, ornamental grasses, perennials, and groundcover as listed in the plant schedules and drawings (Tr. 64, 80; Er. Exh. 4, pp. 20-21, items 62-67);
4. furnishing and installing all low maintenance seeded lawn and repairing all existing lawn areas damaged during construction (Tr. 64, 80-81; Er. Exh. 4, p. 21, item 68);
5. furnishing and installing all soil, including top soil, root zone mix, structural soil, etc., as indicated on the soil depth chart (Tr. 64, 79; Er. Exh. 4, p. 21, items 69, 77);
6. furnishing and installing all filter fabric under the root zone mix (Er. Exh. 4, p. 21, item 70);
7. furnishing and installing all mulch (Er. Exh. 4, p. 21, items 71-72);
8. furnishing and installing all permeable pavers and all related sand, setting beds, steel edge restraints, and aggregate base courses (Tr. 64, 79-80; Er. Exh. 4, p. 21, items 73-76);
9. furnishing and installing all miscellaneous landscaping material, including water, fertilizer, tree watering bags, anti-transpirant, spoil binding agents, biostimulants, hydrogel, herbicides, pesticides, insecticides and fungicides (Er. Exh. 4, p. 20, item 60);
10. furnishing and installing all materials necessary for adequate drainage requirements in planting areas (Er. Exh. 4, p. 20, item 61);
11. providing all maintenance and watering of work performed under the subcontract (Er. Exh. 4, p. 20, item 58);

(Tr. 63-64, 67; Er. Exh. 4, p. 17.) That was not part of Pedersen's work; it was performed by a roofing contractor. (Tr. 67.)

12. furnishing and installing all site furnishings, including tree grates and frames, benches and bike racks (Tr. 64, 80; Er. Exh. 4, p. 22, item 78); and
13. providing for all unloading, hoisting and handling of materials and equipment required for all work performed under the subcontract (Er. Exh. 4, p. 18, item 29).

Under the SWAMS Subcontract Agreement, Pedersen is contractually responsible to "deliver, perform and maintain [the] green roof work so as to not damage and/or void the roof manufacturer's warranty." (Er. Exh. 4, p. 22, item 83.) Pedersen also must provide all required warranties and guarantees to coincide with the dates of final acceptance of the work as determined by the owner. (Er. Exh. 4, pp. 18, 20, items 12, 59.) This specifically includes, but is not limited to, a warranty on the plant materials contained in the modular trays. (*See* Er. Exh. 6, § 2.7 A; Tr. 73-74.)

2. The Green Grid Modular System

The Green Grid system at the SWAMS site was manufactured by Weston Solutions. (Tr. 65.) It consists of two-foot by four-foot flexible plastic trays, each three-and-one-half to four inches in depth, containing a lightweight soil mixture and ten plants. (Tr. 65-66, 69-70, 85-86.) The trays are newly planted just prior to installation. (Tr. 65-66, 73). The trays are installed on the rooftop over a protective sheet in a grid pattern "so that when you ... look at it from above, it looks like one big surface area of plants." (Tr. 65-66, 71.) The Green Grid system at the SWAMS site includes 11,080 square feet of planted area which covers approximately twenty-five to thirty percent of the roof. (Tr. 68.)

Prior to installation of the Green Grid system, the roof is inspected by a technical representative of the roofing installer or manufacturer to determine the adequacy of the roof surface to accept the modules. It is the owner's responsibility to determine the adequacy of the

roof to support the existing and proposed loads and to verify the integrity of the roof for water tightness. (Tr. 69, 74-78; Tr. 322-323; *see* Er. Exh. 6, § 1.2 B-C.)

Installation of the Green Grid system includes the following steps:

1. The pre-planted trays are received at the site on pallets. (Tr. 68-69.) The pallets are hoisted to the roof and set on plywood which serves to protect the roof and distribute the weight. (Tr. 68-69.)
2. Plants that have become loose during transport are replanted on-site. (Tr. 69.) In addition, the plants are inspected to see how dry they are and if they need immediate watering. (Tr. 69, 72-73; *see* Er. Exh. 6, § 2.7.)
3. The roof is swept to remove debris that might interfere with laying of the trays. (Tr. 68-69; *see* Er. Exh. 6, § 3.2 B.)
4. A protective sheet is placed on top of the areas of the roof where the trays will be installed. (Tr. 69-70, 86.) The protective sheet is made of a heavy woven fabric that comes in twenty foot-wide rolls. It is permeable and allows water through for drainage. (Tr. 71-72, 85-86.) The protective sheet is rolled out on the roof and cut to the appropriate size with a scissor. (Tr. 71-72, 87-88.) It is not fastened to the roof in any way, such as with staples or nails. It is held down by the trays that will be installed on top of it. (Tr. 72.)
5. The trays are carried from the staging area and are manually placed on top of the protective sheet to form the green roof. (Tr. 70-73, 84-85, 88-89; *see* Er. Exh. 6, §3.3 B.)
6. The trays are watered, sprayed, and maintained throughout a one-year period leading to final inspection and acceptance by the owner. (Tr. 70-73; *see* Er. Exh. 6, §§ 3.3 B., 3.4 A-B, 3.5 A-B.)

D. Pedersen's Subcontract For The Benito Juarez Project

Benito Juarez is a public high school. (Er. Exh. 7.) The general contractor for the Benito Juarez project is Paschen. The owner of the project is the Board of Education of the City of Chicago. (Er. Exh. 7, p. 1.) On July 24, 2008, Pedersen signed a Subcontract Agreement to provide all labor, material and equipment required to furnish and install a Green Roof system (including all related plantings, products, components and accessories) at the Benito Juarez site.

(Tr. 89-93; Er. Exh. 7, Schedule A; *see* Er. Exh. 8.)³ The subcontract price is \$115,000. (Er. Exh. 7, p. 1.)

The Green Roof system at the Benito Juarez site is different from the Green Grid system at the SWAMS site. (Tr. 93.) The Green Roof system is not a modular system; it is not comprised of pre-planted trays. Instead, it consists of multiple layers or components that are installed on site, on top of the finished roof, to create a "rooftop garden." (Tr. 93-9, 96, 114; *see* Er. Exh. 7, Schedule A; *see* Er. Exh. 8.) Prior to installation of the Green Roof system, the roof is inspected by a technical representative of the roofing installer or manufacturer to determine the adequacy of the roof to accept the plantings. (Tr. 109; Er. Exh. 8, § 1.2 B; *see* Tr. 322-323.)

Pedersen's work with respect to the Green Roof system includes the following:

1. The materials and equipment required to install the Green Roof system are hoisted to the rooftop by crane and unloaded. (Er. Exh. 7, p. 17, item 9; Tr. 103, 111.)
2. Four-inch tall, L-shaped, rigid aluminum edging is manually set in place to frame the areas of the roof where the Green Roof system will be installed. (Tr. 96-97, 112-114; Er. Exh. 7, p. 18, item 26.) The edging is not attached to the roof. It is held in place by the materials that will be installed on top of it. (Tr. 97-98.)
3. A water retention mat, made of a permeable fabric material, is loose-laid on the roof to protect the roof membrane and retain water and nutrients needed for the plants that will be installed above it. (Tr. 98-99, 114; Er. Exh. 7, p. 18, item 27.)
4. A filter fabric is laid on top of the water retention mat. (Tr. 100; Er. Exh. 7, p. 18, item 28.) The filter fabric serves to prevent the gravel or growth media that will be installed above it from falling into, clogging and interfering with the drainage of the underlying water retention mat. (Tr. 101-102, 114.)
5. A thin layer of loose gravel, or "aggregate," is spread on top of the filter fabric to help with the drainage. (Tr. 102, 114; Er. Exh. 7, p. 18, item 30.)

³ Pedersen will perform all of the work shown on Schedule A to the Benito Juarez Subcontract Agreement, with the exception of the installation of the flexible sheet roofing. That is not part of Pedersen's work; Pedersen did not bid on it. (Tr. 92-93; Er. Exh. 7, Schedule A.)

6. A lightweight soil, or "planting medium," is manually installed on top of the aggregate, spread, and graded to the appropriate depth for the selected plant material, through the use of a flat-end shovel and a rake. (Tr. 103-105, 111-112, 114; Er. Exh. 7, p. 18, items 32-33.)
7. The selected plant materials are planted in a pattern to create full coverage of the green roof area. (Tr. 105-106; Er. Exh. 7, p. 18, items 34, 37.) Approximately 14,000 plants will be installed as part of the Benito Juarez Green Roof system. (Tr. 107.) All of plants must be installed within a 24-hour period from the time of shipment. (Er. Exh. 8, § 2.4 A.)
8. The plant materials must be inspected, watered and maintained from the time they are received at the site, during the installation process, and through the date of substantial completion. (Tr. 107-108; Er. Exh. 7, p. 18, item 36; Er. Exh. 8, §§ 2.4 B., 2.6, 3.4 B., 3.5.)
9. Plants that have not taken must be replaced or replanted on site. (Tr. 108-109; Er. Exh. 8, §§ 2.6, 3.5 B.1.)

E. The Work In Dispute

The disputed work in this case involves the rooftop work at the SWAMS and Benito Juarez sites, beginning above the roof's waterproofing membrane. (Bd. Exh. 2, ¶¶ 12-14, 2; Tr. 196-200.) At the SWAMS site, the dispute relates to the placement of the pre-planted vegetative modular trays and related components above the waterproofing membrane. At the Benito Juarez site, the dispute relates to the installation of the Green Roof system from above the waterproofing membrane, up to and including the placement of the growth medium (*i.e.*, soil).

The Roofers are not claiming any work after the placement of the growth medium, including the grading thereof. (Bd. Exh. 2, ¶ 14; Tr. 308.) The Roofers also are not claiming any of the other work awarded to Pedersen at the SWAMS or Benito Juarez sites, including planting, watering and maintaining the plant materials. (Bd. Exh. 2, ¶¶ 12-15; Tr. 327.) Local 150 and Local 703, on the other hand, are claiming all such work. (Bd. Exh. 2, ¶ 12; Tr. 197-200, 237-241, 244.)

F. Pedersen's Assignment And Preference Regarding Performance Of The SWAMS And Benito Juarez Work

Pedersen assigned all of the landscape construction work covered by the SWAMS and Benito Juarez Subcontract Agreements – including the both the disputed non-disputed work – to employees represented by Local 150 and/or Local 703. (Tr. 81-82, 110.) Local 150 and Local 703 are the Board-certified representatives of Pedersen's plantsmen, lead plantsmen, landscape helpers and installers. (Bd. Exh. 2, ¶ 9; Bd. Exh. 4; Tr. 43-47; Er. Exhs. 1-2.) Pedersen has a longstanding collective bargaining relationship with Local 150 and Local 703, through the ILCBA, and is bound by the current Plantsmen and Operators Agreements. (Bd. Exh. 2, ¶ 10; Tr. 43-44, 50-51, 53, 252-253.)

Pedersen 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 and Operators Agreements. (Tr. 54, 120-131.) Pedersen has used employees represented by Local 150 and/or Local 703 to install and maintain three other green roof systems (besides the SWAMS and Benito Juarez projects) since 2002. (Tr. 121-131; Er. Exh. 5.) These systems covered over 11,000 square feet of roofs and other elevated structures. (Tr. Tr. 121-131; Er. Exh. 5.)

Pedersen performs its landscape construction work with crews consisting of an equipment operator, a plantsman, a lead plantsman (depending on the size of the crew), and a landscape helper, all of whom are represented individually or jointly by Local 150 and/or Local 703. (Tr. 53-54, 141.) The equipment operator serves as the crew foreman, and 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. 51-54; Er. Exh. 3, pp.10-11.)

The disputed work at the SWAMS and Benito Juarez sites is covered by the Plantsmen and Operators Agreements. (Tr. 40-41, 44-47, 120, 237-240, 242-243, 275-281.) Article 7, Section 1 of the Operators Agreement generally defines the work covered by the Agreement as operation of the equipment listed therein "on all commercial landscape construction projects." (Er. Exh. 3, p. 7.) In addition, Article 7, Section 1(b) of the Agreement 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.

(Er. Exh. 3, 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, ..." (Er. Exh. 1, p. 2.) It also contains specific language covering various elements of the work involved in installing Green Grid and Green Roof 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.

(Er. Exh. 1, 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. 46, 139, 276-277; Er. Exh. 1, 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. 40-41, 201, 237-238, 277; Er. Exh. 1, pp. 2-3.) Furthermore, testimony presented at the 10(k) hearing establishes that the disputed work at the SWAMS and Benito Juarez sites – including installation of drainage layers, installation of filter fabric, and placement of soil – is the same as work regularly performed by Pedersen's Local 150 and Local 703-represented employees on ground-level landscape construction projects. (Tr. 133-137.) This also is true with respect to all of the related work to be performed by Pedersen in connection with the installation of the Green Grid and Green Roof systems, including grading the soil, installing the plant material, and maintaining and inspecting the plants. (Tr. 136-137.)⁴

Pedersen started its work on the SWAMS project in late May or early June 2009. (Tr. 82.) Ninety-nine percent of that work, including the disputed work, was completed as of the date of the 10(k) hearing. (Tr. 82-83.) Pedersen performed the work with one to two crews comprised of Local 150 and Local 703-represented employees. (Tr. 83-84.) Pedersen's work on the Benito Juarez project had not yet begun as of the date of the 10(k) hearing. The work was scheduled to start in September 2009, with a projected completion date of mid-October 2009. (Tr. 110.) It is

⁴ Eric Moore is the President of Moore Landscapes, Inc., a landscape construction company that is a member of the ILCBA. He has been the President of the ILCBA since 2003; has served on the ILCBA's negotiating committee since the mid-1980's; and has been actively involved in the negotiation of the ILCBA's collective bargaining agreements, including the Plantsmen and Operators Agreements. (Tr. 247-251, 278-279.) Mr. Moore testified that the parties to the Plantsmen and Operators Agreements never thought they needed to specify the locations (*e.g.*, rooftops) where covered work was to be performed because landscape contractors had performed rooftop work for many, many years under the general scope of work provisions contained in those Agreements. (Tr. 279-280.) However, when the Roofers came on the scene and started claiming rooftop work in the summer of 2008, the parties thought it might be wise to be more specific. Therefore, they included the more specific language in the scope of work provision in the current Operators Agreement, which went into effect on January 1, 2009. (Tr. 279-280; Er. Exh. 3, p. 8.) The parties plan to adopt similar language when they negotiate the successor to the current Plantsmen Agreement in the winter of 2009. There was no reason to do so previously, when they negotiated the current Plantsmen Agreement, because landscape contractors regularly were performing rooftop construction projects without any competing claims by the Roofers. (Tr. 280-281.)

Pedersen's intention to perform the work on the Benito Juarez project with a five-person crew comprised of Local 150 and/or Local 703-represented employees. (Tr. 110-111.)⁵

It is Pedersen's preference to perform the disputed work on the SWAMS and Benito Juarez sites with employees represented by Local 150 and Local 703. (Tr. 82, 110, 157.) These employees possess the skills and experience needed to perform the work involved in installing the Green Grid and Green Roof systems. (Tr. 137-140.) This includes skills and experience relating to the installation of landscape drainage, filter fabrics and soil (Tr. 133-137), and horticultural skills needed to transport, install, water and maintain live plants (Tr. 137-139).

The job descriptions in the Plantsmen Agreement show that lead plantsmen, plantsmen, and landscape helpers must be able to perform these and other duties related to Pedersen's work at the SWAMS and Benito Juarez sites. (Tr. 139; Er. Exh. 1, pp. 3-7.) Pedersen'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 Green Roof systems. They also are provided with more formal, classroom-style training and opportunities to develop their skills and receive related promotions and pay increases. (Tr. 140-145, 155-157, 175-176.)

⁵ In a letter to Paschen dated June 24, 2009, Pedersen agreed to use only Local 150-represented employees to install the green roof at the Benito Juarez site. However, the letter expressly states that Pedersen did so only to enable the work on the site to proceed without interruption in the face of a dispute regarding the application of the Chicago Public Schools Multi-Project Labor Agreement to the work being performed at the site and the propriety of using employees represented by Teamsters Local 703 to perform such work; that by providing the agreement, Pedersen was not making any admissions regarding any of those subjects or waiving any rights or claims with respect thereto; and that, in the event the Roofer's Union contested Pedersen's ability to complete all of the work with members of Local 150, Pedersen reserved the right to revoke the agreement and to use any employees it deemed appropriate to complete the work. (Tr. 166-168, 174-175; Er. Exh. 12.) The Roofers subsequently contested Pedersen's ability to complete the work with members of Local 150 through the unsuccessful jurisdictional grievance that it filed with the Joint Conference Board of the Chicago & Cook County Building and Construction Trades Council. (*See* Roofers Exh. 4.) The dispute regarding the application of the Multi-Project Labor Agreement is discussed further in Section III.A.3., below.

The Plantsmen Agreement contains specific provisions designed to incent and reward employees who develop and expand their relevant job skills. (Tr. 141-142; Er. Exh. 1, 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.141-142; Er. Exh. 1, pp. 5-6.)

The Plantsmen Agreement also includes a Certified Landscape Technician Program through the Illinois Landscape Contractors Association ("ILCA"), the state trade association for landscape contractors. (Tr. 281-287; Er. Exh. 1, pp. 8-9.) The program consists of training sessions conducted by the ILCA or the employer, and a series of related written and hands-on tests covering such topics as grading, drainage, planting, plant sensitivity, horticultural practices, equipment operation, and safety. (Tr. 282.) 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. 282-285; Er. Exh. 1, pp. 8-9.)

Pursuant to the Subcontract Agreements for the SWAMS and Benito Juarez projects, Pedersen is required to take reasonable safety precautions with respect to its covered work and to comply with all applicable laws, ordinances, rules and regulations, including applicable OSHA standards. (Er. Exh. 4, p. 10, § 19, p. 20, item 50; Er. Exh. 7, p. 9, § 19, p. 17, item 7.) In March 2009, Pedersen sent two of its Local 150-represented employees to a one-day green roof safety training course conducted by the Chicagoland Construction Safety Council under the joint sponsorship of the ILCA and Local 150. The employees included the equipment operator/foreman and lead plantsman on the SWAMS project. (Tr. 145-146, 149-150; Er. Exh. 10) The training covered all aspects of green roof work, including fall protection, cranes and

rigging, and related OSHA requirements. (Tr. 146-147.) Pedersen's Local 150 and Local 703-represented employees also regularly attend 10-hour OSHA safety training classes conducted at the Elgin Community College Business Center under the sponsorship of the Fox Valley Associated General Contractors. (Tr. 143-144, 153-156; Er. Exh. 11.) The employees who attend these safety programs impart their knowledge to other employee who they work with or supervise during weekly, job-site safety meetings. (Tr. 156-157.)

Pedersen's skilled and trained crews of Local 150 and Local 703-represented employees are able to competently perform all of Pedersen's work on the SWAMS and Benito Juarez projects, including: (1) the disputed components of the installation of the Green Grid and Green Roof systems, (2) the related non-disputed work, such as receiving and staging all of the materials on the jobsites, 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) the other non-disputed work on the projects, such as installing site furnishings, permeable pavers, and ground-level plants. This creates substantial economies and operational efficiencies for Pedersen and the overall project. (Tr. 157-161; *see* Tr. 269-273.)

Pedersen is able to respond quickly and effectively to the schedule changes and disruptions that often occur on construction sites by moving its employees to another part of the project. As a result, Pedersen can keep the employees working and avoid idle time. (Tr. 157-159; *see* Tr. 269-273.) 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. 52, 159-160; *see* Tr. 271, 273.) According to Pedersen's President, it is "quite common" to assign the equipment operators to perform duties as landscape plantsmen when they are not needed to perform their equipment operator's responsibilities. "[T]he dual function of the

people," enables Pedersen to "keep them going on the job," instead of "sending them home and not having work." (Tr. 52; Tr. 159-160, 271, 273; Er. Exh. 3, Article 7, Section 6, pp. 10-11.)

Because employees represented by Local 150 and Local 703 can perform all of Pedersen's work on the projects, Pedersen does not have to hire different people or a different company to perform parts of the work. As such, Pedersen can avoid having to absorb or pass-on the additional costs associated with bringing in another company that will build a profit into its prices. It also can avoid the scheduling problems associated with having multiple companies working on a jobsite. In addition, if Pedersen is unable to use its own trained employees to perform the work, it likely will need to devote additional time to supervising the other company's workers to make sure they are meeting the project specifications. (Tr. 158-160.)

If Pedersen was unable to freely interchange its personnel on the jobsites, it likely would have to send employees home due to a lack of work. (Tr. 160.) Furthermore, if Pedersen was unable to assign the disputed work on the Benito Juarez project to its Local 150 and/or Local 703-represented employees, it would be forced to lay off the four to five crew members who would have performed that work. In the current economy, Pedersen does not have other work to keep them busy. (Tr. 161.)

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

James McNally, Tom Stiede and Eric Moore presented testimonial and documentary evidence at the 10(k) hearing regarding the area and industry practice with respect to the assignment of rooftop landscape construction work (including the installation of Green Grid and Green Roof systems) by landscape construction companies:

1. Mr. McNally is the Vice President of Local 150. He has held that position for one year. Prior to that, he served as the Assistant to the President of Local 150 for four years and as a Local 150 Business Agent for twelve

years. Mr. McNally's duties as Vice President include overseeing Local 150's landscape division and negotiating Local 150's landscape construction agreements. (Tr. 181-183, 186-187.)

2. Mr. Stiede has served as the Secretary-Treasurer of Local 703 since 1995. In that position, he runs the day-to-day affairs of the Local 703 and is involved in negotiating and enforcing its landscape construction agreements. (Tr. 231-233.)
3. Mr. Moore is the President of Moore Landscapes, Inc., a landscape construction company that is a member of the ILCBA. He has held various supervisory and managerial positions with Moore Landscapes since 1981. Mr. Moore has been the President of the ILCBA since 2003; has served on the ILCBA's negotiating committee since the mid-1980's; and has been actively involved in the negotiation of the ILCBA's collective bargaining agreements with Local 150 and Local 703. (Tr. 247-251, 278-279.) Hearing Officer Brodsky acknowledged Mr. Moore's qualifications as an industry "expert" with "knowledge in the field, regarding the type of work that's done, ... who does it, and who's represented by it." (Tr. 255, 264-265.)

Mr. McNally, Mr. Stiede and Mr. Moore testified that it has been the practice for unionized landscape construction companies, including ILCBA and non-ILCBA members, to perform green rooftop projects using employees represented by Local 150 and Local 703. (Tr. 195-196, 198-199, 241-242, 251-253.) Mr. Moore testified that despite his many years of experience in the industry, he has no knowledge of any landscape construction company in the greater metropolitan Chicago area which has a collective bargaining agreement with the Roofers. (Tr. 254.) Mr. Moore also testified that although 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. (*See* Tr. 279-280.)

Mr. Moore testified about his involvement 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. 257-263.) Fourteen landscape contractors responded to Mr. Moore's information request by providing data sheets and photographs (where available) of

green roof projects performed by their respective companies. Mr. Moore compiled the information and put it in book with a separate tab for each responding company. (Tr. 257-259.) The fourteen responding companies, alone, performed a total of one hundred nineteen rooftop projects (including Green Grid and Green Roof systems), covering nearly one million square feet of planted area, with employees covered by collective bargaining agreements with Local 150 and/or Local 703. (Tr. 259-263; Er. Exh. 13–Summary of Elevated Vegetative Projects.)⁶

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).

⁶ Although Hearing Officer Brodsky acknowledged that Pedersen had established a foundation for introduction of the book containing the data sheets and photographs for the one hundred nineteen green roof projects listed on Employer Exhibit 13 (Tr. 266), she refused to accept the book into evidence – presumably for the sake of "keeping the record concise." (Tr. 265.) However, she permitted Pedersen's attorney to present a detailed offer of proof, which appears at Tr. 267-269, 273-274.

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. The parties stipulated that 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. (Bd. Exh. 2, ¶¶ 6, 12-14; *see* Bd. Exh. 3.) It is undisputed that Local 150 and Local 703 used proscribed means to enforce their claims to the disputed work. In their July 6, 2009 letter to Pedersen, Local 150 and Local 703 threatened to engage in jurisdictional picketing at the SWAMS and Benito Juarez sites if Pedersen reassigned any of the disputed work to members of the Roofers. (Bd. Exh. 3; Tr. 116, 201-202, 246.) It is well-established that a threat to engage in conduct proscribed by Section 8(b)(4)(D) is sufficient to establish a violation. *Robbins Plumbing & Heating Contractors, Inc.*, 261 NLRB 482, 487 (1982).

The threat was a real one; it was perceived as such by Pedersen; and it placed Pedersen in the middle of the unions' jurisdictional dispute. (Tr. 116-119, 210-202, 246.) The Vice President of Local 150 testified that they "were concerned about Pedersen assigning the work to

somebody besides our members." (Tr. 202.) The Secretary Treasurer of Local 703 testified that they were prepared "to do what was necessary to retain [their] work ..., up to and including picketing Pedersen." (Tr. 246.) The Roofers have failed to produce "affirmative evidence that the threat was a sham or product of collusion." *Local 3, IBEW (Alliance Elevator Co.)*, 352 NLRB 1947 (2008). To the contrary, the evidence establishes that the July 6th letter was an arm's length communication made at a point when Pedersen was under substantial pressure from the general contractor to do what was necessary to avoid any disruptions of work on the SWAMS project. (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 Pedersen's President acknowledged that Pedersen's collective bargaining agreements with Local 150 and Local 703 contain a no-strike clause (Tr. 163), he testified as follows regarding the relationship between those agreements and the July 6th letter:

Well, if they send me a piece of paper [*i.e.*, the July 6th letter] and tell [me] this is what they're going to do, potentially this is what they may do whatever other pieces of paper [*i.e.*, the collective bargaining agreements] say. So, ... I worried about it and took it very seriously.

(Tr. 117-118.) Furthermore, it is well established that "the existence of a no-strike clause in a union's ... 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

"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); *Operating Engineers Local 150 (R&D Thiel)*, 345 NLRB 1137, 1140 (2005). See *Laborers Local 6 (Anderson Interiors, Inc.)*, 345 NLRB No. 62, slip op. at 3 (2008) (no method for voluntary adjustment existed where the employer was not bound to the dispute resolution mechanism even though the two competing unions were bound); *Carpenters Local 623 (E.P. Donnelly, Inc.)*, 351 NLRB 1417 (2007) (no method for voluntary adjustment existed where only one of the competing unions was a party to a project labor agreement containing a dispute resolution mechanism).

In this case, the Roofers moved to quash the notice of hearing on the basis that there is an agreed upon method for voluntary adjustment that applies to the work in dispute at the SWAMS and Benito Juarez sites. (Tr. 10.) Specifically, the Roofers asserted that because the projects allegedly were on property belonging to the Chicago Board of Education (the "CBOE"), they were covered by the CBOE's Multi-Project Labor Agreement ("PLA"), which provides that jurisdictional disputes shall be referred to the Joint Conference Board ("JCB") established by the Standard Agreement between the Construction Employers' Association (the "CEA") and the Chicago & Cook County Building & Construction Trades Council (the "Trades Council") for final and binding resolution. (Tr. 10-11; Roofers Exh. 1; Respondents Exh. 4.) The Roofers' argument lacks merit because, as will be shown, there is no scenario under which all of the parties to this dispute are bound by the PLA or the Standard Agreement.

Initially, it is clear that neither Pedersen nor Local 703 is bound by the Standard Agreement in the absence of an applicable and binding PLA. The Standard Agreement was entered into by and between the CEA and the Trades Council, and purports to be part of all agreements between employers which are members of the CEA and unions which are members

of the Trades Council. (Respondents Exh. 4, cover pages and Preamble at p. 1.) However, it is undisputed that Pedersen and the ILCBA are not members of the CEA, and that Local 703 is not a member of the Trades Council. (Tr. 41, 243, 331.)

The Standard Agreement provides that an employer may be bound if it is signatory to a collective bargaining agreement containing language that adopts or incorporates the Standard Agreement. (Respondents Exh. 4, Art. VII, p. 6, Art. VIII, paragraph 4.) However, it is undisputed that there is no such language in the ILCBA's collective bargaining agreements with Local 150 and Local 703 (Tr. 115, 193-194, 234-235; *see* Er. Exhs. 1-3.)

The Standard Agreement provides that an interested party present at a JCB hearing is deemed to accept the jurisdiction of the arbitrator and to be bound by the arbitrator's decision and the Standard Agreement, for that case only. (Respondents Exh. 4, Art. VII, paragraph 10.) The Roofers attempted to advance their claims to the disputed work on the SWAMS and Benito Juarez sites by filing jurisdictional grievances against Local 150 with the JCB. (Tr. 206-212; Tr. 305- Roofers Exhs. 3-5.) Hearings with respect to the grievances were conducted by Arbitrator James Cox on July 14, 2009. (Tr. 207-212; *see* Roofers Exhs. 4-5.) However, it is undisputed that Pedersen and Local 703 did not attend the arbitration hearings or otherwise participate in any of the related grievance proceedings. (Tr. 115-116, 230-231, 236-237; *see* Roofers Exhs. 4-5.) Furthermore, the Roofers admittedly did not send the underlying grievance to Local 703; Local 703 was not named as a party to any of the related grievance proceedings; Local 703 was not listed as an addressee or recipient on any of the JCB's related letters or notices; and Local 703 was not sent a copy of Arbitrator Cox's arbitration decisions. (*See* Roofers Exhs. 3-5; Tr. 338-339.)

Because Pedersen and Local 150 are not otherwise bound by the Standard Agreement, the Roofers are forced to rely upon the PLA to connect and bind Pedersen and Local 703 to the Standard Agreement. However, the Roofers' reliance on the PLA is misplaced for several reasons. First, it is clear that the PLA does not apply to the SWAMS project. The parties to the SWAMS Subcontract Agreement are Pedersen and Paschen. The CBOE is not a party to the Subcontract Agreement. (Er. Exh. 4, pp. 1, 40; Tr. 319.) The owner of the SWAMS project, as listed on the Subcontract Agreement, is the Public Building Commission of Chicago – not the CBOE. (Er. Exh. 4, p. 1; Tr. 320.) Moreover, the SWAMS Subcontract Agreement contains no reference to the PLA or any other voluntary mechanism for resolving jurisdictional disputes. (See Er. Exh. 4.)⁷ Arbitrator Cox relied upon these critical and undisputed facts in concluding that Pedersen was not stipulated to the Standard Agreement; that the work at the SWAMS site was not being performed under the PLA; and that, accordingly, he lacked jurisdiction over the matter. (Roofers Exh. 5, p. 2; Tr. 337.)

Second, although the PLA generally applies to the Benito Juarez project, neither the PLA nor the Standard Agreement are binding on Local 703. Local 703 is not a signatory to the PLA and is not included on the list of unions covered by the PLA. (Tr. 246, 331-332; Roofers Exh. 2; Er. Exh. 7, Schedule A, p. 30; see Tr. 194, 235-236.) In fact, the Roofers admitted that Local 703 was not a party to or otherwise bound by the PLA and that, for this reason, they attempted to have Local 703 removed from the SWAMS and the Benito Juarez projects. (Tr. 331-332.)

Roofers Business Agent, Arthur Lucas, testified as follows in response to questioning by Pedersen's attorney:

⁷ This is markedly different from the Benito Juarez Subcontract Agreement, which expressly references both alternative dispute resolution mechanisms and the PLA. (See Er. Exh. 7, ¶ 21. b, pp. 10-11, Schedule E, p. 30.)

Q: Is Local 703, the teamster[s], a member of this multi-[project] labor agreement?

A: Not to my knowledge.

Q: Is Local 703 bound by the terms of the project labor agreement?

A: If you read the project labor agreement to work on any public school, you have to be bound to the project labor agreement.

Q: So, what's the answer to my question?

A: No, he's not a signatory to it.

Q: So, Local 703 is not bound to it?

A: Correct.

Q: Now, ... the roofers tried to get Local 703 bounced off of the – Juarez project because they're not bound to this project labor agreement. Correct?

A: Correct.

Q: And did the roofers try to do the same thing with respect to the Southwest Area Middle School Project?

A: I filed the appropriate complaint sheet according to the project labor agreement.

Q: Okay. Because you did not believe that 703 was bound to that agreement and therefore, in your position, should not be performing work on those sites.

A: Correct.

(Tr. 331-332.)

The Roofers cannot have it both ways: asserting that Local 703 is not bound by the PLA so as to be able to perform the disputed work, while also asserting that Local 703 is bound by the

PLA's procedures for the resolution of jurisdictional disputes. The bottom line is that Local 703 is not bound to the PLA, or the Standard Agreement, at all.⁸

Recognizing as much, the Roofers have advanced yet another argument in support of their desperate efforts to avoid a jurisdictional dispute determination by the Board. They argue that even though Local 703 is not directly bound by the PLA, it is indirectly bound by virtue of its status as a joint representative, along with Local 150, of the employees covered by the Plantsmen Agreement. (Tr.10-11, 14.) In other words, Local 703 is bound by the PLA and the Standard Agreement simply because its joint bargaining representative, Local 150, is bound by those agreements. This argument cannot withstand scrutiny.

Local 150 and Local 703's "joint representative" status serves only to define their relationship with, and obligations to, the bargaining unit employees who elected them and whom they jointly represent under the Plantsmen Agreement. (*See* Er. Exh. 1, Art. I, p. 1; Bd. Exh. 4.) There is absolutely no legal or factual basis for concluding that by joining together to represent the employees in the bargaining unit, Local 150 and Local 703 created a broader agency relationship pursuant to which they each have the authority to bind the other to contracts external to the Plantsmen Agreement. Indeed, even as it relates to the administration of the Plantsmen Agreement, Local 150 and Local 703 have separately defined roles: Local 150 serves as the

⁸ In the Benito Juarez case, Arbitrator Cox relied on specific provisions of the Subcontract Agreement which referenced alternative dispute resolution mechanisms and the PLA, and listed the CBOE as owner of the project, to conclude that he had jurisdiction over the matter. (Roofers Exh. 4, pp. 1-2.) In so doing, however, the Arbitrator did not expressly find that Local 703 was bound by the PLA. In fact, he specifically acknowledged that Local 703 was "not stipulated to the PLA." (Roofers Exh. 4, p. 3.) Arbitrator Cox apparently concluded either (1) that he did not need all of the parties to the dispute to be bound by the PLA in order to have jurisdiction over the matter, or (2) that the only parties to the dispute were Local 150, Local 11 and Pedersen, all of whom were bound by the PLA. The facts and governing legal principles are different in the case presently before the Board. Local 703 is a party to the dispute and in order for the Board to defer to a voluntary method of adjustment, all of the parties must be bound by it. Because Local 703 is not bound by the PLA, the Board must proceed to a determination of the merits of the jurisdictional dispute.

exclusive bargaining representative for the bargaining unit employees in the classifications of plantsmen, lead plantsmen, equipment mechanic, small equipment mechanic and shop helper. Local 703 serves as the exclusive bargaining representative for the bargaining unit employees in the classifications of truck driver, water truck operator, landscape helper and installer. (*See* Ex. 1, Art. I, pp. 1-2.)

Local 703 remains a separate legal entity, which is not a signatory to the PLA, which has not incorporated the Standard Agreement into its collective bargaining agreement with the ILCBA, and which has not otherwise agreed to be bound by the Standard Agreement or submitted to the JCB's jurisdiction. The Roofers failed to produce any evidence that Local 703 assigned or delegated any of its rights or duties to Local 150, or that it authorized Local 150 to act on its behalf in relation to the PLA or the Standard Agreement. To conclude that Local 703 is bound to the PLA and the Standard Agreement solely by virtue of its "joint representative" relationship with Local 150 under the Plantsmen Agreement would fly in the face of fundamental principles of contract law, agency law and due process.

In sum, the evidence establishes that neither Pedersen nor Local 703 was bound to any voluntary method for the adjustment of jurisdictional disputes relative to the work on the SWAMS project, and that Local 703 was not bound to any dispute resolution mechanism relative to the work on the Benito Juarez project. Pedersen and Local 703 both are parties to these jurisdictional disputes. Because all parties are not bound to an agreed-upon method for voluntary adjustment, there is nothing to prevent the Board from proceeding to the merits of these disputes.

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 Pedersen's landscape construction labor force, including lead plantsmen, plantsmen, landscape helpers and installers. Pedersen 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 Pedersen's employees and neither Pedersen nor the ILCBA has any collective bargaining relationship or agreement with the Roofers.

The Operators Agreement expressly refers to and covers the disputed rooftop work. (Er. Exh. 3, 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 and Green Roof systems, including "applying finish landscape materials on subgrade prepared by others." (Er. Exh. 1, pp. 2-3.) There is no limitation in the Agreement regarding the type of subgrade on which finish landscape materials may be applied or the location where that work is performed. And a roof membrane clearly is subgrade prepared by others. This work also is included in the job descriptions for lead plantsmen, plantsmen, installers and landscape helpers set forth in the Plantsmen Agreement. (Er. Exh. 1, pp. 3-7.)

The evidence presented at the hearing establishes that the parties have interpreted the Plantsmen Agreement as covering the disputed work. (Tr. 40-41, 44-47, 237-243, 275-281.) Pedersen assigned the disputed work to employees covered by the Plantsmen Agreement and completed the work on the SWAMS project with those employees. (Tr. 81-82, 110.) Furthermore, Pedersen and other landscape construction contractors traditionally have performed all types of rooftop construction projects using employees covered by the Plantsmen Agreement. (Tr. 121-131, 195-196, 198-199, 241-242, 251-253, 257-263; Er. Exhs. 5, 13.)

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. 7.) However, the above-cited Board decisions demonstrate that any such attempt would be fruitless because the assigning employer, Pedersen, 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, Pedersen'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 Local 703.

3. Employer Preference

The Board normally accords employer preference considerable weight. *Stobeck Masonry, Inc.*, 267 NLRB 284, 287, n. 8 (1983); *Machinists Lodge 776 (Lockheed Martin)*, 352 NLRB 402 (2008); *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).

It is undisputed that Pedersen prefers to continue his current practice of assigning the disputed work to employees represented by Local 150 and Local 703. (Tr. 82,110, 157.) Pedersen has established collective bargaining relationships and agreements with Local 150 and Local 703. Pedersen'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 Pedersen, the employees, and the construction projects on which they work.

The record also establishes the preference of the general contractor, Paschen, with respect to the assignment of work on the SWAMS and Benito Juarez projects. The Roofers admit that Paschen elected to separate the rooftop work on each of the projects. It assigned the installation of the roof structure and waterproofing to roofing contractors. It assigned the disputed green

roof work to Pedersen, a landscape contractor, along with all of the other landscaping work included in the applicable Subcontract Agreements. (Tr. 306-307, 332-335; Er. Exhs. 4, 7.)

The preferences of Pedersen and Paschen 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.

4. Employer Past Practice

The evidence establishes that Pedersen's assignment of the disputed work to employees represented by Local 150 and Local 703 was consistent with its past practice of assigning rooftop landscape construction work to such employees. It is undisputed that Pedersen had completed three prior green roof projects with Local 150 and Local 703-represented employees. (Tr. 121-131; Er. Exh. 5.) It also is undisputed that Pedersen never has assigned any of its green roof work to the Roofers. (Tr. 122-123.) 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

Pedersen, Local 150 and Local 703 presented extensive evidence establishing that the area and industry practice is for landscape construction contractors to install Green Grid and Green Roof Systems with employees represented by Local 150 and Local 703. This included testimonial and documentary evidence regarding one hundred nineteen projects, going back to

2002, on which such work was performed by Local 150 and Local 703-represented employees. (Tr. 121-131, 195-196, 198-199, 241-242, 251-253, 257-263; Er. Exhs. 5, 13.)

In response, the Roofers presented evidence regarding only three green roof projects allegedly performed by roofing contractors within the past two years. (Tr. 309-311.) Furthermore, the evidence was vague with respect to the particular work done on these projects and failed to affirmatively establish that the work was done by employees represented by Local 11. The Roofers' evidence was insufficient to refute or counterbalance the detailed and extensive evidence of area and industry practice presented by Pedersen, Local 150 and Local 703. Accordingly, this factor also favors and award of the disputed work to employees represented by Local 150 and Local 703.

6. Economy and Efficiency of Operations

The evidence demonstrates that Pedersen's Local 150 and Local 703-represented employees possess the skills and experience required to perform all of the disputed and non-disputed work at the SWAMS and Benito Juarez sites. (Tr. 133-140.) This fact, combined with Pedersen's established crew structure and the flexibility afforded by the Plantsmen and Operators Agreements, creates substantial economies and efficiency of operations. Pedersen can avoid the delays and other inefficiencies associated with scheduling work to be performed on-site by multiple trades and devoting additional time to supervising the work of another contractor's employees who lack the skills and experience of Pedersen's landscape employees. Pedersen 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. 157-161; *see* Tr. 269-273.) If Pedersen were required to relinquish the disputed work to the

Roofers, these efficiencies would be lost and it would incur increased costs associated with a roofing contractor's profit mark-up. (Tr. 160-161.)

Employees represented by the Roofers can perform only discrete and limited portions of the work included in Pedersen's Subcontract Agreements. The Roofers do not perform – and do not claim in this proceeding – the vast majority of the work being performed by Pedersen at the SWAMS and Benito Juarez sites. They admittedly would have to subcontract all of the non-disputed work, including the work necessary to complete the installation of the Green Grid and Green Roof systems, to a landscape contractor. This specifically includes, but is not limited to, spreading and grading the soil, installing the plants, and maintaining the plants. (*See* Tr. 308, 322, 327-329.) In contrast, Pedersen'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. (Tr. 157-161.)

The economy and efficiency of operations factor favors an award of the disputed work to Pedersen'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 Pedersen'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 SWAMS and Benito Juarez sites as a result of regular on-the-job training, formal classroom training, regular performance of similar work on rooftop and ground-level projects, and attendance at general and rooftop-specific OSHA training courses. (Tr. 133-137-145, 155-157, 175-176.) Moreover, Pedersen's Local 150 and Local 703-represented employees actually have installed three green roof systems, in addition to those at the SWAMS and Benito Juarez sites. (Tr. 121-131; Er. Exh. 5.) There is no evidence in the record of any problems with the quality of their workmanship on any of these projects. (See Tr. 130.)

The Roofers provided testimony regarding an extensive apprenticeship training program. (Tr. 291-293.) However, the testimony failed to mention any classes or training dealing with the installation of green roofs. It also failed to establish the extent to which (if at all) the training program covers any of the specific skills needed to perform the disputed work. (See Tr. 291-293.) In any event, the testimony presented at the hearing shows that the disputed work does not require technical roofing skills or experience. It does not involve tampering with or adjusting the roof in any way. (Tr. 139-140.)

As described by Pedersen's President, the disputed work relating to the installation of the Green Grid and Green Roof systems involves a series of steps requiring: (1) using a broom to sweep clean the surfaces where the modular trays or other green roof components will be installed; (2) using a scissor to cut the rolls of protective sheets, water retention fabric, and filter

fabric to the appropriate dimensions; (3) rolling out or loose-laying these materials in the appropriate layers; (4) manually spreading a thin layer of gravel; and (5) manually bringing in and placing the planting media. (Tr. 69-72, 86-88, 98-102, 114.) These are basic skills possessed by Pedersen's Local 150 and 703-represented employees, who have utilized them in the installation of other green roof systems. Importantly, Pedersen's employees also possess the complementary landscaping and horticultural skills, experience and licenses, which the Roofers' members do not possess, that are critical to the creation of a viable living rooftop environment. (Tr. 133-140; *see* Tr. 308, 322, 327-329.) Therefore, the relative skills factor favors awarding the disputed work to employees represented by Local 150 and Local 703.

8. Gain or Loss of Employment

The undisputed evidence establishes that reassignment of the disputed work to the Roofers would result in layoffs for the four-to-five person crew which is scheduled to perform the disputed work at the Benito Juarez site. (Tr. 161.) 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 site because they no longer would have the ability to move to the disputed work when their non-disputed work is postponed or reduced due to scheduling changes or other disruptions at the site. (*See* Tr. 157-161, 269-273.) Accordingly, this factor also favors an award of the disputed work to employee represented by Local 150 and Local 703.

9. Other Considerations

a. The PLA

The Roofers may assert that the PLA prevents the Board from making an affirmative award of the disputed work to employees represented by Local 703 because they could not

perform the work without violating the PLA.⁹ Such an argument would be a non-starter. First, project labor agreements are only relevant in 10(k) jurisdictional disputes when the employer is a party to the agreement covering the disputed work. *See IBEW Local 363*, 326 NLRB 1382 (1998) (after finding that the employer was not bound by the project labor agreement, the Board proceeded to award the disputed work to a union which also was not bound by the agreement). Because Pedersen is not bound by the PLA with respect to the SWAMS project, the PLA is arguably relevant only to the Benito Juarez project.

Second, the Board has held that a project labor agreement is not determinative of a jurisdictional award where, as here, there is a countervailing collective bargaining agreement supporting an award of the disputed work to a union that is not a party to the project labor agreement. In such a case, the Board will award the disputed work in accordance with the application and balancing of all of the relevant 10(k) factors, even if this results in an award in favor of a union whose members cannot perform the work under the terms of an applicable project labor agreement. This was exactly the result in *Carpenters Local 623 (E.P. Donnelly, Inc.)*, 351 NLRB 1417 (2007).

In *Donnelly*, the employer was bound by a project labor agreement that favored an award of the work to Local 27 of the Sheet Metal Workers and a collective bargaining agreement that favored an award of the work to Carpenters Local 627. Ultimately, the Board awarded the work to Local 627, contrary to the terms of the project labor agreement, because the factors of "employer preference, current assignment and past practice, and economy and efficiency of

⁹ Any such argument necessarily would be predicated on the assertion that Local 703 is not covered by or bound to the PLA, which would conflict with the Roofers' argument that all of the parties to the dispute are bound by the mechanism for resolving jurisdictional disputes set forth in the PLA. (*See* Section III.A.3. above.)

operations" weighed in favor of such an award. For these same reasons, the Board should award the disputed work in this case to Local 150 and Local 703.¹⁰

b. Prior arbitration awards

Over the objections of Pedersen, Local 150 and Local 703, the Roofers were permitted to introduce a copy of June 6, 2009 arbitration award issued by Arbitrator Steven Biereg in a case involving a jurisdictional dispute over the installation of a green roofing system on the Roosevelt Collection Project located at 949 S. Wells, Chicago, Illinois. (Tr.217-224; Roofers Exh. 6.) The arbitration was convened pursuant to the provisions of the Standard Agreement. The employer was Moore Landscapes, Inc. ("Moore"). The unions involved in the proceeding were Local 150, the Roofers, and Local 4 of the Laborers Union. (Roofers Exh. 6.) For the reasons set forth below, the Board should not consider the arbitrator's decision when determining the merits of the current jurisdictional dispute.

Arbitrator Biereg's decision involved a different employer (Moore), at least one additional union (the Laborers), and a different project (Roosevelt Collection). By its terms, the decision is limited to the jurisdictional dispute on the Roosevelt Collection Project. (Er. Exh. 6, p. 2.) Neither Moore nor Local 703 attended the arbitration hearing. (Er. Exh. 6, p. 1.) In addition, the factors to be considered by an arbitrator when resolving a jurisdictional dispute under the Standard Agreement are substantially different from the Board's established 10(k) factors. (See Er. Exh. 6, p. 3; Respondents Exh. 4, Art. VI, pp. 4-5.) For example, the Standard Agreement does not include the certification, collective bargaining agreement, employer preference, or employer practice factors that are central to the Board's 10(k) analysis. See *United*

¹⁰ It bears noting that the Plantsmen Agreement would permit Pedersen to perform the disputed work only with employees represented by Local 150 if that was necessary. Although Article II (b) of the Plantsmen Agreement contains certain ratios of plantsmen (represented by Local 150) to landscape helpers (represented by Local 703), it expressly states that "these ratios will be assessed based on the Employer's annual payroll, ... and not on any specific job or jobs."

Brotherhood of Carpenters, Local Union No. 623 (E.P. Donnelly, Inc.), 351 NLRB 1417, 1422 (2007) (arbitrator's jurisdictional award "is entitled to little weight because he did not consider most of the factors that the Board takes into account in making an award of disputed work under Section 10(k)").¹¹

Furthermore, the Roosevelt Collection jurisdictional dispute at issue in Arbitrator Biereg's decision itself is the subject of a 10(k) hearing conducted by Region 13 in July 2009 in Case Nos. 13 CD 800 and 13 CD 801. (Tr. 342; Tr. 218-222.) 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).

c. Roofing licensing statute

At the outset of the 10(k) hearing, the Roofers' attorney asserted that, "according to state law, only licensed roofing contractors, may apply ... roofing systems." (Tr. 33.) He subsequently secured Pedersen's admission that it does not have a roofing license. (Tr. 162.) Other than that, however, the Roofers did not develop their position, through evidence or argument, at the hearing. In fact, the Roofers did not even cite the provision of state law that relates to the licensure of roofing contractors. Therefore, the Roofers should not be permitted to rely upon this argument in their post-hearing brief. *See Garg v. Potter*, 521 F.3d 731 (7th Cir. 2008) (undeveloped arguments are waived).

In any event, Pedersen'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

¹¹ For similar reasons, the Board should disregard the earlier jurisdictional award by Arbitrator Biereg in the Lowes Home Improvement Center case, which was the subject of a rejected offer of proof. (Tr. 214-217.)

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.

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, Pedersen submits that the Board should find that the SWAMS and Benito Juarez jurisdictional disputes are properly before it and should make an

affirmative award of the disputed work 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 PEDERSEN COMPANY with the Office of the Executive Secretary of the National Labor Relations Board prior to 11:59 Eastern Time on September 8, 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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