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I. STATEMENT OF CASE

On May 1, 2012, Beverly Environmental, LLC., (“Beverly” or “Employer”), filed a charge with the National Labor Relations Board, Sub Region 33, alleging that the International Union of Operating Engineers, Operators, Local 150, AFL-CIO (“Operators, Local 150”) violated Section 8(b)(4)(D), 29 U.S.C. §158(b)(4)(D), of the National Labor Relations Act (“Act”). Also on May 1, 2012, Beverly filed a charge with the National Labor Relations Board, Sub Region 33, alleging that the International Brotherhood of Teamsters, Local 703 (“IBT, Local 703”) violated Section 8(b)(4)(D), 29 U.S.C. §158(b)(4)(D), of the Act.

On May 24, 2012, Sub Region 33 conducted a hearing pursuant to Section 10(k) of the Act, 29 U.S.C. §160(k), concerning Beverly’s assignment of all landscape construction work, except for the operation of the silt fence installation machine at the Shell project in Limestone, Illinois.¹ Operators, Local 150 members operate the tractor² that installs the silt fence and there is no dispute over the operation of that piece of equipment (Tr. 35). Laborers, Local 751 International Union of North America, Local Union No. 751 (“Laborers, Local 751”) is a party-in-interest. Laborers, Local 751 was served with a Notice of the Hearing but did not participate in the hearing (Tr. 90). Briefs were originally scheduled to be due on May 31, 2012. On May 25, 2012, Operators, Local 150 filed a Motion For Extension Of Time To File Post Hearing Briefs. The National Labor Relations Board (“Labor Board”) granted the motion extending the submission date to June 7, 2012. Later, Beverly filed a Motion For Extension of Time To File

¹ The Notice of Hearing contained the following description of the disputed work:

All landscape construction work being performed by employees of Beverly Environmental, LLC except for the operation of the silt fence installation machine at the Shell Waterline Pipeline project in Limestone, IL.

² The tractor is a small, maroon colored, Case landscaping utility tractor with a bucket on the front (Tr. 35). A blue Berkland fence installer is mounted on the tractor (Tr. 36).

Post Hearing Brief and the Labor Board granted the motion extending the submission date to June 21, 2012. Operators, Local 150 now files this brief in support of its position that the Labor Board should award the disputed landscape work to Operators, Local 150 and IBT, Local 703 and enter a broad award.

II. STATEMENT OF FACTS

A. THE PARTIES

Operators, Local 150, IBT, Local 703, and Laborers, Local 751 are labor organizations as that term is defined in Section 2(5) of the Act. Gabe Restrepo is an Organizer/Business Agent for Operators, Local 150 (Tr. 67). Restrepo's job duties include representing the membership, insuring that the employers are following the collective bargaining agreements, negotiating contracts, and working out differences among the members and the employers (Tr. 67-68). Operators, Local 150 represents employees in collective bargaining (Tr. 71-72). Restrepo participated in the contract negotiations for the collective bargaining agreement commonly referred to as the "Landscape Contractors Agreement" (Er. Ex. 1) which affects the terms and conditions of employment for the Operators, Local 150 members and the IBT, Local 703 members working for Beverly and other contractors signed to that agreement (Tr. 68). The term of the Landscape Contractors Agreement is January 1, 2010 through December 31, 2012 (Er. Ex. 1). Operators, Local 150's jurisdiction is the Northern portions of Illinois, Indiana, and Iowa. Operators, Local 150 members elect the officers, who are fellow members, to run Operators, Local 150 (Tr. 72 and 84). Operators, Local 150 has a Constitution and By-Laws governing the organization and the membership (Tr. 72).

Mario Martinez is a Business Agent for the IBT, Local 703 (Tr. 85). He has been a member of IBT, Local 703 for 15 years and a Business Agent for four years (Tr. 85). As a Business Agent, he represents IBT, Local 703 members, and protects and polices the IBT, Local 703 contracts (Tr. 85). IBT, Local 703 is run by officers who are members of the organization and who are elected by the membership (Tr. 85-86). IBT, Local 703 has a Constitution and By-Laws and is affiliated with Joint Council 25 (Tr. 86). IBT, Local 703 exists to represent employees to better their wages and working conditions (Tr. 86). IBT, Local 703 represents some of Beverly's employees (Tr. 88).

Laborers, Local 751 represents employees working for other employers (Tr. 45). Laborers, Local 751 addresses issues concerning employee working conditions, processes grievances, and deals with employers concerning those matters (Tr. 83). Laborers, Local 751 has collective bargaining agreements with R&R Sewer and Laveka (Tr. 83). On July 30, 2010, Laborers, Local 751 filed an unfair labor practice charge with the Labor Board against Huff Sealing Corporation in Albion, Illinois in Case No. 14-CA-030168 alleging a violation of Section 8(a)(5) of the Act (Tr. 65-66). The charge was filed by Roger Gold, Esq. who is representing Laborers, Local 751 in the current matter (Tr. 66).

Beverly is an Illinois corporation engaged in landscape construction in Chicago and the nearby counties (Tr. 12 and 44). In the previous twelve months Beverly has purchased and received goods in excess of fifty thousand dollars (\$50,000.00) (Tr. 13 and 44). These goods were shipped from locations outside of Illinois directly to Beverly's facility in Markham, Illinois (Tr. 13-14 and 44). Beverly employs approximately eighteen employees (Tr. 12). Some of the employees are members of Operators, Local 150 and some employees are members of IBT,

Local 703 (Tr. 14). Beverly has a signed collective bargaining agreement with Operators, Local 150 and IBT, Local 703, commonly known as the “Landscape Contractors Agreement” (Tr. 14 and Er. Ex. 1). Beverly is also a signatory with Operators, Local 150 to the collective bargaining agreement commonly referred to as the Heavy Highway agreement (Tr. 14). Beverly also has a “Landscape Operators’ Agreement” with Operators, Local 150 (Tr. 15 and Er. Ex. 2).³

B. CERTIFICATION AND THE COLLECTIVE BARGAINING AGREEMENTS

Beverly, Operators, Local 150, and IBT, Local 703 have a bargaining relationship and have executed a collective bargaining agreement – Landscape Contractors Agreement - covering the terms and conditions of the relationship (Er. Ex. 1). The bargaining unit is Labor Board certified pursuant to Section 9(a) of the Act (Er. Ex. 1, p. 1).⁴ The Landscape Contractors Agreement (Er. Ex.1) between Operators, Local 150, IBT, Local 703 and Beverly covers the planstmen who install sod, install erosion control, install silt fence, install trees, spread soil as well as other landscape work (Tr. 15). The Landscape Contractors Agreement also covers truck drivers, water truck operators, installers, and landscape helpers (Er. Ex. 1 pp. 3-6).

The relevant portions of the Landscape Contractors Agreement include the Recognition, Scope of Work, Job Descriptions, and Union Jurisdiction provisions, which provide, in pertinent part:

³ The term of the Landscape Operators Agreement is January 1, 2009 through December 31, 2011 (Tr. 44 and Er. Ex.2). Beverly and Operators, Local 150 continue to operate pursuant to that agreement and Operators, Local 150 and the Illinois Landscape Contractors Bargaining Association are in the process of negotiating a successor agreement (Tr. 44-45).

⁴ Contrary to unclear testimony of one of the witnesses (Tr. 88), according to the parties’ collective bargaining agreement, the relationship is pursuant to Section 9(a) of the Act (Er. Ex. 1, p. 1).

ARTICLE I RECOGNITION

Pursuant to certification by the National Labor Relations Board, the Association and the Employers hereby recognize the Unions jointly as the exclusive collective bargaining representative of the following unit of employees: All full-time and regular part-time employees of the Employers employed as Plantsmen, Lead Plantsmen, Equipment Mechanics, Small Engine Mechanics, Shop Helpers, Truck Drivers, Landscape Helpers (i.e., landscape construction general laborers), Water Truck Operators and Installers, but excluding Landscape Equipment Operators, landscape maintenance workers, office clerical employees, guards and supervisors as defined in the National Labor Relations Act, and all other employees.

The Association, the Employers and the Unions acknowledge that they have a relationship as defined under Section 9(a) of the National Labor Relations Act.

For purposes of implementation and administration of this Agreement, the Association and the Employers recognize: (i) Local 150 as the sole and exclusive bargaining representative for and on behalf of the employees of the Employers within the territorial jurisdiction of Local 150 in the following job classifications, and hereby assign to Local 150 all bargaining unit work within said classifications: Plantsmen, Certified Plantsmen, Lead Plantsmen, Certified Lead Plantsmen, Equipment Mechanics, Small Engine Mechanics and Shop Helpers; and (ii) Local 703 as the sole and exclusive bargaining representative for and on behalf of the employees of the Employers within the territorial jurisdiction of Local 703 in the following job classifications, and hereby assign to Local 703 all bargaining unit work within said classifications: Truck Drivers, Water Truck Operators, Landscape Helpers (i.e., landscape construction general laborers), Installers and Certified Installers (Er. Ex. 1, p. 1).

ARTICLE III SCOPE OF WORK

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, tree trimming and brush removal, the utilizing of liquid and dry fertilizers and chemicals, landscape excavation,

soil preparation, all seeding including hydro seeding and any other mulching applications, sodding, construction of retaining walls and related gravel work, installation of drainage for landscape areas, exterior decking work, brick paving and related gravel work, erosion control of shoreline and other areas, stream bank stabilization, installation of playground equipment and other landscape structures, irrigation work, decorative lighting, 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. The scope of work covered by this Agreement shall also include all work pertaining to the construction of new golf courses and the reconstruction of golf courses, excluding the preparation of subgrading on such work. The preparation around greens and sand traps for the purpose of laying sod for controlling erosion and the planting trees and bushes shall be included in this Agreement.

This Agreement specifically includes, but is not limited to, the performance of landscape work on walls, rooftops, other elevated structures and over-structures, 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, landscape 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.

Any other provision in this Agreement and the Equipment Operators Agreement to the contrary notwithstanding, it is expressly understood that the scope of work covered by this Agreement and the Equipment Operators Agreement excludes (i) any and all landscaping work of any kind on detached single family homes for which the work is individually bid by the home owner, and (ii) landscape maintenance work (wherever performed). Trimming of hedges and bushes as part of the planting process shall be covered under the terms of this Agreement.

The operation of trenching and other equipment used in the installation of irrigation systems shall remain the jurisdiction of the Operating Engineers under the Landscape Equipment Operator classification in the Equipment Operators Agreement. Employers may not use water pumps for dewatering purposes unrelated to the landscape work covered by this Agreement (Er. Ex. 1, pp. 2-3).

**ARTICLE IV
JOB DESCRIPTIONS**

LEAD PLANTSMEN:

Lead Plantsmen are employees who perform all of the work performed by Plantsmen (as described below), serve as working foremen, and have the responsibility to direct the work of Plantsmen, Installers, and Landscape Helpers. However, nothing in the responsibility to direct the work of other employees will include supervisory authority within the meaning of Section 2(11) of the National Labor Relations Act.

PLANTSMEN:

Plantsmen are employees who assist Lead Plantsmen in overseeing the work of Landscape Helpers and in performing such tasks as plan reading and job layout, installing and utilizing plant materials, tree trimming and brush removal, the utilization of liquid and dry fertilizers and chemicals, landscape excavation, soil cultivation, weeding, sodding, construction of retaining walls and related gravel work, installation of drainage for landscape areas, exterior decking work, erosion control work, stream bank stabilization work, the non-mechanized laying of, installation of and/or assembly of irrigation pipe, installation of playground equipment and other landscape structures, installation of decorative lighting, the placing of soil and other landscape materials, applying finish landscape materials on subgrade prepared by others, performing landscape work on walls, rooftops, other elevated structures and over-structures, performing basic tractor skills, loading and unloading equipment from trucks and other miscellaneous functions pertaining to general landscape operations on new or existing construction sites.

Plantsmen must be able to identify the major plants used as shade trees, ornamentals, shrubs, perennials and ground covers; to consistently perform horticulturally sound planting and pruning techniques; and to effectively and safely operate all equipment within the scope of work of Plantsmen under this Agreement. Plantsmen must be able to perform all of their job duties with minimal supervision. They may be required to fill in for Lead Planstmen who are absent or on vacation. In such cases, the Plantsmen shall be paid the applicable wage differential set forth in this Agreement.

Plantsmen shall not perform any duties that are assigned exclusively to other classifications in this Agreement. Plantsmen are prohibited from bricklaying, including the non- mechanized laying of,

cutting of, and/or decorative arrangement of bricks. Plantsmen are prohibited from running any trucks requiring a CDL license or operating any equipment covered by the current Heavy Highway Agreement. Plantsmen may not operate any equipment covered by the current Equipment Operators Agreement, except for the purpose of training or filling in for Lead Operators or Equipment Operators who are absent or on vacation. When filling in for a Lead Operator or Equipment Operator who is absent or on vacation, the Plantsmen shall be paid the applicable wage differential set forth in the Equipment Operators Agreement. Plantsmen may operate all other hand-held or walk-behind landscape equipment, such as water pumps 3" or less, sod cutters, sod rollers, walk-behind sod rollers, chain saws, and air compressors, utilized solely to perform landscape work.

TRUCK DRIVER:

A bargaining unit member engaged primarily in driving dump trucks and other trucks transporting materials, water and equipment to and from the Employer's or a customer's job site, as required by the Employer, including mulch blower trucks and fertilizer trucks, with the exception of lowboys operated by Landscape Equipment Operators as that classification is defined by the Equipment Operators Agreement, which shall remain the jurisdiction of the Operating Engineers. Requires a CDL license. As an incidental part of his primary responsibilities, a Truck Driver also may be required to load and unload equipment and materials and to assist in landscape duties; provided, however, that he may not operate equipment covered by the Equipment Operators Agreement at or on a construction site except as directly related to the delivery of equipment and materials to the site or the removal of equipment from the site.

WATER TRUCK OPERATOR:

A bargaining unit member engaged primarily in driving a truck which transports water to and from the Employer's or a customer's job site, hooking up to fire hydrants and pumps, operating a hose in order to water plants, sod, and hooking up to houses, etc. The work performed does not require that the driver have a CDL license. As an incidental part of these primary duties, a Water Truck Operator may also be required to assist in the performance of landscape duties.

INSTALLER:

A bargaining unit member engaged primarily in the non-mechanized laying of, mechanized cutting of and/or non-mechanized decorative arrangement of paving bricks; building of retaining walls; and the non-mechanized laying of, installation of and/or assembly of irrigation pipe. As an incidental part of their primary duties, Installers may also be required to perform the functions of a Plantsman.

LANDSCAPE HELPER:

A bargaining unit member who works with and assists Installers, Plantsmen and Lead Plantsmen in the performance of all landscape work covered by this Agreement. Landscape Helpers shall not perform any duties that are assigned exclusively to other classifications in this Agreement. Landscape Helpers are prohibited from running any trucks requiring a CDL license and motorized equipment covered by the current Equipment Operators Agreement or Heavy Highway Agreement. After completion of three (3) full seasons as a Landscape Helper, an employee shall be eligible for promotion to the Plantsmen Trainee or Installer Trainee classification provided the employee meets the following qualifications for the Plantsmen or Installer classification:

1. Is able to identify the top eight (8) plants used in each of the following categories:
 - a. Shade trees
 - b. Ornamentals
 - c. Shrubs
 - d. Perennials & ground cover
2. Demonstrates the ability to consistently perform horticulturally sound planting techniques, and pruning techniques, as part of the planting process, with minimal supervision.
3. Demonstrates the ability to effectively assist the Leadman Operator or Lead Plantsman in plan reading and job layout.
4. Demonstrates the ability to consistently perform basic tractor skills with minimal supervision.

5. Demonstrates the ability to operate effectively and safely all equipment within the scope of work of a Plantsmen.

Whenever a vacancy occurs for the position of a Plantsmen or an Installer, the Employer shall be obligated to post that position for a period of five (5) days. The most qualified Landscape Helper employed for three (3) or more consecutive seasons who bids for the position shall be promoted to the position. If two (2) or more equally qualified Landscape Helpers bid for the position, it shall be awarded to the most senior employee. Only if there are no qualified Landscape Helpers who bid for the position is the Employer free to hire a candidate from outside the Company.

Upon their promotion, they shall be classified as a Plantsmen or Installer Trainee and be paid \$2.00 less per hour than the Plantsmen/Installer rate for their first and second full seasons. As a Plantsmen or Installer Trainee, they shall be eligible for the same fringe benefits as the Plantsmen/Installer. After two years as a trainee, they shall be promoted to the Plantsmen/Installer classification and paid accordingly.

Subject to the above limitations, the Employer may, within its discretion, either promote an employee into the Plantsmen classification prior to completion of three (3) full seasons or hire an employee directly into the Plantsmen classification (Er. Ex. 1, pp. 3-6).

Section 6. Union Jurisdiction.

The parties recognize that the present Agreement constitutes the basic landscape construction labor collective bargaining agreement covering landscape construction labor work performed at or on any construction site in the following counties:

In Illinois: Boone, Carroll, Cook, DuPage, DeKalb, Grundy, Jo Daviess, Kane, Kankakee, Kendall, Lake, LaSalle, Lee, Livingston, Mercer, Ogle, Rock Island, Stephenson, Whiteside, Will, Winnebago; Bureau County; and McHenry County.

In Indiana: Elkhart, Fulton, Jasper, Kosciusko, LaGrange, Lake, LaPorte, Marshall, Newton, Noble, Porter, Pulaski, Saint Joseph and Starke.

In Iowa: Cedar, Clinton, Des Moines, Lee, Louisa, Muscatine and Scott (Er. Ex. 1, pp. 11-12).

The contract does not contain an agreed upon method for resolving this dispute. Additionally, there is no other agreement containing an agreed upon method for resolving this dispute (Tr. 52 and 72-73).

Beverly is also signatory to the Landscape Operators' Agreement which contains the job classification "landscape equipment operator" ("operator") (Er. Ex. 2, Art 1 – Recognition, p. 2). The operator will operate the equipment on the project, including the tractor with the silt fence installer, and the skid steer (Tr. 18). The operators are members of Operators, Local 150 (Tr. 59).

Beverly employs members of Operators, Local 150 and IBT, Local 703, and has never employed members of Laborers, Local 751 (Tr. 18 and 60). Beverly does not have a collective bargaining agreement with Laborers, Local 751 or with any Local of Laborers International Union of North America (Tr. 57).

C. THE SHELL PROJECT AND THE NUMEROUS GRIEVANCES

The Shell Oil Project or Shell Pipeline Project ("Shell Project") is located in Limestone, Illinois, which is West of Kankakee (Tr. 19). R&R Sewer and Water is installing waterlines for Limestone, and Beverly is replacing the top soil; installing sod or hydro seeding; and installing and removing the silt fencing⁵ (Tr. 16 and 19, and Er. Ex. 3). This is a two-year project (Tr. 20). The work should be completed in Fall 2013 (Tr. 91-92 and 93). Some of Beverly's employees are currently working on the Shell Project (Tr. 16). Beverly has performed other work in the

⁵ A silt fence is a black tarp that is installed along the work site to control erosion (Tr. 32, 56-57, and Er. Exs. 6, 7, and 8). A machine plows the ground to bury a small portion of the fence and stakes are driven into the ground and the fabric is stapled or nailed to the stakes (Tr. 32). The silt fence may be installed to create a barrier to prevent soil and debris from coming into the work area and also to prevent soil and debris from leaving the work area and disturbing adjacent areas (Tr. 33).

Kankakee area and when it has, it has employed Operators, Local 150 members and IBT Local 703 members (Tr. 19).

The Landscape Contractors Agreement contains the job classification “plantsmen” (Tr. 16). The plantsmen will spread top soil, install sod, and assist in the installation of the silt fence, plant trees, and the other tasks in his job classification (Tr. 17). The Landscape Contractors Agreement also contains the job classification “installer” (Tr. 17). The installers install brick work and also perform the same tasks as the plantsmen (Tr. 17). The plantsmen are members of Operators, Local 150 and the installers are members of IBT, Local 703 (Tr. 17).

On April 6, 2012, Beverly was performing work at the Shell project installing the silt fence; an operator from Operators, Local 150 was operating the equipment,⁶ and one or two Operators, Local 150 plantsmen and one or two IBT, Local 703 members were following the equipment attaching the silt fence to the stakes (Tr. 21-22 and 61). Typically the operator operates the tractor and two other employees follow behind hammering wooden stakes into the ground and stapling or nailing the fabric to the stakes (Tr. 36-37). Beverly is installing the silt fence first, then another contractor is installing water mains, and then Beverly is coming back to remove the silt fence and seed the area or install sod (Tr. 39-41 and 61-62). The collective bargaining agreement between Beverly, Operators, Local 150 and IBT, Local 703 provides for the composition of the crew⁷ that follows the silt fence installer and for the crew that seeds the area or installs sod (Tr. 42-43 and Er. Ex. 1 at p. 2). Operators, Local 150 and IBT, Local 703

⁶ The operator generally operates a tractor. The silt fence installation machine is attached to a landscape tractor which has a small plow on it to dig a trench and the silt fence machine rolls out the fence and puts the fence in the ground (Tr. 34).

⁷ The crew and type of work is considered a composite crew comprised of Plantsmen and installers who are members of Operators, Local 150 and Teamsters divided 40% Operators, Local 150 members and 60% Teamsters (Tr. 90-91).

members are qualified to perform the work for Beverly at the Shell project (Tr. 88). Operators, Local 150 and IBT, Local 703 are claiming this work (Tr. 72 and 87).

On April 6, 2012, Terry Taylor, a Laborer, Local 751 Business Agent,⁸ came to the job site and told the operator, Alex Straughn, that he could continue working at the site but that the Operator Local 150 plantsmen and IBT, Local 703 members could not do the work at that site, and that those employees had to be Laborers, Local 751 (Tr. 23 and 62). James Esposito, Beverly President, called Taylor at approximately 2:00 p.m. on April 6, 2012 (Tr. 23). Taylor told Esposito that Beverly's Operators, Local 150 plantsmen and IBT, Local 703 members would not be allowed on the project (Tr. 24). Esposito told Taylor that he would have to call Operators, Local 150 and have Operators, Local 150 call him, to which Taylor responded: "You can call them, but whatever you do, it's not going to fucking matter and [Laborers, Local 751] don't . . . do it that way down here in this area, we don't use those guys, we use laborers" (Tr. 24). Esposito called Gabrielle Restrepo, Operators, Local 150 Organizer/Business Agent, to advise him of the situation and Restrepo told Esposito that he should continue working on the project as he is doing (Tr. 25).

Later, on April 6, 2012, Laborers, Local 751 filed a grievance "on behalf of 2 Laborers for 8 hrs pay and fringes each. This grievance is for a total of 16 hrs pay and fringes. This grievance is on going until settled" (Er. Ex. 4(a) and Tr. 26). The grievance was against R&R Sewer Water & Excavating ("R&R") for the work Beverly performed at the Shell Project in

⁸ His business card identified Taylor as a business agent or business representative (Tr. 63). When Taylor introduced himself to the operator he identified himself as being affiliated with "Local 751" (Tr. 64).

Limestone, Illinois (Er. Ex. 4(a)). Laborers, Local 751 claims a total of \$835.04, and the grievance is signed by a representative of Laborers, Local 751 (Er. Ex. 4(a)).

On April 11, 2012, Esposito was at the Shell project installing silt fence with an operator and a plantsmen, both members of Operators, Local 150, and two members of IBT, Local 703 (Tr. 27). Restrepo was there also (Tr. 28). Taylor came to the job site. Restrepo and Esposito drove to Taylor's car and they had a conversation (Tr. 74). Taylor told Restrepo that: "These guys can't do the work, you need to have laborers; Laveka⁹ (phonetic) Landscaping should be doing the work" (Tr. 28).

Restrepo responded: "That's not going to happen" (Tr. 28).

Taylor said: "Well, you know what the problem is, you have landscapers doing Laborers work" (Tr. 74).

Restrepo responded that he "didn't know that that was a problem" (Tr. 74).

Taylor said: "Well, it is a problem . . . [and] . . . the only way that we can resolve this problem is that Laborers perform the work. You can have your machines all you want, your operators, but the guys on the ground are mine, they will be mine, they are always going to be mine" (Tr. 74-75). Restrepo believed this to be a claim for the work (Tr. 75 and 77).

On April 11, 2012, James J. McNally, Operators, Local 150 Vice President, and Thomas W. Stiede, IBT, Local 703 Secretary-Treasurer sent a letter to Esposito explaining that they learned that Laborers, Local 751 is claiming the work; that the work has been historically and traditionally performed by Operators, Local 150 and IBT, Local 703; that Operators, Local 150

⁹ Laveka Landscaping employs members of Operators, Local 150 and Laborers, Local 751, but not IBT, Local 703 (Tr. 28).

and IBT, Local 703 claim the work; and that Operators, Local 150 and IBT, Local 703 “will engage in any and all means, including picketing, to enforce and preserve their historical and traditional work assignment” (Er. Ex. 5).¹⁰ Esposito received the letter on or about April 11, 2012, and gave a copy of the letter to R&R (Tr. 29). Restrepo was not involved in drafting the letter, nor did he talk to McNally about the letter (Tr. 80). Likewise, Restrepo would not be involved in the decision to picket the jobsite (Tr.80).

On April 11, 2012, Laborers, Local 751 filed another grievance against R&R, which is identical to the April 6, 2012 grievance except that it alleges additional dates for the violation and that Laborers, Local 751 claims pay and fringes for three laborers for eight hours each, or a

¹⁰ The full text of the letter is:

As you know, the International Union of Operating Engineers, Local 150, AFL-CIO (“Operators”) and the International Brotherhood of Teamsters, Local 703 (“Teamsters”) are the jointly certified bargaining representatives of Beverly Environmental’s (“Beverly”) employees. It is our understanding that Beverly has historically and traditionally assigned all of its landscape construction work to members of the Operators and the Teamsters and has, consistent with this practice, assigned the landscape construction work at the Shell waterline project in Limestone, Illinois to members of the Operators and the Teamsters. It is our further understanding that the Laborers International Union of North America, Local 751 (“Laborers”) recently claimed jurisdiction over the same landscape construction work. This will confirm that the Operators and the Teamsters also claim the disputed work at the Shell waterline project.

Please be advised that if Beverly reassigns *any* of the landscape construction work currently being performed at the Shell waterline project to members of the Laborers, the Operators and the Teamsters will engage in any and all means, including picketing, to enforce and preserve their historical and traditional work assignment. Should it become necessary to picket Beverly, please be advised that the Operator’s and the Teamsters’ disputes with Beverly Environmental would be jurisdictional in nature and all picketing would be directed at Beverly exclusively at times when Beverly was present at the Shell waterline project.

Please contact me if you have any questions regarding this matter.

total of twenty-four hours pay and fringes (Er. Ex. 4(b) and Tr. 26). Laborers, Local 751 claims \$1,252.56 and the grievance is signed by a representative of Laborers, Local 751 (Er. Ex. 4(b)).

Laborers, Local 751 filed several more grievances claiming the work. On April 13, 2012, Laborers, Local 751 filed a third grievance against R&R, which is identical to the April 6 and 11, 2012 grievances except that it alleges additional dates for the violation and that Laborers, Local 751 claims pay and fringes for three laborers for four hours each, or a total of twelve hours pay and fringes (Er. Ex. 4(c) and Tr. 26). Laborers, Local 751 claims a total of \$626.64 and the grievance is signed by a representative of Laborers, Local 751 (Er. Ex. 4(c)).

On April 30, 2012, Laborers, Local 751 filed a fourth grievance against R&R, which is identical to the April 6, 11, and 13, 2012 grievances except that it alleges additional dates for the violation and that Laborers, Local 751 claims pay and fringes for two laborers for eight hours each, or a total of twenty-four hours pay and fringes (Er. Ex. 4(d) and Tr. 26-27). Laborers, Local 751 claims a total of \$835.04 and the grievance is signed by a representative of Laborers, Local 751 (Er. Ex. 4(d)).

On May 11, 2012, Laborers, Local 751 filed fifth and sixth grievances against R&R, which are identical to the April 6, 11, 13, and 30, 2012 grievances except that they allege additional dates for the violations and that Laborers, Local 751 claims pay and fringes for five laborers for eight hours each for pay and fringes for a total of forty hours pay and fringes for the May 9, 2012, violation totaling \$2,087.60, and two laborers for eight hours each, for a total of twenty-four hours pay and fringes for the May 11, 2012 violation totaling \$835.04 (Er. Ex. 4(f) and e respectively) and Tr. 27). The grievances are signed by a representative of Laborers, Local

751 (Er. Ex. 4(e and f)). R&R told Esposito that Laborers, Local 751 has told R&R that R&R cannot use Beverly (Tr. 100).

D. BEVERLY'S PREFERENCE

Beverly's preference is to have the work performed by the plantsmen who are Operators, Local 150 members and the employees who are IBT, Local 703 members (Tr. 30). One of the reasons Beverly prefers these employees is because they have the skills necessary to perform the job based on past experience (Tr. 30 and 52). Another reason for wanting to use Operators, Local 150 and IBT, Local 703 members is that Beverly has a relationship with those individuals (Tr. 51-52). Beverly has used Operators, Local 150 members and IBT, Local 703 members on its past projects (Tr. 60, 81, and 89). Beverly intends to utilize the same employees for the length of the project (Tr. 30). Beverly would be required to train the Laborer, Local 751 members if it were to hire those employees (Tr. 30). Beverly has never used members of Laborers, Local 751, or members of any Laborer Local on any of its projects (Tr. 60). Beverly does not have a collective bargaining agreement covering Operators, Local 150, IBT, Local 703, and Laborers, Local 751 (Tr. 30). The cost to Beverly would be greater if it used Laborers, Local 751 rather than Operators, Local 150 and IBT, Local 703 members (Tr. 51).

E. OTHER JURISDICTIONAL DISPUTES

Beverly has had jurisdictional disputes with Local 4 of Laborers International Union of North America ("Laborers, Local 4") (Tr. 31, 53, and 55). One dispute was in May, 2011, and the other dispute was in June-July, 2011 (Tr. 31 and 53). These disputes arose at the beginning of the landscape season which is typically April (Tr. 31). The claims were for work in the Chicago area (Tr. 31). Laborers, Local 4 threatened to picket on one occasion at the Cellular

Field job site (Tr. 99). The work occurring during these disputes consisted of the same type of work (sodding, seeding, and dirt placement) that is at issue in the current dispute (Tr. 64).

Currently, Beverly has other similar projects in which it is using Operators, Local 150 and IBT, Local 703 members (Tr. 54). Those projects are located in Chicago, Mokena, Manteno, and Lockport (Tr. 54). Additionally, Beverly is bidding or recently bid on projects in the same geographic area as the Shell project that require the same type of work, including one project in Manteno (Tr. 95). The Manteno project will begin in approximately two months (Tr. 96). Beverly anticipates problems with Laborers, Local 751 if it is awarded any jobs in this area, in part, because the general contractor, Tenco Excavating (“Tenco”), for the Manteno project told Esposito that it cannot use Beverly for the landscaping portion of the job (Tr. 96). Tenco initially explained that it had to wait for the result of this matter before it could hire Beverly (Tr. 96). The project was awarded approximately one month ago (Tr. 97). The contractor told Beverly that due to the current case pending before the Labor Board, and because Laborers, Local 751 told the general that they also would be claiming the work, the contractor would not hire Beverly (Tr. 97-98).

Natural Creations is having similar problems with Laborers, Local 751 (Tr. 101). Likewise, Atrium Landscape has had the same problems with Laborers, Local 751 (Tr. 102). Other companies that are signatory to the Landscape Construction Agreement have had jurisdictional issues with Laborers, Local 751 including Laurel Landscaping and Consolidated Landscape (Tr. 101).

III. ARGUMENT

A. THE PARTIES

1. Operators, Local 150, IBT, Local 703, and Laborers, Local 751 are labor organizations within the meaning of Section 2(5) of the Act.

As a preliminary matter, all three Unions are labor organizations within the meaning of Section 2(5) of the Act. Section 2(5) of the Act provides: “The term ‘labor organization’ means any organization of any kind . . . in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.”

Operators, Local 150 represents employees for purposes of collective bargaining (Tr. 71-72). The contracts Operators, Local 150 negotiates on behalf of its membership affect the terms and conditions of employment for its members (See Er. Exs. 1 and 2). Operators, Local 150 members elect fellow members to hold office to run Operators, Local 150 and it has a Constitution and By-Laws governing the organization and the membership (Tr. 72 and 84). Therefore, Operators, Local 150 is a labor organization within the meaning of Section 2(5) of the Act.

IBT, Local 703 represents its members, and it protects and polices its contracts (Tr. 85). IBT, Local 703 is run by officers who are members of the organization and who are elected by the membership (Tr. 85-86). IBT, Local 703 has a Constitution and By-Laws and is affiliated with Joint Council 25 (Tr. 86). IBT, Local 703 exists to represent employees to better their wages and working conditions (Tr. 86). Therefore, IBT, Local 703 is a labor organization within the meaning of Section 2(5) of the Act.

Finally, Laborers, Local 751 represents employees working for other employers (Tr. 45). Laborers, Local 751 addresses issues concerning employee working conditions, processes grievances, and deals with employers concerning those matters (Tr. 83). Laborers, Local 751 has collective bargaining agreements with R&R and Laveka (Tr. 83). Previously, Laborers, Local 751 has filed an unfair labor practice charge with the Labor Board against an employer alleging a violation of Section 8(a)(5) of the Act (Tr. 65-66). Therefore, Laborers, Local 751 is a labor organization within the meaning of Section 2(5) of the Act.

2. Beverly is engaged in commerce within the meaning of Section 2(6) of the Act

Beverly is an Illinois corporation engaged in landscape construction in Chicago and the nearby counties (Tr. 12 and 44). In the previous twelve months Beverly has purchased and received goods in excess of fifty thousand dollars (\$50,000.00) (Tr. 13 and 44). These goods were shipped from locations outside of Illinois directly to Beverly's facility in Markham, Illinois (Tr. 13-14 and 44). Beverly employs approximately eighteen employees (Tr. 12). Therefore, Beverly is engaged in commerce within the meaning of Section 2(6) of the Act.

B. PRELIMINARY DETERMINATIONS

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that: (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. Super Excavators, 327 NLRB No. 31 (1998). All three requirements are met, and therefore the Labor Board should proceed with a Section 10(k) analysis in this case.

1. There are competing claims for the work

Operators, Local 150 and IBT, Local 703 are currently performing the work and the record is clear that they continue to claim the work. Additionally, the April 11, 2012 letter from Operators, Local 150 and IBT, Local 703 to Beverly states clearly that they claim the work (Er. Ex. 5). The job will continue to Fall 2013 (Tr. 91-92, and 93).

Laborers, Local 751 has claimed the work also. The conduct of the Business Agent for the Laborers, Local 751 establishes the claim for the work. He has made numerous comments to Beverly, Operators, Local 150 and IBT, Local 703 including, but not limited to: that Operator, Local 150 and IBT, Local 703 members would not be allowed on the project (Tr. 24); that “it’s not going to fucking matter and [Laborers, Local 751] don’t ... do it that way down here in this area, we don’t use those guys, we use laborers” (Tr. 24); “These guys can’t do the work, you need to have laborers; Laveka Landscaping should be doing the work” (Tr. 28); and “the only way that we can resolve this problem is that laborers perform the work ... the guys on the ground are mine, they will be mine, they are always going to be mine” (Tr. 74-75). He then proceeded to file five pay-in-lieu grievances, which constitute a claim for the work. See Super Excavators, 327 NLRB No. 31 (1998). He also told other contractors to refrain from hiring Beverly because Beverly does not employ members of Laborers, Local 751 (Tr. 96-98). Clearly, all three unions are claiming the work, therefore the first requirement has been met.

2. There is reasonable cause to believe that Section 8(b)(4)(D) has been violated

Section 8(b)(4)(D) of the Act provides, in pertinent part, that “It shall be an unfair labor practice for a labor organization or its agents . . . (ii) to threaten . . . any person engaged in

commerce or in an industry affecting commerce, where in either case an object thereof is: . . . (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization . . . rather than to employees in another labor organization”

On April 11, 2012, Operators, Local 150 and IBT, Local 703 jointly sent a letter to Beverly providing “that if Beverly reassigns any of the landscape construction work currently being performed at the Shell . . . project to members of the Laborers [Local 751], the Operators [Local 150] and [IBT, Local 703] will engage in any and all means, including picketing, to enforce and preserve their historical and traditional work assignment” (Er. Ex. 5) (italics in original). This language is substantially similar to the threat in Super Excavators, 327 NLRB No. 31 (1998). In Super Excavators, 327 NLRB No. 31 (1998) the Labor Board found that the union’s letter stating that “Should the assignment [of work] be changed from Laborers [Local No. 113] to Operators [Local 139], [Laborers] Local No. 113 will have no other choice but to use every means at it’s [sic] disposal, including striking, to protect the Laborers [Local No. 113] jurisdiction” constituted a threat of economic action if the work was reassigned sufficient to establish that reasonable cause existed to believe that a violation of Section 8(b)(4)(D) had occurred. The Board noted that it is not required to find that a violation occurred, rather “only that reasonable cause exists for finding a violation.” Super Excavators, 327 NLRB No. 31 (1998). The letter in the instant case from the Operators, Local 150 and IBT, Local 703 to Beverly is clear that “if Beverly reassigns any . . . work currently being performed at the Shell . . . project to members of the Laborers [Local 751], the Operators [Local 150] and [IBT, Local 703] will engage in any and all means, including picketing, to enforce and preserve their . . . work assignment” (Er. Ex. 5). This letter constitutes a threat of economic action if work is reassigned

and therefore reasonable cause exists to believe a violation of 8(b)(4)(D) occurred. Such a threat meets the second requirement. Super Excavators, 327 NLRB No. 31 (1998).

3. The Parties do not have an agreed upon method for the voluntary adjustment of the dispute

Nothing in the agreement between and amongst Operators, Local 150, IBT, Local 703, and Beverly provides for a resolution to this dispute. Additionally, witnesses for Operators, Local 150 and Beverly testified that no such method exists (Tr. 52, 72-73). Finally, even though Laborers, Local 751 did not participate in the hearing, its presence would not have altered the fact that no method for voluntary adjustment of the dispute exists. Therefore, the third requirement has been met.

C. PURSUANT TO SECTION 10(k) OF THE ACT THE LABOR BOARD SHOULD AWARD THE DISPUTED WORK TO OPERATORS, LOCAL 150 AND IBT, LOCAL 703

Section 10(k) requires the Labor Board to make an affirmative award of disputed work after giving due consideration to various factors. NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting), 364 U.S. 573 (1961). The Labor 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) citing Machinists Lodge 1743 (J. Jones Construction), 135 NLRB 1402 (1962). Here, all of the relevant factors favor an assignment of the disputed work to Operators, Local 150 and IBT, Local 703.

1. Certification and Collective Bargaining Agreements

Beverly, Operators, Local 150, and IBT, Local 703 have a bargaining relationship and have executed a collective bargaining agreement covering the terms and conditions of the relationship (Er. Ex. 1). The bargaining unit is Labor Board certified pursuant to Section 9(a) of the Act (Er. Ex. 1, p. 1).¹¹

The Landscape Contractors Agreement (Er. Ex.1) between Operators, Local 150, IBT, Local 703 and Beverly specifically covers the Planstmen, Installers, and Landscape Helpers who install sod, install erosion control/install silt fencing, install trees, and spread soil as well as other landscape work. (Tr. 15 and Er. Ex. 1, p 3-6). The work being performed by Beverly at the Shell project includes this type of work, specifically, installing silt fencing around the project, replacing top soil, installing sod, and hydro-seeding the area (Tr. 16).

The Landscape Contractors Agreement contains the job classification “plantsmen” (Tr. 16). The plantsmen will spread top soil, install sod, and assist in the installation of the silt fence, plant trees, and the other tasks in his job classification (Tr. 17). The Landscape Contractors Agreement also contains the job classification “installer” (Tr. 17). The installers install brick work and also perform the same tasks as the plantsmen (Tr. 17). The Landscape Contractors Agreement contains the job description for Landscape Helper. Landscape Helpers assist Installers, Plantsmen, and Lead Plantsmen in the performance of landscape work (Er. Ex. 1, p.

¹¹ Contrary to unclear testimony of one of the witnesses (Tr. 88), the relationship is pursuant to Section 9(a) of the Act.

5). The plantsmen are members of Operators, Local 150 and the installers and landscape helpers are members of IBT, Local 703 (Tr. 17 and Er. Ex. 1, p.1).

Beverly employs members of Operators, Local 150 and IBT, Local 703, and has never employed members of Laborers, Local 751 (Tr. 18 and 60). Beverly does not have a collective bargaining agreement with Laborers, Local 751 or with any Local of Laborers International Union of North America (Tr. 57). Therefore, the first factor favors the assignment of the work to Operators, Local 150 and IBT, Local 703.

2. Employer Preference and Past Practice

In the instant case, Esposito explained that he preferred to use members of Operators, Local 150 and IBT, Local 703 because they are familiar with the work and have the skills necessary to perform the job (Tr. 30, 52). Esposito also explained that he has employed these members on other projects (Tr. 60, 81, 89) and intends to continue to employ them (Tr. 30). Conversely, Beverly has never employed members of Laborers, Local 751 and does not intend to employ them (Tr. 60). Consequently, this factor favors an award of the work to the Operators, Local 150 and IBT, Local 703.

3. Area and Industry Practice

Operators, Local 150 and IBT, Local 703 have collective bargaining agreements with other contractors covering this type of work in the Limestone, Illinois area as well as throughout the jurisdiction of the Operators, Local 150 (Tr. 69). Beverly employs members of Operators, Local 150 and IBT, Local 703 on other similar projects in the same area (Tr. 54). Other than the testimony of the witnesses concerning the Laborers, Local 751 as a labor organization, there was no evidence as to what type of work they perform or what they believe to be the area practice.

Therefore, this factor also favors an assignment of disputed work to the members of Operators, Local 150 and IBT, Local 703.

4. Skills, Safety and Training

Beverly prefers to utilize members of Operators, Local 150 and IBT, Local 703 because they have the skills and abilities to perform the tasks. (Tr. 30, 52). Additionally, because Beverly has employed the members of Operators, Local 150 and IBT, Local 703 in the past, those members are familiar with Beverly's requirements. Conversely, Beverly has no experience with members of Laborers, Local 751 (Tr. 60). Moreover, there was no evidence concerning the skills and abilities of the members of Laborers, Local 751. Therefore, all five factors favor awarding the disputed work to Operators, Local 150 and IBT, Local 703.

5. Economy and Efficiency

Beverly explained at the hearing that, based on the grievances, it is more economical to employ members of Operators, Local 150 and IBT, Local 703, rather than Laborers, Local 751 (Tr. 51). This factor favors Operators, Local 150 and IBT, Local 703. Therefore, all five factors favor awarding the disputed work to Operators, Local 150 and IBT, Local 703.

D. THE EMPLOYER IS ENTITLED TO A BROAD AWARD

For an Employer to obtain a broad award it must establish that the disputed work has been a continuing source of controversy in the relevant geographic area, that similar disputes are likely to recur, and that the charged party has a proclivity to engage in unlawful conduct to obtain work similar to the disputed work. United Assoc. of Journeymen and Apprentices of the Plumbing and Pipe Fitting Indus. of the U.S. and Canada, (C&R Heating & Service Co., Inc.), 328 NLRB No. 176, 162 LRRM. 1300 (1999). The Employer has met its burden.

At the hearing, Beverly explained that Laborers, Local 751 had talked to other contractors and told them not to hire Beverly to perform similar work because Beverly does not employ members of Laborers, Local 751. (Tr. 96-98). Beverly has lost projects because of the conversations Laborers, Local 751 has had with other contractors (Tr. 96-98). The remarks made by the Laborers, Local 751 Business Agent to Beverly, as well as the remarks he made to the Operators, Local 150 Business Agent, were broad and not limited to the Shell project. The Laborers, Local 751 Business Agent said “the only way to resolve this problem is that the Laborers perform the work...the guys on the ground are mine, they will be mine, they are always going to be mine” (Tr. 74-75)(emphasis added). These threats were universal and effective as evidenced by the fact that Beverly has lost a bid. Additionally, Beverly has been embroiled in other jurisdictional disputes with other Locals of the Laborers International Union of North America (Tr. 31, 53, 55). These factors establish that Beverly is entitled to a broad award for the entire area covered by Laborers, Local 751.

IV. CONCLUSION

For all the above-stated reasons Operators, Local 150 and IBT, Local 703 respectfully request the Board to award the disputed work to Operators, Local 150 and IBT, Local 703, and to enter a broad award.

Respectfully submitted,

By: /s/ Steven A. Davidson
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served the foregoing via electronic filing with the Executive Secretary and additionally sent eight (8) copies of same *via UPS overnight delivery* on June 21, 2012.

In addition, the undersigned hereby further certifies that he served the foregoing on the following persons via e-mail on or before 5:00 p.m. on June 21, 2012:

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