

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD
REGION 25**

RiverStone Group, LLC,)
)
 Employer,)
)
and)
)
Joshua David Ballegeer,)
)
 Petitioner,)
)
 and)
)
International Union of Operating)
Engineers, Local 150, AFL-CIO,)
)
 Intervenor Union.)

Case No. 25-RD-105145

**INTERVENOR UNION'S
REQUEST FOR REVIEW**

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I. STATEMENT OF THE CASE

On May 15, 2013, Joshua David Ballegeer filed a petition with Region 25 of the NLRB (Case No. 25-RD-105145) seeking decertification of the International Union of Operating Engineers, Local 150, AFL-CIO (“Local 150” or “Union”) as the collective bargaining representative for the employees working for RiverStone Group LLC (“RiverStone” or “Employer”) at its Cleveland Quarry site (Bd. Ex. 1(a)).¹ On May 24, 2013, the Region conducted a hearing into Local 150’s objection to the petitioned-for unit. There, Local 150 argued that the Regional Director should dismiss the Decertification Petition in part because the petitioned-for unit is not coextensive with the existing bargaining unit (Tr. 8). Moreover, Local 150 argued that the Cleveland Quarry is not an appropriate bargaining unit, and that the proper bargaining unit is the bargaining unit comprised of the five worksites known as the “Illinois quarries” (Cleveland Quarry, Allied Stone, Midway Stone, Moline Yard, and Cordova Dredge), because these are the sites the parties have bargained over and considered as a single bargaining unit for more than 25 years (Tr. 8). On June 7, 2013, the parties filed post-hearing briefs.

¹ Record references from the hearing conducted May 24, 2013, will be referenced, “Tr. ____” for transcript citations, “Bd. Ex. ____”, for Board exhibits, “Er. Ex. ____” for Employer exhibits, and “U. Ex. ____” for Union exhibits.”

On June 13, 2013, the Regional Director issued his “Decision and Direction of Election” (“Decision”).² There the Director found that (Decision at 2):

For the reasons discussed in detail below, it is concluded that the Cleveland Quarry facility unit previously recognized was not merged in to a larger unit, and that the following employees of the Employer constitute a unit appropriate for the purposes of collective-bargaining, within the meaning of Section 9(b) of the Act:

All production, service and maintenance employees used in the operation of power drive equipment, which is recognized as being within the jurisdiction of the I.U.O.E., at the Employer’s Cleveland Quarry, but excluding office clerical, guards, supervisors and professionals as defined in the National Labor Relations Act, as amended.

In arriving at this decision, the Regional Director assumed that the Cleveland Quarry unit and the other facilities were “previously recognized” (*id.* at 2). The Regional Director then relied primarily upon a finding that “the parties negotiate simultaneously for five separate contracts to cover the five separate facilities involved in this matter”(*id.* at 3), thereafter maintaining “separate contracts” for the five separate facilities (*id.*). Intervenor Local 150 submits that the Regional Director’s assumption of prior individual recognition and his finding that the parties negotiated separate contracts is in error. For the reasons stated as follows, the Board should review that Decision and dismiss the Petition for seeking to carve out a separate bargaining unit not coextensive with the existing unit.³ In the

² After the Regional Director issued his Decision, the Region set the election for July 10, 2013. An election was conducted at that time, and the ballots impounded pending resolution of this Request for Review.

³ The Union agrees generally with the other findings by the Regional Director to the effect that the Employer manages the five Illinois quarry facilities out of its Moline office as a single production enterprise (Decision at 2-3). The Union also agrees that it has represented employees at these five facilities at least since 1960 (*id.* at 2), and that the

alternative, the Union respectfully requests that the Board revisit its contract bar rule, and find that the decertification petition filed here is barred by the current five-year collective bargaining agreement.

II. STATEMENT OF FACTS⁴

A. Local 150 and the RiverStone Quarries in Illinois⁵

1. Local 150

Local 150 represents heavy equipment operators throughout northern Illinois, eastern Iowa and northwest Indiana (Tr. 87-88). Local 150 has represented the production and maintenance employees used in the operation of power driven equipment, which is recognized as being within the jurisdiction of Local 150 at the RiverStone Illinois quarries since 1991 (Tr. 90; Er. Ex. 2, at Art. 1, Sec 1; U. Exs. 10, 13, 14, and 15, at Art 1, Sec 1). Prior to 1991, the International Union of Operating Engineers, Local 537 represented the same employees; it then merged into Local 150 (Tr. 90-91). Representation of the employees was seamlessly transferred from Local 537 to Local 150.

recognition clause in the Union's contract does not contain any geographic description of the bargaining unit (*id.* at 3). The Union further agrees that the Regional Director has correctly determined that the parties have throughout their bargaining history referred to the five facilities as the "Illinois Quarries," and negotiations over them as the "Illinois Quarry negotiations" (*id.*).

⁴ There was virtually no contrary testimony concerning the Statement of Facts. Failure to rebut evidence leaves those facts about which evidence was presented uncontested and therefore established. *Waterbury Hotel Management, LLC*, 333 NLRB 482, 493 (2001); *Pro-Tek Fire Suppression, Inc.*, 2004 NLRB LEXIS 131, *4-5 (NLRB 2004).

⁵ At one time, RiverStone operated under the name Moline Consumers and in or about 2005 it changed its name to RiverStone Group, LLC (U. Ex. 1 at p. 3, April 4, 2005 RiverStone proposal regarding name change from Moline Consumers to RiverStone). Hereinafter, all references to RiverStone include Moline Consumers.

2. RiverStone's General Operations and Centralized Labor Relations

RiverStone is an aggregate construction materials producer and seller.

RiverStone's main office is located at 1701 5th Avenue, Moline, Illinois (Tr. 37). The RiverStone management, sales personnel, clerical personnel,⁶ engineers, and personnel department work out of the main office (*id.*). Marshall Guth is the Vice-President of Operations for RiverStone (Tr. 13). He reports to Oscar Ellis, President of RiverStone (Tr. 38). Guth's office is located in the main office in Moline, Illinois (Tr. 37). Guth oversees various Illinois and Iowa facilities including the Illinois quarries (Tr. 16). At one time, the Illinois quarries included a facility known as General Sand and Gravel (Tr. 53-54).

Guth's duties include oversight of the varying operations of the RiverStone mine division including plant construction, mine planning, and contract administration (Tr. 13). Plant construction includes determining if and when to modernize a plant or to expand a plant (Tr. 33). Guth must understand the market and determine how to meet market demands (*id.*). Guth and RiverStone management decide whether to close a facility (Tr. 53-54).

Each site has a superintendent who reports directly to Guth (Tr. 38). Guth interacts with each site superintendent at least weekly (Tr. 45). Guth conducts meetings with all the site superintendents once or twice each year (Tr. 44). When a site superintendent is absent, on vacation for example, a RiverStone engineer will

⁶ Each site has a scale person who completes payroll records and collects sales data, etc. and forwards it to the main office in Moline (Tr. 39). The accounting personnel in the main office check the information from the scale person (*id.*).

take over for him (Tr. 143-144). Guth has moved site superintendents from one site to another (Tr. 41). Sometime in or about 2005, RiverStone decided to close General Sand and Gravel (Tr. 53), and Guth moved the superintendent to Allied Stone (Tr. 54). Guth has many other responsibilities that will be discussed throughout this brief.

All human resource functions for the Illinois quarries are centralized and controlled by the main office in Moline, Illinois. Illinois quarry employees are paid by RiverStone and payroll comes from the main office in Moline, Illinois (U. Exs. 4, 7). The paychecks identify RiverStone as the employer and identify the site where the employee normally reports by number and not site name (*id.*). All contributions to the health and welfare and pension funds come from RiverStone and are paid for by RiverStone in a single check covering all the Illinois quarries (U. Ex. 8). Likewise, dues deductions are made by the RiverStone human resource department (U. Ex. 9). RiverStone also has a sexual harassment policy applicable to all Illinois quarry employees (U. Ex. 6). The sexual harassment policy provides that an employee who believes he or she has been subjected to sexual harassment should report the matter immediately to the “Company Director of EEO (Greg Eckman) or Personnel Office (Amy Castry)” (U. Ex. 6, at p. 1). There is only one drug and alcohol policy and it applies to all RiverStone Illinois quarry employees (Tr. 134, 144; U. Ex. 5)

The human resource department for RiverStone is responsible for advertising for job openings (Tr. 35). The job applications are collected at the main office

located in Moline, Illinois (Tr. 37). The job applications are sent to the site superintendent who in turn will schedule an interview (Tr. 43). The various superintendents do not have authority to decide to add personnel (Tr. 35). Rather, since Guth is responsible for some portions of the budget, including budgeting for the number of employees at each site, he decides if additional staff is necessary (Tr. 34).

Labor relations issues, including grievances, are addressed by Guth. Since at least 1987, the Employer's bargaining team that negotiated the collective bargaining agreement with Local 150 consisted of Guth and the Company's lawyer; no site superintendents were involved (U. Ex. 1 at pp. 2, 4; U. Ex. 3 at pp. 1, 3, 4). Marshall Douglas, the Union's Treasurer, has discussed two grievances with Guth (Tr. 104). The first situation involved alleged improper reporting of time (*id.*). Douglas proposed that in exchange for refraining from filing a grievance, RiverStone would not press charges against the employees or fight their unemployment (*id.*). Guth agreed and the matter was resolved (Tr. 104-105). The second issue involved a termination (Tr. 105). Douglas and Guth attempted to resolve the issue, but they could not agree, and the matter was advanced to arbitration (*id.*). Final and binding arbitration is the next step in the grievance process (Er. Ex. 2, at Art. 11, Sec. 3, Step Four; U. Exs. 10, 13, 14 and 15, at Art. 11, Sec. 3, Step Four).

Jim Cheville, a retired employee, was involved in one grievance situation. He noticed that the superintendent was operating equipment when he should not have

been (Tr. 132). Cheville reported the incident to the Union's business agent (*id.*). Guth ultimately responded to the grievance and it was resolved (*id.*).

3. The Five Current Worksites

Since as early as the 1960s, the employees of RiverStone have been represented by the International Union of Operating Engineers (Tr. 91).⁷ Local 150 represents the employees at the Illinois quarries in the following classifications: master mechanic, mechanic, welder, crane, end loader, operator and driller, dozer, scraper, crusher, pugmill, and screenhouse, plant clean up man, pit loader (Er. Ex. 2 at Art. 9, Sec. 1; U. Exs. 10, 13, 14, and 15 at Art. 9, Sec. 1). The current sites include Cleveland Quarry, Moline Yard, Allied Stone, Midway Stone, and Cordova Dredge (Tr. 89). None of these sites are separately incorporated (Tr. 30-31), and they are listed as divisions of RiverStone, which is the corporate entity (Tr. 30, Er. Ex. 2 at p. 1; U. Exs. 10, 13, 14, and 15 at p. 1).

Cleveland Quarry is located in Cleveland, Illinois (Tr. 23). There are seven Local 150 represented employees at that site (Tr. 63). Moline Yard is located in Moline, Illinois (Tr. 22). There are three Local 150 represented employees at that site (Tr. 63). Allied Stone is located in Milan, Illinois (Tr. 22). There are twelve Local 150 represented employees at that site (Tr. 63). Midway Stone is located in Hillsdale, Illinois (Tr. 75). There are six or seven Local 150 represented employees at that site (Tr. 63). Cordova Dredge is located on the Mississippi River, North of

⁷ In or about 2005, the Employer changed its name from Moline Consumers to RiverStone (U. Ex. 1 at p. 3, April 4, 2005 RiverStone proposal regarding name change from Moline Consumers to RiverStone).

the other four sites, in Cordova, Illinois (Tr. 50, 75, and Er. Ex. 1). There are three Local 150 represented employee at that site (Tr. 63). The distance between Cleveland and each of the other sites is approximately 15-20 miles (Tr. 26).

The various sites produce and/or sell aggregate and other materials (Tr. 14). Cleveland Quarry, Allied Stone, and Midway Stone mine and process various sizes and qualities of materials (Tr. 75-76). The Cordova Dredge site collects sand and rock from the bottom of the Mississippi River and then transfers the material to sales sites (Tr. 50, 75). These four sites produce the material and deliver it to the Moline Yard from which it is sold (Tr. 50). The Moline Yard does not produce any material, rather it is exclusively involved in the sale of the material produced by the Illinois quarries (Tr. 50, 75). The Moline Yard also purchases material from other companies and then resells it, but it does not receive material from any other RiverStone-owned sites (Tr. 73).

i. Common Terms and Conditions of Employment

The current terms and conditions of employment are identical between and amongst the five sites. The following terms and conditions of employment are identical in all five sites:

- i. Recognition;
- ii. Union Security;
- iii. Hours of Work and Premium Pay;
- iv. Starting Time and Report Pay;
- v. Holidays;
- vi. Vacations;
- vii. Seniority;
- viii. Hospitalization and Medical Insurance;

- ix. Wage Scales;⁸
- x. Security Payments;
- xi. Arbitration;
- xii. Discharge and Suspension;
- xiii. Protection of Rights;
- xiv. Extra – Contract Agreements;
- xv. Work Stoppages;
- xvi. Safety and Sanitation;
- xvii. Leave of Absence;
- xviii. Military Service;
- xix. Reparability and Savings
- xx. Funeral Leave;
- xxi. Pensions;
- xxii. Insurance on Mechanics’ Tools;
- xxiii. Union – Management Cooperation;
- xxiv. Duration and Termination; and
- xxv. Signature Line (compare Er. Ex. 2 and U. Exs. 10, 13, 14, and 15)

The Recognition clause provides:

The Company recognizes the Union as the exclusive bargaining agency for all production, service and maintenance employees used in the operation of power driven equipment, which is recognized as being within the jurisdiction of the I. U. O. E., but excluding office clerical, guards, supervisors and professionals as defined in the National Labor Relations Act, as amended.

These sections make no distinction regarding sites (Er. Ex. 2 at Art. 1, Sec. 1; U. Exs. 10, 13, 14, and 15 at Art. 1, Sec. 1).

ii. Common Skills and Abilities

The employees operate various pieces of equipment including end loaders, small cranes, dozers, scrapers, crushers, pugmills, and excavators (Er. Ex. 2, Art 9,

⁸ There are a few minor differences between the sites with respect to classifications and wages. For example, there is only one classification and one wage rate for the Cordova Dredge site, which is General Operator, because that site only dredges, but that rate is the same as the Master Mechanic rate at the other sites (U. Ex. 13, at Art 9, Sec. 1 compared to Er. Ex. 2, at Art. 9, sec. 1, and U. Exs. 10, and 14, Art 9, Sec. 1). Also, the classifications and rates at the Moline Yard are slightly different and the end loader operator earns ten cents per hour more than the end loader operators at the other sites (compare U. Ex. 15, Art. 9, Sec 1, to Er. Ex. 2, and U. Exs. 10 and 14, Art. 9, Sec. 1).

Sec. 1; U. Exs. 10, 13, 14 and 15, Art. 9, Sec 1). There are mechanics, master mechanics and welders at some of the sites (*id.*). Some employees operate the crushing plant, which involves crushing the larger rocks into smaller rocks, separating the rock according to size and quality, and washing the rock (Tr. 129). The skills and abilities of the employees at the various sites are comparable (Tr. 132).

iii. Employee Interchange

Throughout the years, employees from one site have been transferred to other sites (Tr. 127, 140). For example, Jim Cheville, who was normally assigned to the Midway site, was periodically assigned to the Cleveland site to perform maintenance work (Tr. 127). Cheville also worked at the Allied site for several months to assist with maintenance because the Company was starting a second shift (Tr. 127-128). Kevin Covemaker was transferred from Cleveland to Allied to operate the rock drill (Tr. 141). Approximately once or twice a year, employees move from site to site (Tr. 127).

iv. Common Equipment and Equipment Exchange

Each site utilizes certain heavy equipment operated by Local 150 represented employees. The crushing sites, Allied, Cleveland, and Midway, have small cranes, end loaders, yard loaders, and trucks (Tr. 130). Cordova Dredge has slightly different equipment because it is a dredging operation, not a crushing operation (*id.*). Throughout the years, equipment from one site will be sent to other sites based on operational needs (*id.*). The equipment transfer might be initiated by the

site superintendent, but the transfer must be approved by Guth (Tr. 131).

Equipment transfers might occur once every few months or could occur quite frequently (*id.*). RiverStone also has a crane, an excavator, and forklifts that travel from site to site on a fairly regular basis (Tr. 142). Decisions and final approval to transfer equipment come from Guth (Tr. 143).

There is a slight difference amongst the sites concerning the type of equipment used (Tr. 17). For example, although Cordova Dredge is a production site, it also has dredging equipment because that site is the only site that dredges (Tr. 18). The Moline Yard has different equipment because it is not a production site, rather it is a sales site (Tr. 17). Allied, Cleveland, and Midway are production sites (Tr. 18), and thus have similar equipment.

4. Local 150's Bargaining History with RiverStone

Marshall Douglas has been a member of Local 150 since 1993 (Tr. 87). He came on staff as an organizer in 1997 (Tr. 88), and he was elected the Union's Treasurer in 2007 (Tr. 87). As Treasurer, Douglas's responsibilities are to report the financial disbursements to the members (*id.*). As an employee of the Union, he supervises the Local 150 Business Agents and Organizers in Local 150's Districts 4, 5, and 8, which generally cover the Rockford, LaSalle and the Quad-Cities areas (*id.*). Douglas is also the lead negotiator for various contracts (Tr. 89).

i. Early Negotiations

The negotiation process that resulted in the 2000, 2005, and 2010 contracts was the same as that used by the parties since the 1960s (Tr. 91). Operations Vice-

President Guth admitted that the bargaining process was the same as long as he was on the Company's bargaining team, which has been since 1987 (Tr. 71). During the 1982 negotiations there were approximately 115 or 120 employees/members (Tr. 120). Although there were five or more sites involved, there was one set of negotiations that covered all of the employees at the Illinois quarries (Cleveland, Moline, Allied, Midway and Cordova Dredge and at times other locations) (Tr. 122). The entire group of employees working at these sites met to discuss bargaining proposals and to select employee bargaining representatives for the entire group (Tr. 120-121). The Local 150 bargaining team met with RiverStone's team and the parties exchanged proposals that covered all of the employees at all of the Illinois quarries sites (Tr. 122). The Company never proposed or said that the sites were separate; that negotiations were for one group only; or made proposals specific to one site (Tr. 123-124). After the parties reached a tentative agreement, the Local 150 team met with the employees and they voted as one group to accept the one tentative agreement (Tr. 122). This process was identical for the successor contract negotiations as well. During the process for all of these negotiations, neither the Company, the Union, nor the employees ever expressed a desire to be treated separately or quarry by quarry (Tr. 125, 126-127, 138).

ii. The 2000 Negotiations

In 2000, Douglas organized the Iowa quarries owned by RiverStone (Tr. 89). There are five quarries – Bettendorf, San Luis, McCausland Quarry, Le Clair Quarry, and New Liberty (*id.*). In 2000, Douglas offered to negotiate the Iowa

quarries and the Illinois quarries simultaneously (Tr. 91-92; U. Ex. 2, at p. 1).

RiverStone objected to this suggestion (U. Ex. 2, at p. 1). In his May 12, 2000 letter, Robert Boeye, attorney for RiverStone, responded, in part, as follows (*id.*) (emphasis added):

It is my understanding by your letter that you insist that as a precondition for further bargaining with Moline Consumers Company concerning the Illinois quarries, that the Company agrees to alter the existing bargaining units by combining LeClaire Investment, Inc.'s quarry with the Illinois quarries, or in the alternative to simultaneously negotiate the contracts for both the Illinois and Iowa quarries.

The subject line in Boeye's May 12, 2000 identifies the matter as "Re: Moline Consumer Company - Illinois Quarry Negotiations" (U. Ex. 2, at p. 1). Local 150 responded, advising Boeye that it was not making preconditions to bargaining, and Boeye sent a reply on May 18, 2000, that again referenced the matter as the "Moline Consumer Company - Illinois Quarry Negotiations" (U. Ex. 2, at p. 6). On May 19, 2000, Boeye sent another letter to Local 150 referencing the matter as: "Moline Consumers Company Labor Agreement" (U. Ex. 2, at p. 7). The parties have always understood Illinois quarry negotiations to mean negotiations over at least the five Illinois sites at issue in this matter (Tr. 92).⁹ In fact, it was common for the parties to refer to the five sites as the Illinois quarries (Tr. 93). RiverStone did not want to negotiate the Iowa quarries simultaneously with the Illinois quarries and so those two contracts were negotiated separately. Local 150 and RiverStone negotiated the four Iowa quarries as one unit (Tr. 72).

⁹ As discussed throughout this brief, the number of quarries constituting the "Illinois quarries" has changed depending upon RiverStone's operational needs.

In 2000, Local 150 went on strike at the Iowa quarries for unfair labor practices (Tr. 96). The Union's members at the Illinois quarries took a strike vote to honor the unfair labor practice strike occurring at the Iowa quarries (*id.*). Local 150 had a single meeting including all the Illinois quarry employees to take the strike vote, who voted collectively to honor the unfair labor practice strike occurring at the Iowa quarries (*id.*).

After the strike was settled in 2001, Local 150 and RiverStone reached a tentative agreement over the Illinois quarries (Tr. 96). Shortly after reaching the tentative agreement, Local 150 conducted a meeting of all the employees from the Illinois quarries to present the tentative agreement to them (Tr. 97). The tentative agreement was presented to all the employees working in the Illinois quarries as a single agreement (*id.*). One vote was taken and all employees present voted to accept the tentative agreement (Tr. 98). After the contract was ratified, at the same meeting the employees separated into their respective quarry groups and decided how to divide the financial package between wages and benefits (*id.*). Although RiverStone had no involvement in this process, the Company knew of and acknowledged it (Tr. 98, U. Ex. 1 at p. 4). The parties then reduced the Agreement to six separate documents because there were a few variations in classifications, some distinctions as to the apportionment of wages to benefits and because the employees wanted to maintain seniority based on their work site, not Company-wide (Tr. 109-110).

iii. The 2005 Negotiations

The process for the 2005 negotiations was virtually identical to the 2000 negotiations except that there was no strike in 2005 (Tr. 98-99). On February 28, 2005, Boeye sent a letter to William Dugan, then Union President-Business Manager, advising the Union that he would be representing RiverStone in negotiations for the successor agreement (U. Ex. 1). The letter provides, in pertinent part, the following (U. Ex. 1, at p. 1) (emphasis added):

We have been retained by RiverStone Group, Inc. and their Allied Stone Quarry; Cordova Dredge, General Sand and Gravel, Cleveland Quarry, Midway Stone Quarry and Ready Mixed Concrete Divisions (collectively the “Company”) to represent it in negotiations for new collective bargaining agreements to replace the agreements with your union, which expires April 30, 2005. This letter serves as the Company’s official notice to your union that it has elected to terminate the current collective bargaining agreement upon its expiration.

Upon demand, the Company is prepared to bargain concerning wages, hours and other terms and conditions of employment to be included in a new collective bargaining agreement between the Company and Local 150 of the International Union of Operating Engineers.

The bargaining team for the Company was either attorney Bob Boeye or Art Eggers and Vice-President Guth; and the team for the Union was Roy Setser, employee at the Allied site, James Cheville, employee at the Midway site, Union Business Agent Jim Meyers, and Douglas (Tr. 99; U. Ex. 1, at p. 2). The two employees were selected by all the employees working at the Illinois quarries during the initial meeting in which the employees discussed the proposals the Union would advance to the Employer on behalf of all the Illinois quarries (Tr. 99). The first session was April 4, 2005, where the Company made a single, unified

proposal which applied to the six sites (Tr. 59; U. Ex. 1, at p. 3).¹⁰ The proposal applied universally to all of the sites except for the name change for Moline Yard (Tr. 60-62; U. Ex. 1, at p. 3). The proposal did not distinguish between the sites (U. Ex. 1, at p. 3). As with the 2000 negotiations, the parties never discussed the quarries individually, and RiverStone never proposed to negotiate separately over each quarry (Tr. 99). As with the 2000 negotiations, the parties did not distinguish the wage and fringe benefit package, hours, or working conditions from quarry to quarry (Tr. 99-100).

The parties met a second time on April 19, 2005, and the party representatives were the same except that Boeye attended instead of Eggers (Tr. 66; U. Ex. 1, at p. 4). RiverStone provided a two-page document containing the tentative agreements (U. Ex. 1, at pp. 4 and 5). The wage tentative agreement identified the increases for each of the five years without reference to the various work sites (U. Ex. 1, at p. 4). The tentative agreement also provided that, “The Union shall have the option of allocating the above increases between wages, pension and health and welfare contributions” (*id.*). There is no requirement that the allocations be made on a site-by-site basis and it was exclusively the Union’s decision to apportion the economic package agreed upon for the entire unit among wages and benefits (*id.*).

The parties reached a tentative agreement in April (Tr. 100). The Union met with all the Illinois quarry employees at one time and, as a group, they voted to

¹⁰ Ready-Mix Concrete changed its name to Moline Yard (U. Ex. 1, at p. 3) and General Sand and Gravel was not yet closed (U. Ex. 1 at p. 1).

accept the contract (Tr. 100-101). The employees also decided to start equalizing the pay and pension distribution for all the employees at all the quarries and therefore did not separate by quarry to apportion the financial package between pay and benefits (Tr. 101).

iv. The 2010 Negotiations

The 2010 negotiation process was the same as the prior negotiations. The Union's bargaining team consisted of Douglas, Union Business Agent Stephen Russo, and three employees – Jim Cheville, Roger Hampton, and Steve Carlson (Tr. 101-102; U. Ex. 3, at p. 1). As in the prior negotiations, the three employees were chosen by all the Illinois quarry employees at the initial meeting when all the employees met to discuss the contract issues (Tr. 102). The Company's bargaining team again consisted of Guth and Boeye (Tr. 106; U. Ex. 3, at pp. 1, 3, 4).

During the 2010 negotiations, the parties never discussed the quarries individually, and the Company never proposed separate negotiations for each quarry (Tr. 102; U. Ex. 3, at p. 2 and 5-6). RiverStone never tried to separate the Cleveland quarry from the other quarries (Tr. 102-103). As in the prior negotiations, the parties never distinguished the wage and benefit package, hours, or working conditions from quarry to quarry (Tr. 103; U. Ex. 3, at pp. 2 and 5-6). The parties reached a tentative agreement in May, 2010 (Tr. 103; U. Ex. 3, at pp. 5-6). The contract proposals as well as the tentative agreement covered all the employees working at the Illinois quarries (Tr. 107). The wage package, hours of

work, and working conditions did not vary from quarry to quarry (Tr. 103; U. Ex. 3, at pp. 2, 5-6).

After reaching the tentative agreement, all the RiverStone employees from the Illinois quarries met as one group at the Local 150 Hall in Rock Island, not quarry by quarry, and the Union bargaining team presented the tentative agreement to the employees (Tr. 103-104). That document was the proposal/tentative agreement that RiverStone presented to the Union at the May 22, 2010 bargaining session (Tr. 106). The employees as a group then proceeded to ratify the five-year contract in a single vote (Tr. 103-104, 106, 108; U. Ex. 3, at pp. 5-6). Pursuant to the Parties' previous practice, the agreement was then reduced to five separate documents, one document for each quarry (Er. Ex. 2; U. Exs. 10, 13, 14, 15).

v. Other Quarry Negotiations

RiverStone owns two quarries about 60 miles east of the Cleveland Quarry, namely Troy Grove and Vermillion (Tr. 72). RiverStone and Local 150 negotiate those two sites as one contract (*id.*). As described *supra*, the five Iowa quarries are negotiated as a single unit (U. Ex. 2).

III. ARGUMENT

A. The Regional Director Erred in Finding That The Cleveland Quarry Is A Unit Appropriate For A Decertification Election Because It Is Not Coextensive With The Historically Recognized Bargaining Unit

Where “the petitioned-for unit is not coextensive with the currently recognized and established bargaining unit, the petition shall be dismissed.”

Wisconsin Bell, Inc., 283 NLRB 1165, 1166 (1987) (dismissing decertification petition where parties agreed to merge recently certified unit into larger preexisting unit), citing, *Green-Woods Cemetery*, 280 NLRB 1359 (1986); *Westinghouse Electric Corp.*, 227 NLRB 1932 (1977). As the Board explained long ago in dismissing multiple decertification petitions in *Campbell Soup Co.*, 111 NLRB 234, 235 (1955) (emphasis added):

Mindful of the fact that Congress has made no provision for the decertification of part of a certified or recognized bargaining unit and in the absence of any statutory requirement or overriding policy considerations to the contrary, we find that the existing bargaining unit is the unit appropriate for the purposes of collective bargaining in these severance cases involving Kraft employees.

The Regional Director erred in finding that the Cleveland Quarry is a unit appropriate for decertification petition because it is not coextensive with the historically recognized bargaining unit. The Regional Director's initial error is in assuming that the Cleveland Quarry and presumably the other specific quarry facilities which comprise the operation the parties historically refer to the "Illinois Quarries" were separately recognized. There is no evidence in this record that the individual quarry facilities were ever certified as appropriate bargaining units by the NLRB. Nor is there record evidence that the individual quarries were ever individually recognized by the parties as separate units. Indeed, the record demonstrates and the Regional Director found that the Employer recognized the Union "as the exclusive bargaining agency for all production, service and maintenance employees used in the operation of power drive equipment, which is recognized as being within the jurisdiction of the I.U.O.E. ...," without regard to any

geographic location (Decision at 3). And although this recognition clause is repeated verbatim in five separate documents, the Regional Director erred in finding that these were five separate agreements simply negotiated simultaneously.

The record shows that the parties have historically negotiated a single contract. As the Regional Director found, the Union assembles the employees of all the Employer's "Illinois Quarry" facilities in a single meeting to develop bargaining strategy (Decision at 3); a single Union team of negotiators then meets with a single team of Employer representatives to exchange proposals covering all the Employer's facilities in a series of negotiations. Once an agreement is reached, the Union then presents the contract as a single agreement, in a single meeting to its members who then ratify it in a single vote. It is only after the contract is approved, that the employees of the individual quarries had in the past decided individually, without any participation by management, as to how they would apportion the economic package. It was for that reason alone then that the contract was broken down into five separate documents. That practice however was phased out by the Union over the last two negotiations in 2005 and 2010.

That the Employer considered the Illinois Quarries to comprise a single bargaining unit covered by a single contract is confirmed by its pre-negotiation correspondence. In 2000, Local 150 organized four quarries in Iowa owned and operated by Moline Consumers¹¹ under the corporate name LeClaire Investments. The Union petitioned for and the Board certified a unit consisting of material

¹¹ Moline Consumers became RiverStone in about 2005. *See* footnote 5, *supra*.

production facilities in LeClaire, McCauslin, and New Liberty, Iowa, as well as a loading operation in Muscatine, Iowa (NLRB Case No. 33-RC-4484). Negotiations over the Illinois quarries were scheduled to begin in that year as well, so the Union proposed to RiverStone that negotiations be combined (U. Ex. 2 at p. 1). The Employer rejected the request “to simultaneously negotiate the contracts for both the Illinois and Iowa quarries” as an unlawful precondition to bargaining (*id.*). Nevertheless, the Employer’s May 12, 2000 letter confirms that it likewise understood this bargaining relationship to cover “the Illinois quarries” as one bargaining unit and that the negotiations were for a single “collective bargaining agreement” (*id.*).

Prior to meeting with the employer in any given contract year, the Union customarily met with bargaining unit members to identify bargaining issues (Tr. 99, 102). In a single meeting with all the employees of the Illinois quarries at the Local 150 Union Hall in Rock Island, Illinois, the members discussed their economic proposals, any local issues they wanted to address, and selected two or three rank-and-file members to represent the whole group in bargaining (*id.*). Not every quarry had an employee member of the bargaining team.

For as long as anyone involved can remember, RiverStone and I.U.O.E. Local 537, later Local 150, negotiated over the Illinois quarries as a single unit. In 2000, 2005, and 2010, the company bargaining team consisted of RiverStone Vice-President of Operations Marshall Guth, and Company attorney Robert Boeye (Tr. 106; U. Ex. 1 at pp. 1, 2, 4; U. Ex. 3 at pp. 1, 3, 4). The Union team varied, but

usually included a Local 150 officer (Financial Secretary Ray Connors in 2000 and 2005, Treasurer Douglas in 2010); a business agent responsible for servicing the quarries (Craig Wonderlich in 2000, Jim Myers in 2005, and Steve Russo in 2010); and two or three rank-and-file employees including Jim Cheville from Allied Stone and, in 2005, Roy Setzer, from Midway (Tr. 99-102). In 2010, the Union team included Cheville again from Allied Stone, Steve Carlson from Cleveland and Roger Hampton from the Midway facility (Tr. 101-102).

Consistent with its long standing practice, in 2005 RiverStone submitted its proposals to the Union at the outset of negotiations (Tr. 59; U. Ex. 1 at p. 3). Once again, the Employer's correspondence referred to RiverStone and the Illinois Quarries as "collectively the 'Company'" (U. Ex. 1); stated its intent "to terminate the current collective bargaining agreement upon its expiration," referring specifically to the agreement in the singular (*id.*) (emphasis added); and indicated its intent to bargain "a new collective bargaining agreement," again in the singular (*id.*) (emphasis added). The Employer's proposals expressly encompassed the six then existing facilities (the General Sand and Gravel facility had since been closed) and did not distinguish between them over any of its terms. RiverStone proposed language changes again without regard to specific sites, as well as wage and benefit increases applicable to the entire unit (U. Ex. 1 at pp. 3, 5-6). Significantly, RiverStone stated, "The Union shall have the option of allocating the above increases between wages, pension, and health and welfare contributions" (U. Ex. 1 at p. 5). RiverStone's proposals maintained that same format in 2010 (U. Ex. 3 at

p. 2, 5-6). There were no separate bargaining sessions for any of the individual quarries (Tr. 99, 102).

After arriving at a tentative agreement, the Union customarily presented that tentative agreement to the entire bargaining unit at a single meeting at the Rock Island Union Hall. In 2005, a majority of the employees attended the meeting and voted to accept the contract in a single ratification vote (Tr. 100). In 2010, the same pattern of collective bargaining occurred, including the employees from all five sites attending the meeting and ratifying the tentative agreement (Tr. 103).

This process on the part of the Union and the unit employees reflects the facts relied upon by the Regional Director in *Green-Wood Cemetery*, 280 NLRB 1359 (1986). There the Regional Director dismissed a decertification petition filed by a group of office clericals on the ground that it was not coextensive with the larger recognized unit. The Board approved the dismissal, explaining (*id.* at 1360):

The Regional Director found further support for a finding of merger of units in the 1982 negotiations. He noted that the Union had a single negotiating committee for all employees, held a single contract proposal meeting for all employees, and held a single ratification vote. He further noted that the parties entered into a single contract extension, that there were no separate sessions for proposals related to the clericals, and, most importantly, that the parties retained the merge recognition clause from the 1979 agreement.

Prior to 2005 and 2010, after the Illinois Quarry employees voted to ratify the agreement, the unit employees broke down into separate sub-groups according to the facility at which they worked (Tr. 109). Those sub-groups of employees then apportioned the economic package agreed upon by RiverStone and the Union and ratified by the entire bargaining unit. *Id.* It is for this reason that minor variations

in the distribution of the economic package, and because seniority rights are accorded employees by facility, that separate documents are executed (Tr. 108-110; U. Exs. 10, 13, 14, 15; Er. Ex. 2). The written agreements are identical in all aspects save for the economic distribution and some classifications. And as observed *supra*, the recognition clause makes no distinction between facilities. The existence of individual agreements is alone insufficient to establish separate units. *See, White-Westinghouse Corp.*, 229 NLRB 667, 672-673 (1977) (the “reality of the bargaining relationship” outweighs local supplements to a national agreement peculiar to individual merged units); *Univac Division of Remington Rand Division of Sperry Rand Corporation*, 137 NLRB 1232, 1234 (1962) (Board finding that “the Employer and the Union intended to and in fact did carry on bargaining on the basis of a multi-plant unit and that the individual certified units have been merged into one overall unit”) (citation omitted).

A “bargaining unit” is an entity which exists independent of any specific contract. Determination of a bargaining unit is a process which logically precedes collective bargaining. An employer can voluntarily recognize a union as the representative of any given group of employees, then bargain a contract. *See, generally, Lamons Gasket Company*, 357 NLRB No. 72, slip op. at 3 (2011) (federal labor law “expressly recognizes two paths employees may travel to obtain representation for the purposes of collective bargaining with their employer.”). Or the Board can exercise its statutory authority to determine “an appropriate unit” under Section 9(a) of the Act. 29 U.S.C. § 159(a). Prior bargaining history is given

substantial weight in determining the appropriateness of a bargaining unit. NLRB, *An Outline of Law and Procedure In Representation Cases*, § 12-220, “History of Collective Bargaining,” at 138. This is so because the Board is reluctant to disturb a unit established by collective bargaining. *Id.* The parties to any given bargaining relationship can, moreover, merge pre-existing units through collective bargaining. *See, e.g. Wisconsin Bell*, 283 NLRB at 1166; *Univac Division of Remington Rand*, 137 NLRB at 1234. It is this “reality of the bargaining relationship” *White-Westinghouse*, 229 NLRB at 672-673, that determines the bargaining unit, and therefore requires dismissal of the petition here.

The Regional Director’s reliance on *Metropolitan Life Insurance Company*, 172 NLRB 1257 (1968) in this case is misplaced. There, unlike here, two separately certified bargaining units were represented by the intervenor union. *Id.* at 1257-1258.¹² The union and the company conducted integrated negotiations with a single bargaining team, arriving at identical terms for both facilities, but executed separate contracts. *Id.* at 1258. Unlike this case, however, the parties considered the units to be separate: they in writing referred to the “Minnesota bargaining unit and the Wisconsin bargaining unit;” the employer operated the facilities separately with “little or no transfer or interchange of” employees between the unit (*id.*); and although the union aggregated the ratification votes of the employees, the ratification procedures were apparently conducted separately (*id.*). Unlike here, the

¹² This is likewise true in the *Delta Mills, Inc.*, 287 NLRB 367 (1987) and *Duval Corporation*, 234 NLRB 160 (1978) cases cited by the Employer in its brief to the Regional Director. In those cases, the Board found that preexisting certified units were not merged into a single unit by bargaining.

intervenor union in *Metropolitan Life* referred to the agreements in the plural in a single notice letter of an intent to terminate the contract (*id.*). By contrast RiverStone utilized a single letter but referred to the agreement in the singular (U. Ex. 2 at 1). And while the contract recognition clauses in *Metropolitan Life* never purported to merge the units into a single unit, the contract recognition clause here makes no geographic distinction within the unit description.¹³ There is no way to interpret the recognitional clause other than that it defines a unit of all the employees performing the work described regardless of their location.

Furthermore, *Metropolitan Life* contradicts the Regional Director's contention that community of interest factors are irrelevant in the determination of the appropriateness of the bargaining unit for decertification purposes (Decision at 5). In *Metropolitan Life*, the Regional Director expressly found "that the following employees of the Employer constitute an appropriate unit for purposes of collective bargaining within the meaning of Section 9(b) of the Act," going on then to identify the individuals in the previously certified Wisconsin unit. 172 NLRB at 1258. The Regional Director had expressly analyzed the employer's "administrative organization" with the two preexisting Wisconsin and Minnesota bargaining units, and concluded that there was "little or no transfer or interchange" of employees between district offices. *Id.* It may be true that the Regional Director in any given case involving preexisting certified units need not revisit community of interest

¹³In *Louisiana Dry Dock Company, Inc.*, 293 NLRB 233 (1989), cited by the Employer but not the Regional Director, the Board found the recognition clause in the contract ambiguous because while it listed specific facilities in several different states, it did not explicitly define this as a multi-state unit.

factors on the ground that the Region had already done this work prior to certification. Where, as here, there has been no previous certification, analysis of community of interest factors is appropriate.

B. The Community of Interest Factors Require A Finding That The Cleveland Site Standing Alone Is Not An Appropriate Bargaining Unit And That The Only Appropriate Bargaining Unit Is A Multi-Site Unit Comprised of All Five Historically Combined Sites

1. The Existing Bargaining Unit Has Always Consisted Of All Five Sites As Demonstrated By The Community-Of-Interest Factors And Therefore The Regional Director Incorrectly Decided That Community-Of-Interest Factors Are Not Relevant In This Case

The Regional Director, in his Decision and Direction of Election at page 5 determined that:

the unit appropriate in a decertification election must be coextensive with either the certified or recognized bargaining unit; hence community-of-interest factors which would be considered in making an initial appropriate unit determination are not relevant herein.

In support of his Decision, the Regional Director cited *Fast Food Merchandisers* 242 NLRB 8 (1979). However, *Fast Food Merchandisers* is distinguishable from this case for several reasons. That decertification case involved a stipulation for certification upon a consent election. A secret ballot election was conducted and there were various challenges to ballots which were sufficient in number to affect the results of the election. The challenged ballots concerned the classification of employees who had been specifically excluded from the recognized bargaining unit. The record included an agreement by the parties to exclude from the bargaining unit the employees within the classification, whose titles were specifically excluded

under the recognition clause of the collective bargaining agreement. 242 NLRB 8 (1979). The Board explained (*id.* at 9):

Whatever affect given by the Board to stipulated units in representation elections, it would obviously frustrate the Board policy of directing decertification elections in the existing bargaining unit to permit the parties to vary the unit and participate in an election in a different unit of their own choosing.

Fast Food Merchandisers is readily distinguishable from the case at hand, because this case does not involve an election involving a certified bargaining unit. The five sites have historically been recognized as the existing bargaining unit and by directing an election of the employees at one site, exclusive of the other four sites, the Regional Director is permitting the Employer and a dissident group of employees to carve out a new bargaining unit.

Moreover, the Board in *Westinghouse Electric Corp.*, 115 NLRB 530, 532 explained (emphasis added):

As the Board has previously pointed out, Section 9 (c)(1)(A)(ii) of the Act does not require the Board to conduct a decertification election on the basis of a petition which seeks to raise a question concerning representation with respect to only part of an existing unit. Rather, as is clearly evident from the statutory language, that section of the Act was designed to provide a method for determining whether an existing unit of employees desire to continue their current representation, and the Board is required to conduct an election thereunder only when a question is raised concerning such current representation in the existing unit.

Thus, the community-of-interest factors are relevant because those factors aid in establishing the “existing unit.” The existing and recognized unit consists of all five sites and any single site unit, Cleveland or otherwise, is inappropriate.

Additionally, the recognition clause in the case at hand does not distinguish

between sites, rather it reads as if all five sites are one bargaining unit. For decades, the Intervenor, Employer, and Petitioner were all content that the bargaining unit consisted of all five sites. As more fully explained below, the historically recognized bargaining unit consists of all five sites.

The Board holds fast to its longstanding presumption that a petitioned-for employer-wide unit is appropriate. *Western Electric Co.*, 98 NLRB 1018 (1952). Where a multi-site employer is involved, the Board has consistently looked to several factors in assessing the appropriateness of the unit: (1) the extent to which the requested smaller unit represents a distinct and identifiable employee grouping; (2) geographic proximity of the various sites; (3) interchange of employees among the sites; (4) similarity in employees' skills, duties and working conditions; (5) functional integration of the employer's operations; (6) centralized control of management and supervision; (7) extent of union organization; (8) desires of affected employees; and (9) history of collective bargaining. *NLRB v. Aaron's Office Furniture Co.*, 825 F.2d 1167, 1169 (7th Cir. 1987); *Dezcon, Inc.*, 295 NLRB 109, 111 (1989); *Kapok Tree Inn*, 232 NLRB 702, 703-704 (1977); *NLRB v. Carson Cable TV*, 795 F.2d 879, 884-885 (9th Cir. 1986); *Friendly Ice Cream Corp. v. NLRB*, 705 F.2d 570, 575-577 (1st Cir. 1983). No single factor alone is determinative. *NLRB v. Chicago Health and Tennis Clubs*, 567 F.2d 331, 335 (7th Cir. 1977). In weighing these factors, the ultimate determination to be made is whether the employees share a requisite "community of interest." *Friendly Ice Cream Corp. v. NLRB* at 575-576; *Kapok Tree Inn* at 703-704.

i. Each Worksite Is Not a Distinct and Identifiable Employee Grouping

As the collective bargaining agreements and the testimony of the employees indicate, each of the facilities has the same types of employees performing the same types of jobs in essentially the same working conditions (Er. Ex. 2; U, Exs. 10, 13, 14, and 15; and *see, supra*, Section II, A. 3.). The employees do not hold themselves out as individual groups and the Employer historically has treated the sites as one integrated business entity. The employee interchange and functional integration of operations, as more fully discussed below, further establishes that no worksite is distinct. For these reasons, no one Illinois site, including Cleveland Quarry, is a distinct bargaining unit and therefore a single site bargaining unit is inappropriate and the only appropriate bargaining unit is a multi-site bargaining unit consisting of all five sites.

ii. Geographic Proximity of the Various Sites

Local 150 has demonstrated that the sites are geographically proximate. As pointed out in the Statement of Facts, all five sites are within 15-20 miles of each other (Tr. 26). The four production sites range from approximately ten miles to twenty miles from the RiverStone office in Moline, Illinois and the central Moline Yard (Er. Ex. 1). Therefore, the proximity of the various sites favors a multi-site bargaining unit and demonstrates that a single site unit is inappropriate. *See, NLRB v. Carson Cable TV*, 795 F.2d 879, 886.

iii. The Company Interchanges Employees Between the Sites

The evidence demonstrates that while the sites are not situated virtually on top of each other, RiverStone nonetheless has some interchange of employees from site to site. The evidence establishes that employees are transferred from one site to another based on operational needs. For example, when the Allied site started a second shift, Cheville worked at the site to assist until the site was up and running efficiently (Tr. 127-128). Covemaker normally works at the Cleveland site, but was sent to the Allied site to operate the drill for several months (Tr. 141). Thus, there is employee interchange between sites. Additionally, *assuming arguendo*, that it is determined that Cleveland Quarry is an appropriate bargaining unit separate and apart from the larger group because each site has a contract, then such a transfer arguably will be a violation of the contract with the other quarry, and will at a minimum cause other problems. This is particularly true if, under that scenario, the employees at the Cleveland Quarry vote to decertify and non-union “operators” are assigned to a site where the equipment operators are represented by Local 150. Such a scenario will not further industrial peace and stability. *See Dezcon, Inc.*, 295 NLRB 109, 111 (“While the evidence of interchange is not overwhelming, the circumstances of the Employer’s business render the interchange documented in the record significant”).

iv. The Employees At All The Sites Have Similar Skills, Duties, and Working Conditions

As demonstrated in greater detail in the Facts section of this Brief, the employees at all five sites have similar skills, duties and working conditions. Furthermore, the documents memorializing the agreement reached between Local 150 and RiverStone identifying the terms and conditions of employment are identical with the exception that the job classifications vary slightly and one pay rate at the Moline Yard site is slightly higher than the other sites (Er. Ex. 2; U. Exs. 10, 13, 14, 15). Thus, the evidence establishes that as between the five sites, the employees have similar skills, duties and work conditions. Therefore, a single site bargaining unit is inappropriate and the only appropriate bargaining unit is a multi-site bargaining unit consisting of all five sites. *See Dezcon, Inc.*, 295 NLRB 109, 111; *NLRB v. Carson Cable TV*, 795 F.2d 879, 885.

v. The Worksites Are Functionally Integrated

The main office for all five sites is Moline, Illinois. The fringe benefit contribution report exhibits demonstrate that all fringe benefits are paid by RiverStone in a single check covering all the Illinois quarries, as well as Troy Grove (U. Ex. 8). Payroll and all human resource policies and procedures are generated from the Moline office (U. Exs. 4, 5, 6, 7). The sites share equipment and, in fact, there are roving pieces of equipment that move from site to site (Tr. 131, 142). Employees move from site to site, including superintendents (Tr. 54, 127-128, 141). Employees from the main office, engineers, fill in when superintendents are absent (Tr. 143-144). Four of the five sites produce aggregate and send it to the Moline

Yard, and the Moline Yard sells the materials. This is evidence of functional integration. Guth and the main office decide whether to expand operations at any given site because of demand, or conversely, to shut down a particular site. Because the sites share equipment, personnel and financial control, they should be considered functionally integrated. Therefore, this factor favors a multi-site bargaining unit and establishes that a single site bargaining unit is inappropriate. *See, NLRB v. Chicago Health and Tennis Clubs*, 567 F.2d 331, 336-337.

vi. The Company Has Centralized Control of Management and Supervision

The evidence demonstrates that RiverStone has a centralized hiring system. Although the site superintendents have some input in hiring decisions, Guth and the human resource personnel decide if and when additional employees are needed, when and how to advertise, collect the job applications, perform an initial screening, and then send the applications to the site superintendents (Tr. 34-37). As Operations Vice-President, Guth must approve the addition of any and all new positions (Tr. 35). Thus, the way that the individuals are considered and hired demonstrates that RiverStone has centralized control of management and supervision. Guth is the Vice-President of Operations for RiverStone and he is responsible for overseeing all five sites. The superintendents report directly to him. Guth has weekly contact with the site superintendents and has group meetings with all of them once or twice a year.

RiverStone has common labor relations because there is one set of negotiations for all five sites (Tr. 122; U. Exs. 1, 2, 3). Guth signs the collective

bargaining agreement with the Union (Tr. 29 and *see, e.g.*, Er. Ex. 2); none of the site superintendents has the authority to sign a CBA (Tr. 30). The Company has centralized human resources. There is a drug and alcohol policy and a sexual harassment policy that applies to all five sites, with the first step of the sexual harassment policy being to report the incident to personnel at the main office. The Company also has a centralized payroll system. Thus, the Company has centralized labor relations. Therefore, this factor favors a multi-site bargaining unit. *See, NLRB v. Chicago Health and Tennis Clubs*, 567 F.2d 331, 336; *NLRB v. Carson Cable TV*, 795 F.2d 879, 885-886.

vii. Extent of Union Organization

The Union has represented the employees at all five sites and more and treated them as one group since at least the 1960s (Tr. 91). The employees from all the sites meet as one group and decide matters as one group. They collectively decide the bargaining proposals, collectively select the employee members of the bargaining team, and collectively ratify the agreement.

viii. Desires of Affected Employees

Throughout the numerous sets of negotiations, which included meetings to discuss the contract proposals and to select the negotiating team, and meetings to ratify the contract, no Union member expressed any desire to create a separate bargaining unit. The employees also agreed to equalize the apportionment of wages and benefits for all employees. Therefore, the desire of the affected employees is to have one bargaining unit. Finally, the geographical separation of the sites is not so

large as to inhibit any employee from participating in Union activities. *See, NLRB v. Carson Cable TV*, 795 F.2d 879, 886.

ix. History of Collective Bargaining

As the Union established in the above Sections of the Statement of Facts and Argument, the history of collective bargaining clearly demonstrates RiverStone, the Union and the employees of the Illinois quarries always believed there to be only one bargaining unit. Breaking off the Cleveland Quarry into a separate unit is inappropriate. If the Board carves out Cleveland, then the Board's next step presumably would be to determine that the remaining four sites are likewise separate bargaining units. If so, then there would be five separate bargaining units comprised of three to twelve employees each, which would be inappropriate. Therefore, a single site is inappropriate and the only appropriate bargaining unit is the multi-site bargaining unit consisting of all five sites.

x. The Company's Failure to Produce Documents Permits Negative Inferences

RiverStone failed to provide the documents/information requested in the Union's subpoena and therefore a negative inference can be drawn. The failure of the Company to produce evidence regarding a relevant and material point permits the adverse inference that the evidence would have been unfavorable to the Employer. *St. Barnabas Hospital*, 334 NLRB 1000, 1015, n. 20 (2001); *see also Roper Corp. v. NLRB*, 712 F.2d 306 (7th Cir. 1983) (failure to call witness supported inference testimony would have been unfavorable). When a party has relevant documentary evidence within its control which is not produced, that failure gives

rise to inference that the evidence would be unfavorable to the party. *Montana Power Company*, 2000 WL 33664341 (NLRB August 15, 2000); *NLRB v. MFY Industries, Inc.*, 573 F.2d 673 (10th Cir. 1978). As noted in the Statement of the Case, the employer did not contest any of the evidence concerning bargaining unit appropriateness presented by Local 150. Accordingly, the Region would be entitled to make the appropriate inferences with respect to all of the foregoing elements associated with the Union's argument that a multi-site bargaining unit has been recognized for decades and is the only appropriate bargaining unit.

2. Cleveland Quarry As A Single Site Bargaining Unit Is Inappropriate Because It Cannot Stand Alone – The Only Appropriate Bargaining Unit Consists Of All Five Sites

The Cleveland Quarry and the other sites are interrelated and cannot be separated. As discussed above employees transfer from one site to the other sites, equipment moves from site to site, and the sites are interdependent on each other. Material mined at all the sites is shipped and sold in Moline, and all the sites are managed from that main office. Permitting the employees at Cleveland quarry to decertify has the potential to create grievances and unfair labor practices because of this interrelated operation. Non-Union Cleveland quarry employees working side-by-side with bargaining unit employees performing work covered by a collective bargaining agreement which prohibits such activity will destroy the labor peace the Act is intended to foster.

Another impermissible consequence was created by the Regional Director's Decision: if the Cleveland quarry is now a separate bargaining unit, consistent with

that rationale the other sites could likewise become separate bargaining units. Ultimately there could be five separate bargaining units. However, that outcome could deny certain employees any representation in the future. Some of the sites have three employees and at times fewer than three employees. If the number of employees drops to one, then that employee could have no representation rights under the Act, due to the “one-person” rule. *Roman Catholic Orphan Asylum*, 229 NLRB 251, 252 (1977) (contrary to Board Policy to certify a single person unit); *Joe White ILA*, 154 NLRB 1, 6 (1965) (“It is well established that there cannot be concerted action within the meaning of the Act by one employee.”). That outcome is contrary to the purpose of the Act. The Board has dismissed petitions which seek to sever from an existing unit separate units of employees where those units would be one person, and therefore inappropriate for collective bargaining. *General Textile Mills, Inc.*, 109 NLRB 263, 266 (1954). The creation of a separate Cleveland quarry bargaining unit appropriate for collective bargaining is a proper consideration by the Board and sufficient basis alone to dismiss the petition.

C. The Appropriate Election Bar Is Five Years Where The Employer And The Union Agree Upon, And The Employees Vote To Ratify, A Five Year Contract.

In its Post-Hearing Brief, Intervenor Local 150 argued that the Board should revisit its three-year contract bar rule and dismiss the decertification petition here because the parties negotiated a five year contract which was ratified by the membership (Brief of Intervenor Local 150 at 28-32). The Regional Director rejected this argument, pointing out that he “clearly has no authority to overrule or

ignore what even the Intervenor concedes is clear Board precedent” (Decision at 5).

Because the contract bar applies only for the first three years of a collective bargaining agreement under *General Cable Corp.*, 139 NLRB 1123 (1962) the Regional Director found no contract bar in this case (Decision at 5). For the reasons that follow, Intervenor Local 150 respectfully requests that the Board reexamine the contract bar rule and extend the bar in situations where, as here, the parties negotiate and bargaining unit employees by secret ballot vote ratify a collective bargaining agreement of greater than three years.

As stated in J.E. Higgins, Jr., *The Developing Labor Law* at 609 (Bloomberg BNA, 6th Ed. 2012);

In an effort to stabilize the employer-union relationship, the Board has established the *contract-bar* doctrine whereby a current and valid collective bargaining agreement will ordinarily prevent the holding of an election. Although now recognized by implication in Section 8(b)(7), the doctrine is discretionary and not statutorily mandated. The formulation, application, and modification of the Board’s contract-bar rules are committed to the Board’s judgment and are not subject to ordinary judicial review.

“This rule was formulated by the Board in an effort to reconcile the NLRA’s goals of promoting industrial stability and employee freedom of choice.” *NLRB v.*

Dominick’s Finer Foods, 28 F.3d 678, 683 (7th Cir. 1994). Therefore, the Board has “substantial discretion in deciding whether to apply the rule in a particular case and in formulating the contours of the rule.” *Id.*

The Board adopted the current three year contract-bar rule in *General Cable Corp.*, 139 NLRB at 1125. Despite support from “the overwhelming majority of labor and management representatives” in support of a longer bar period, the Board

explained that, “Stability of industrial relations would in our judgment be so heavily weighted against employee freedom of choice as to create an inequitable imbalance.” A few years later, in *General Dynamics Corp.*, 175 NLRB 1022, 1023-1024 (1969), the Board again rejected an employer argument that the three year rule should be enlarged to five years for the reason articulated in *General Cable*.

The Board recently reviewed the balance between employee free choice and labor relations stability in *Lamons Gasket Company*, 357 NLRB No. 72 (2011). There the Board overruled its decision and the procedures for challenging voluntary recognition agreements established in *Dana Corp.*, 351 NLRB 434 (2007). The Board explained that, “The modifications have proved unnecessary to protect free choice and thus unnecessarily undermine the Act’s purpose of encouraging collective bargaining with employees’ freely chosen representative.” *Lamons Gasket*, 357 NLRB No. 72 at 9. The Board’s three year contract-bar rule similarly creates an inequitable balance against stable collective bargaining relationships in favor of a misguided conception of employee free choice.

In this case, the parties have a history of negotiating five-year collective bargaining agreements (Tr. 91). It is uncontested that regardless of the scope of the bargaining unit, the parties’ current agreement is effective for five years, from May 3, 2010 through May 3, 2015 (Er. Ex. 2, U. Exs. 10, 13-15). This five year term is consistent with the agreements between the parties covering the Illinois quarries since at least 2000 (U. Ex. 1 at pp. 3, 6; U. Ex. 3 at pp. 2, 5). Every time the members of the bargaining unit as a group voted to ratify these agreements, they

did so knowing that it provided for this five year duration (*see, e.g.*, U. Exs. 1 at pp. 3, 6, and 3 at pp. 2, 5). This informed vote fully satisfies the Board's free-choice policy. The unit employees know that, for good or ill, regardless of future changes in economic circumstances, they are approving an agreement for five years. The Union, the Employer and those employees are entitled to rely on this five year deal.

The Board has recognized the significance of membership ratification in formulating its contract-bar rule. *See, Appalachian Shale Products, Co.*, 121 NLRB 1160, 1162 (1958) (discussing the "general rule" that where membership ratification is made a condition precedent to contract validity, the failure to achieve timely ratification of the contract will remove it as a bar). If the failure to ratify an agreement can eliminate the three year contract bar, then an employee vote on a contract of greater than three years should extend the election bar. This protects the employees who by a majority vote opt for the stability and certainty of an extended agreement, as well as the Employer and Union, from a mid-term disruption of their contract.

Furthermore, application of the three year bar to this situation permits a small group of dissenters to disrupt this stable bargaining relationship. It is essential to recognize that under the National Labor Policy, employee free choice rests upon traditional American principles of majority rule. *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967) ("The majority rule concept is today unquestionably at the center of our federal labor policy."); *Dick's Sporting Goods*, General Counsel Advice Memorandum Case No. 6-CA-34821 (2006) at 18, ("The

essence of industrial democracy, as contemplated and enforced by the Act, is fundamentally based on majoritarian principles.”). An extended contract bar thereby “effectuates rather than impedes employee free choice,” *Lamons Gasket*, 357, NLRB No. 72 at 10, where a majority of the unit employees have voted to ratify a contract greater than three years duration. Overreliance on an ambiguous concept of employee free choice to allow the minority to undermine the position of the majority and the Union’s relationship with the Employer is not warranted by the policies of the Act.

Finally, adopting a contract bar rule which conforms to the collective bargain of the parties and approved by the employees affected is consistent with the National Labor Policy of voluntary, private ordering of labor relations. *Lamons Gasket*, 357 NLRB No. 72 at 8, relying on *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970) (object of the Act not to allow government regulation of terms and conditions of employment, rather to insure that employers and their employees could work together to establish mutually satisfactory conditions). Election bars consistent with the voluntary agreements of the parties “more likely advance the statutory purpose of preventing ‘industrial strife or unrest’ and ‘encouraging the practice and procedure of collective bargaining.’” *Lamons Gasket*, 357 NLRB No. 72 at 8. The Board should modify its contract bar rule to advance better the policies of the Act, and dismiss the petition here.

CONCLUSION

For all the above-stated reasons, Local 150, Intervenor in Case No. 25-RD-105145, respectfully requests that the Board dismiss the decertification petition. In the alternative, the Union asks the Board to review the Regional Director's Decision, reverse it and determine that the appropriate bargaining unit is comprised of the employees working at all five job sites.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he e-filed the foregoing with the Executive Secretary and Region 25 via the National Labor Relations Board's website on July 11, 2013 and served copies on the following individuals:

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