UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SEEDORFF MASONRY, INC.

and Case 25-CA-088910

INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL 150, AFL-CIO

GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Respectfully submitted by:

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Comes now Counsel for the General Counsel and respectfully submits to the Board this Answering Brief to the Exceptions to the Administrative Law Judge's Decision filed by Seedorff Masonry, Inc., hereinafter referred to as Respondent. Counsel for the General Counsel hereby requests that Respondent's exceptions be denied and that the Administrative Law Judge's Decision in instant case, which issued on November 19, 2013, be affirmed. In support of this position, Counsel for the General Counsel offers the following:

I. STATEMENT OF THE CASE

On November 30, 2012, Region 25 issued a complaint and notice of hearing in the instant case alleging that, since about April 12, 2012, the Respondent has violated Sections 8(a)(1) and (5) of the National Labor Relations Act (Act) by refusing to adhere to a collective-bargaining agreement with the International Union of Operating Engineers, Local 150, hereinafter referred to as the Union. On July 11, 2013, an administrative hearing was held before Administrative Law Melissa Olivero regarding the instant case. On August 27, 2013, the parties filed post-hearing briefs. On November 19, 2013, the Judge issued her decision. In her decision, the Judge

correctly concluded that, since the parties' current collective-bargaining agreement is still in effect, the Respondent's refusal to abide by terms of this agreement violated Sections 8(a)(1) and (5) (Decision, p. 7, 1. 15-35).

On December 17, 2013, the Respondent filed exceptions to the Judge's Decision. On December 19, 2013, the Counsel for the Union filed a motion for an extension of time for filing an answering brief to January 14, 2014, which was granted on December 20, 2013.

II. STATEMENT OF THE FACTS

A. Background

The Respondent is a corporation with an office and place of business in Strawberry Point, Iowa and is engaged in the installation of brick, stone, and block at primarily commercial facilities (TR 15; GC Ex 1(d); GC Ex 1(f)). The Respondent performs work in Nebraska, Illinois, Missouri, South Dakota, Minnesota, and Wisconsin. The Respondent also performs work in the following counties in Iowa: Scott County, Muscatine County, Clinton County, Moline County, and Rock Island County (TR 15, 79). Furthermore, the Respondent hires between 10 and 30 bricklayers and 10 to 30 laborers seasonally to perform work in these areas (TR 79). Robert Marsh is the President (TR 13). Mark Raima served as the Vice President and Controller between at least 1988 and 2003 (TR 15-16).

B. Participation Agreement and Building Agreement Individual Signers Agreement

On July 18, 1988, Respondent's Vice President and Controller Raima signed a Participation Agreement on behalf of the Respondent requiring the Respondent to make payments to Local 537's, Health, Welfare, and Pension Funds (GC Ex 3). Also, on July 19, 1988, Raima signed an

agreement called the Building Agreement Individual Signers, hereinafter referred to as the Signers Agreement, on behalf of the Respondent. The Signers Agreement stated that,

> "the undersigned employer hereby becomes a signatory employer to this agreement between the Quad City Builders Association, Inc. (Association) and International Union of Operating Engineers, Local Union No. 537 (Local 537). The undersigned employer signatory hereto who is not a member of the said Association agrees to be bound by any amendments, extensions or changes in this Agreement agreed to between the Union and the Association, and further agree to be bound by the terms and conditions of all subsequent contracts negotiated between the Union and the Association unless ninety (90) days prior to the expiration of this or any subsequent agreement said non-member notifies the Union in writing that it revokes such authorization. Further, said non-member employer agrees that notice served by the Union upon said Association and Mediation Services for re-opening, termination or commence of negotiations shall constitute notice upon and covering the non-member employer signatory hereto" (TR 17; GC Ex 2).

About late 1991 to 1992, Local 537 merged into the Union. Thus, Local 537 became a part of the Union (TR 23-24). On March 1, 2006, former Union President and Business Manager William Dugan sent a letter to Association President Steve Tondi requesting to commence negotiations for a new collective-bargaining agreement since the then current collective-bargaining agreement was scheduled to expire on May 31, 2006 (TR 113-115; Union Ex 2). On April 17, 2006, Tondi sent a letter to Dugan stating that he was willing to meet (TR 81-83; Resp. Ex 4). The Association and the Union subsequently negotiated several collective-bargaining agreements (TR 26-27).

C. Current Collective-Bargaining Agreement

Between 1988 and 2010, the Association and the Union negotiated 10 collective-bargaining agreements. The most recent collective-bargaining agreement, hereinafter referred to as the Agreement, which is effective from June 1, 2010 through May 31, 2014 (TR 26-27; GC Ex 4). Section 1.1 of the Agreement states that contractors recognize the Union as the sole collective-bargaining agent for those employees of the contractors engaged in the operation and

maintenance of all hoisting and portable machines and engines used on building work and excavating work pertaining to or that may be done in preparation, such as grading and improvement of the property or site, by the contractor, whether operated by steam, electricity, gasoline, diesel, compressed air or hydraulic power and including all equipment listed in the wage classification contained herein under Article 11 of the Agreement, or any other power machine that may be used by the contractor for the construction, alteration, repair or wrecking of a building or buildings in the counties of Rock Island and Mercer, the west half of Henry and the following described portion of Whiteside County, Illinois which shall include all territory in the west portion of Whiteside County from the 5th sectional line east of Morrison, Illinois, running directly north and south, and the counties of Cedar, Clinton, Des Moines, Lee, Louisa, Muscatine, and Scott in the State of Iowa, except mortar mixers or concrete mixers 3 ½ S or smaller with no skip attached, pumps other than described in Article XXII.

Also, Section 1.2 of the Agreement states that work that pertains to sewers, water mains, grading and paving of streets or grading and landscaping of property site, on any private home development, shall be subject of coverage under the agreement. All construction, erection, modification, addition to or improvement within Industrial, Institutional and Commercial property boundaries shall be subject to coverage hereunder. Furthermore, Section 3 of the Agreement states that, when an employer performs work covered by the Agreement in the areas covered by the Union, the employer will obtain all employees used in the performance of such work through the referral offices of the Union.

D. Grievances

On October 13, 2011, Union Business Representative Ryan Drew filed a grievance alleging that the Respondent violated the current collective-bargaining agreement failing to use a

bargaining unit member to perform maintenance on a forklift at the Iowa State Penitentiary project in Fort Madison, Iowa on October 3 and 4, 2011. Also, on October 13, 2011, Drew filed a grievance alleging that the Respondent violated the current collective-bargaining agreement by failing to use a bargaining unit member to operate a crane at the Burlington Church project in Burlington, Iowa on October 5, 2011 (TR 43-50, 53-55; GC Ex 7; Resp. Ex 1).

Starting about October 13, 2011, the Respondent and the Union engaged in several discussions regarding the grievances. On November 3, 2011, President Marsh sent an email to Union Business Representative Drew stating, in part, that the Respondent was not signatory to the Agreement and none of the memoranda that Drew sent to Respondent appear to bind the Respondent to the Agreement. The email also stated that, if Drew disagreed with Marsh's position, Drew should identify the document upon which he was relying. The email further stated that the Respondent would need this information to process the grievances further. In the email, Marsh also argued that the Burlington, Iowa grievance should be covered by the Project Labor Agreement (PLA) with the Union. The PLA is separate and distinct from the Agreement with the Union (TR 46-47, 51-52; Resp. Ex 2).

Later that day, Drew sent an email to Marsh and attached to the email copies of memoranda showing a brief history of the Agreement that the Respondent signed with the Union. The email also stated, in part, that Drew would be sending Marsh a second email that had correspondence between the Respondent and the Union regarding the Agreement (TR 51-52, Resp. Ex 2).

Even after November 3, 2011, the Respondent and the Union continued their discussions regarding the grievances. The parties even selected an arbitrator to hear the grievances about February 1, 2012. On February 1, 2012, the American Arbitration Association sent a written

notice called "Notice To Parties of Arbitrator Appointment" to the parties indicating, inter alia, that the proposed hearing dates for the arbitration would be March 23, 27, or April 9, 2012 (TR 56-60, Union Ex 1). On April 12, 2012, Respondent sent a letter to the Union repudiating the Agreement (TR 36-37; GC Ex 6). Specifically, on April 12, 2012, Respondent's Attorney Kelly Baier sent the Union a letter stating that no collective-bargaining agreement currently existed between the Respondent and the Union. Since about April 12, 2012, the Respondent has failed to adhere to the current collective-bargaining agreement between the Respondent and the Union. The Respondent never sent any written notification to the Union seeking to terminate the Signers Agreement or the Agreement as required by the Signers Agreement to which it is still bound (TR 18, 37).

III. ARGUMENT

A. The Judge Correctly Concluded That Respondent Violated Sections 8(a)(1) and (5) of the National Labor Relations Act By Repudiating the Parties' Current Collective-Bargaining Agreement.

In its exceptions, the Respondent argues that the Judge erroneously concluded that the Respondent's repudiation of the collective-bargaining relationship with the Union violated the Act. The Respondent also argues that the Judge erroneously concluded that the Respondent's refusal to proceed with the Burlington grievance violated the Act.

Despite the Respondent's arguments, the Judge correctly concluded that, since the Agreement was still in effect, the Respondent's refusal to abide by the terms of the Agreement violated Sections 8(a)(1) and (5) of the Act (Decision, p. 7, l. 33-35). In her decision, the Judge found that, on July 19, 1988, the Respondent entered into the Signers Agreement, which bound the Respondent to all amendments, extensions, or changes in the Signers Agreement agreed to

between Local 537 and the Association, unless ninety (90) days prior to the expiration of the Signers Agreement or any subsequent agreement said non-member notifies Local 537 in writing that it revokes such authorization (Decision, p. 2, l. 35 – p. 3, l. 12). The Judge also found that, in the early 1990's, Local 537 and the Union merged (Decision, p. 2, l. 37-39). Furthermore, the Judge found that, between 1988 and the present time, the Association and the Union negotiated 10 successive collective-bargaining agreements with the current Agreement being effective from June 1, 2010 through May 31, 2014 (Decision, p. 3, l. 14-17). Moreover, the Judge found that there was no evidence demonstrating that the Respondent ever sent any written notice to the Union terminating the parties' collective-bargaining agreement or revoking the authority of the Association to negotiate subsequent agreements as required by the Signers Agreement (Decision, p. 7, l. 15-23). Additionally, the Judge found that, on April 12, 2012, the Respondent's counsel sent a letter to the Union stating, in relevant part, that no collective-bargaining agreement existed between the Respondent and the Union (Decision, p. 6, l.5-13).

Record evidence demonstrates that, on July 18, 1988, Respondent's Vice President and Controller Raima signed a Participation Agreement on behalf of the Respondent requiring the Respondent to make payments to Local 537's, Health, Welfare, and Pension Funds (GC Ex 3). Also, on July 19, 1988, Raima signed the Signers Agreement, which bound the Respondent to all amendments, extensions, or changes in the Signers Agreement agreed to between Local 537 and the Association, unless ninety (90) days prior to the expiration of the Signers Agreement or any subsequent agreement said non-member notifies Local 537 in writing that it revokes such authorization. The Signers Agreement also stated that the non-member employer agrees that notice served by the Union upon said Association and Mediation Services for re-opening,

termination or commence of negotiations shall constitute notice upon and covering the non-member employer signatory hereto (TR 17; GC Ex 2).

About late 1991 to 1992, Local 537 merged into the Union. Thus, Local 537 became a part of the Union (TR 23-24). Between 1988 and 2010, the Association and the Union negotiated 10 collective-bargaining agreements. The most recent collective-bargaining agreement is the Agreement, which is effective from June 1, 2010 through May 31, 2014 (TR 26-27; GC Ex 4).

On October 13, 2011, Union Business Representative Drew filed two grievances alleging violations of the parties' current collective-bargaining agreement (TR 43-50, 53-55; GC Ex 7; Resp. Ex 1). Starting about October 13, 2011, the parties engaged in several discussions about those grievances (TR 46-47, 51-52; Resp. Ex 2). However, despite continued discussions about those grievances, Respondent's Attorney Kelly Baier sent the Union a letter dated April 12, 2012 stating that no collective-bargaining agreement currently existed between the Respondent and the Union (TR 36-37; GC Ex 6). During the hearing, President Marsh testified that the Respondent never sent any written notification to the Union seeking to terminate the Signers Agreement or the Agreement as required by the Signers Agreement to which it is still bound (TR 18, 37). Therefore, the preponderance of record evidence supports that Judge's findings and conclusions that the Respondent violated the Act by refusing to abide by the terms of the Agreement (Decision, p. 7, l. 33-35).

B. The Judge Correctly Concluded That The Respondent Failed To Establish The Existence Of A Stable, One-Person Unit Because The Respondent Failed To Produce Relevant Records To Support Its Position.

In its exceptions, the Respondent argues that the Judge erroneously concluded that the Respondent failed to establish the existence of a stable, one-person unit. The Respondent also argues that the Judge erroneously discredited President Marsh's testimony and incorrectly drew an adverse inference against the Respondent regarding the employment of no more than one Union member at any material time because no documentary evidence supported Marsh's testimony. Also, the Respondent argues that the Judge erroneously failed to draw an adverse inference against the General Counsel with respect to the one-person unit issue because the General Counsel subpoenaed the former president of the Respondent to attend the hearing, but did not call him to testify.

Despite the Respondent's arguments, the Judge correctly concluded that the Respondent failed to establish the existence of a stable, one-person unit because the Respondent failed to produce relevant records to support its position (Decision, p. 10, l. 3). In her decision, the Judge cited Galicks, Inc., 354 NLRB 295 (2009), remanded on other grounds 188 LRRM 3024 (6th Cir. 2010) to support her conclusion that it is the Respondent's burden to prove the existence of a stable one-person unit. Also, in support of her conclusion, the Judge also cited McDaniel Electric, 313 NLRB 126, 127 (1993), in which the Board held that it requires proof that the purportedly single-employee unit was a stable one and not merely a temporary occurrence (Decision, p. 9, l. 11-14).

Furthermore, in her decision, the Judge found that President Marsh testified that, since 2003, the Respondent has not employed more than one Union member at a time within the union's jurisdiction. The Judge also found that Marsh testified that he reviewed the Respondent's payroll records in reaching his conclusion that the Respondent has never employed more than one Union member at a time. Moreover, the Judge found that the Respondent failed to produce said payroll records. Thus, the Judge correctly discredited Marsh's testimony regarding the one-person unit issue and correctly concluded that an adverse inference should be drawn against the Respondent since it failed to produce any evidence, particularly the payroll records referenced by Marsh, at the hearing to support its one-person unit defense. In support of her conclusion, the Judge cited International Automated Machines, 285 NLRB 1122, 1123 (1987) and Martin Luther King, Sr. Nursing Center, 231 NLRB 15 fn. 1 (1977), in which the Board held that the failure of a respondent to produce relevant evidence that is particularly under its control allows the trier of fact to draw an adverse inference that such evidence would not be favorable to it (Decision, p. 9, l. 16-28).

During the hearing, President Marsh testified that the Respondent seasonally employs between 10 and 30 Bricklayers and 10 to 30 Laborers. Marsh also testified that these employees work in counties of Scott County, Muscatine County, Clinton, Moline, and Rock Island. Additionally, Marsh testified that, upon a review of the Respondent's payroll records, the Respondent has not hired more than one operator at a time since 2003 (TR 79, 80).

Even though President Marsh testified that the Respondent has not hired more than one operator at a time since 2003, Marsh's testimony lacked sufficient detail and specificity to support a finding or conclusion that the Respondent employed a stable one-person unit since 2003. Specifically, Marsh's testimony lacked essential information necessary to make a

determination regarding the one-person unit issue such as the names, hire dates, and termination dates of the Respondent's employees since 1993; the job classifications of each employee hired by the Respondent since 2003; the wage rates of the Respondent's employees since 2003; the type of work performed by the Respondent's employees since 2003; the date(s) that work was performed since 2003; and the type of machinery used on various projects since 2003.

Also, President Marsh testified that he reviewed the Respondent's payroll records prior to his testimony (TR 80). Thus, Marsh relied upon the Respondent's payroll records as a basis for his testimony. Even though Marsh's testimony is based upon a review of the Respondent's payroll records, the Respondent failed to produce said payroll records or any documents to support its claim that the Respondent has hired no more than one operator at a time since 2003. Thus, if the payroll records had supported Marsh's testimony and, in turn, the Respondent's position, the Respondent would have produced them. Therefore, the preponderance of record evidence supports the Judge's findings and conclusions that the Respondent failed to establish the existence of a stable, one-person unit since the Respondent failed to produce relevant evidence in support of its position (Decision, p. 10, l. 3-4).

Additionally, as discussed above, it is the Respondent's burden to prove the existence of a stable, one-person unit. Thus, since it is the Respondent's burden to prove the existence of a stable, one-person unit, the Counsel for the General Counsel's decision not to call Respondent's former president to testify has no bearing regarding the Respondent's burden of proof.

C. The Judge Correctly Concluded That The Respondent Failed To Establish The Existence Of A Stable, One-Person Unit Because The Respondent Used Laborers To Perform Union Work As Covered By The Agreement.

In its exceptions, the Respondent argues that the Judge erroneously found that the Respondent used members of the Laborers Union to perform work reserved for the Union within

the Union in violation of the Agreement. The Respondent also argues that the Judge erroneously failed to find that the Respondent was a party to a collective-bargaining agreement with the Laborers that covered the work being performed by the Union.

Despite the Respondent's arguments, the Judge correctly concluded that the Respondent failed to establish the existence of a stable, one-person union since the Respondent allowed members of the Laborers Local #538 to perform bargaining unit work covered by the Agreement with the Union (Decision, p. 9, l. 30 – p. 10, l. 3). In her decision, the Judge found that the Respondent sent letters to Laborers Local #538 and the Great Plains Laborers' District Council clearly demonstrating that the Respondent had attempted to assign work belonging to the Union to the Laborers despite the Agreement with the Union (Decision, p. 9, l. 30-37).

Record evidence demonstrates that, at least since June 2, 2011, the Respondent has allowed members of Laborers Local #538 to perform bargaining unit work covered by the Agreement with the Union. Thus, members of the Union should have been allowed to perform at least some of the work that the Respondent assigned to members of Laborers Local #538. President Marsh testified that the Respondent employs between 10 and 30 bricklayers and 10 to 30 laborers seasonally who perform work within the Union's jurisdiction (TR 79). Marsh also testified that the Respondent typically makes work assignments to the Laborers for operations of basically any equipment that it takes to support masonry operations including the maintenance and fueling of the equipment (TR 95-96). However, Section 1.1 of the Agreement clearly states, in part, that contractors recognize the Union as the sole collective-bargaining agent for those employees of the contractors engaged in the operation and maintenance of all hoisting and portable machines and engines used on building work and excavating work pertaining to or that may be done in preparation (GC Ex 4).

Also, President Marsh testified that, on June 2, 2011, he sent a letter to Michael Tuthill, a representative of Laborers Local #538, confirming that the Respondent was assigning all work involved in the tending of masons in the Southeast Iowa area to Laborers Local #538. The letter stated, in relevant part, that the assignment involved the unloading, mixing, handling, hoisting and conveying of all materials used by masons by any mode or method: the loading, unloading erecting, dismantling, moving and adjusting of all scaffolds, the starting, stopping, fueling, oiling cleaning, operating and maintenance of all mixers, mortar pumps and other devices under the direction of the Respondent. The work assignment outlined in Marsh's June 2, 2011 letter overlaps the work described in the Section 1.1 of the Agreement (TR 95-96; GC Ex 4; Resp. Ex 9). Moreover, Marsh testified that, with respect to the assignment of work outlined in his June 2, 2011 letter, he thought that the Union also played a part in the performance of that work (TR 96).

Furthermore, during the hearing, there was some discussion about whether the work performed by Laborers Local #538 should have been performed by the Union. Pursuant to this discussion, the Judge asked Respondent Attorney Baier whether there was work available for a Union operator to perform and whether Laborers Local #538 was claiming the work. In response, Baier stated "that the Laborers performed it" (TR 105). Therefore, the preponderance of record evidence supports the Judge's findings and conclusions that the Respondent failed to establish the existence of a stable, one-person union since the Respondent allowed members of the Laborers Local #538 to perform bargaining unit work covered by the Agreement with the Union (Decision, p. 9, l. 30 – p. 10, l. 3).

D. The Judge Correctly Concluded That The Union Did Not Terminate The Agreement With The Respondent Pursuant To Its Letter Dated March 1, 2006.

In its exceptions, the Respondent argues that the Judge erroneously concluded that the Union did not terminate the Agreement with the Respondent by virtue of its 2006 letter to the Association. The Respondent also argues that the Judge erroneously concluded that the Union, by virtue of its 2006 letter to the Association, did not intend to terminate the Agreement, but rather only sought negotiations for a new agreement.

Despite the Respondent's arguments, the Judge correctly concluded that the Union's March 1, 2006 letter to the Association did not terminate the Agreement with the Respondent (Decision, p. l. 25-29). In her decision, the Judge found that, in 2006, the Union sent a letter to the Association indicating that the Union would like to meet to begin negotiating a new contract as the then-existing contract was about to expire. The Judge also found that the Association responded to the Union's letter agreeing to meet with the Union. The Judge further found that the Respondent did not receive a copy of the letter (Decision, p. 3, l. 30-35).

During the hearing, the Union introduced Union Exhibit 2 into evidence, which is a letter dated March 1, 2006 from Union President and Business Manager Dugan to Association President Tondi requesting that Tondi meet with Dugan as soon as possible to start negotiations leading to a new agreement. The letter also requested that Tondi provide Dugan with the date, time, and place for a meeting that would be convenient for both parties (Union Ex 2). The Union's March 1, 2006 letter clearly demonstrates that the Union was seeking to continue and extend the Association's bargaining relationship and, in turn, the bargaining relationship with the Respondent pursuant to the Signers Agreement. In fact, pursuant to the Union's letter, the Union and the Association subsequently entered into a new collective bargaining agreement (TR 26-27; GC Ex 4).

President Marsh testified that the Union sent a 2006 letter to the Association terminating any collective bargaining agreement and bargaining relationship existing between the Union and the Respondent (TR 20, 80; Resp. Ex 4). However, the Respondent never produced any such letter. Therefore, the preponderance of record evidence supports the Judge's findings and conclusions that that the Union's March 1, 2006 to the Association did not terminate the Agreement with the Respondent (Decision, p. l. 25-29).

E. The Judge Correctly Concluded That The Union Did Not Receive Clear And Unequivocal Notice of Repudiation of the Agreement Until April 12, 2012.

In its exceptions, the Respondent argues that the Judge erroneously found that the Union first received clear and unequivocal notice of the Respondent's repudiation of the Agreement on April 12, 2012 and that neither the October 17, 2011 letter or the November 11, 2011 email from President Marsh provided clear and unequivocal notice. The Respondent also argues that the Judge erroneously concluded that the Respondent's actions regarding the processing the two grievances of the Union demonstrates that the Respondent did not give clear and notice of the repudiation of the Agreement.

Despite the Respondent's arguments, the Judge correctly concluded that the Union did not receive clear and unequivocal notice that the Respondent had repudiated the Agreement until April 12, 2012 (Decision, p. 8, l. 42-22). In her decision, the Judge, cited Art's Way Vessel, Inc., 355 NLRB 1142, 1147 (2010), in which the Board held that it is well settled that the 6-month limitations period prescribed by Section 10(b) begins to run only when a party has clear and unequivocal notice, either actual or constructive, of the violation of the Act (Decision, p. 7, l. 42 – p. 8, l. 1). In her decision, the Judge found that nothing contained in President Marsh's October 17, 2011 letter indicated that the Respondent was repudiating the Agreement. The

Judge found also that Marsh's letter merely advised the Union that he was unavailable to attend a grievance meeting and that the Respondent was not amenable to settling the grievance (Decision, p. 8, l. 18-21). Record evidence demonstrates that, on October 17, 2011, President Marsh sent a letter to Union President and Business Manager Dugan stating that the Respondent was in receipt of documents faxed to the Respondent on October 13, 2011 alleging violations by the Respondent. The letter also stated that the Respondent would not be available to attend the grievance meeting scheduled on October 20, 2011. The letter further stated that the Respondent would not be sending the Union a check for the alleged violations (TR, 97-98; Resp. Ex. 10).

The Judge further found that, in Marsh's November 11, 2011 email, he stated that "to my knowledge the Respondent is not signatory to the Agreement and none of the memoranda that you sent appear to bind the Respondent to that Agreement. If you disagree, please identify the document upon which you are relying. We will need this information to be able to address your grievances further". Moreover, the Judge also found that Marsh's use of qualifying language made his statements less than a clear and unequivocal notice of contract repudiation. The Judge also found that the Respondent was open to receiving proof from the Union of the Respondent's signatory status. Additionally, the Judge found that the Union responded almost immediately to Marsh's invitation to provide further proof by providing various documents and a narrative explanation (Decision, p. 8, l. 23-34).

Record evidence demonstrates that, on November 3, 2011, President Marsh sent an email to Union Business Representative Drew stating, in part, that the Respondent was not signatory to the Agreement and none of the memoranda that Drew sent to Respondent appeared to bind the Respondent to the Agreement. The email also stated that, if Drew disagreed with Marsh's position, Drew should identify the document upon which he was relying. The email further

stated that the Respondent would need this information of process the grievances further. Later that day, Drew sent an email to Marsh and attached copies of memoranda showing a brief history of the Agreement that the Respondent signed with the Union. The email also stated, in part, that Drew would be sending Marsh a second email that has correspondence between the Respondent and the Union regarding the Agreement (TR 51-52, Resp. Ex 2).

Additionally, in her decision, the Judge found that, between October 11, 2011 and April 12, 2012, the parties proceeded through all of the steps of the grievance procedure related to the Burlington grievance short of arbitration. The Judge also found that an arbitrator was appointed and, in February 2012 the arbitrator sought to schedule a date for an arbitration hearing. The Judge further found that the Union first received clear and unequivocal notice of Respondent's total contract repudiation on April 12, 2012, the date of the letter from the Respondent's attorney to the Union (Decision, p. 8, l. 14-16, 36-44).

Record evidence demonstrates that, even after November 3, 2011, the Respondent and the Union continued their discussions regarding the grievances. The parties even selected an arbitrator to hear the grievances about February 1, 2012. On February 1, 2012, the American Arbitration Association sent a written "Notice To Parties of Arbitrator Appointment" to the parties indicating, inter alia, that the proposed hearing dates for the arbitration would be March 23, 27, or April 9, 2012 (TR 56-60, Union Ex 1). Not until April 12, 2012, did the Respondent send a letter to the Union repudiating the parties' collective-bargaining agreement (TR 36-37; GC Ex 6). Therefore, the preponderance of record evidence supports the Judge's findings and conclusions that the Union did not receive clear and unequivocal notice that the Respondent had repudiated the Agreement until April 12, 2012 (Decision, p. 8, l. 42-22).

F. The Judge Correctly Concluded That, Even If The Union Filed The Charge In The Instant Case To Circumvent Board Procedures, Such Action Would Not Be Unlawful.

In its exceptions, the Respondent argues that the Judge erroneously failed to conclude that the charge in the instant case is an inappropriate use of Board procedures to obtain work properly performed by Laborers pursuant to the collective-bargaining agreement between the Laborers and the Respondent. Despite the Respondent's argument, the Judge correctly concluded that, even if the Union filed the charge in the instant case to circumvent Board procedures to obtain work, such action would not be unlawful. Also, there is no evidence demonstrating that the Union filed the charge in the instant case for this reason. Furthermore, the Respondent has failed to cite any case to stand for the proposition that, if the Union filed the charge in the instant case to circumvent Board procedures to obtain work, such action would be unlawful. Therefore, the preponderance of record evidence supports the Judge's findings and conclusions that, even if the Union filed the charge in the instant case to circumvent Board procedures to obtain work, such action would not be unlawful.

G. The Judge Correctly Refused To Admit Respondent's Exhibit 8 Into Evidence.

In its exceptions, the Respondent argues that the Judge erroneously failed to admit Respondent's Exhibit 8 into evidence. Despite the Respondent's argument, the Judge correctly refused to admit Respondent's Exhibit 8, into evidence. The Respondent sought to present Respondent's Exhibit 8, an arbitrator's decision concerning a grievance brought by the Union under a project labor agreement (PLA) with the Respondent and not under the Agreement. The Judge refused to admit Respondent's Exhibit 8 into evidence since it did not relate to the Agreement (Decision, p. 11, l. 44-46). Since the PLA is separate and distinct from the

Agreement, Respondent's Exhibit 8 is not relevant to the instant case. Therefore, the Judge correctly refused to admit Respondent's Exhibit 8 into evidence.

H. The Judge Did Not Erroneously Fail To Find That the Union Acknowledged That It Had No Collective-Bargaining Agreement With The Respondent By Asking The Respondent To Sign A Collective-Bargaining Agreement in June 2011.

In its exceptions, the Respondent argues that the Judge erroneously failed to find that the Union acknowledged that it had no collective-bargaining agreement with the Respondent by asking the Respondent to sign a collective-bargaining agreement in June 2011. Despite the Respondent's argument, the Judge did not erroneously fail to find that the Union acknowledged that it had no collective-bargaining agreement with the Respondent by asking the Respondent to sign a collective-bargaining agreement in June 2011. During the hearing, the Respondent admitted into evidence Respondent's Exhibit 5, a memorandum of agreement between the Union and Mid-America Regional Bargaining Association Illinois Building Agreement. President Marsh testified that he received the memorandum of agreement from the Union about June 21, 2011 (TR, 83-86; Resp. Ex. 5). Record evidence clearly demonstrates that this memorandum of agreement is different from the Signers Agreement and the Agreement, which are the documents at issue in the instant case. This memorandum of agreement is between the Union and Mid-America Regional Bargaining Association Illinois Building Agreement and not the Quad City Builders Association, Inc. (GC Ex 2; GC Ex 4). Thus, Respondent's Exhibit 5 is clearly not relevant to the instant case. Therefore, the Judge did not err by failing to find that the Union acknowledged that it had no collective-bargaining agreement with the Respondent by asking the Respondent to sign a collective-bargaining agreement in June 2011.

I. The Judge Correctly Concluded That The Respondent Created A Jurisdictional Dispute Between The Laborers And The Union.

In its exceptions, the Respondent argues that the Judge erroneously found that the Respondent created a jurisdictional dispute between the Laborers and the Union regarding the work at issue. Despite the Respondent's argument, the Judge correctly concluded that that the Respondent created a jurisdictional dispute between the Laborers and the Union regarding the work at issue (Decision, p. 10, l. 27). In her decision, the Judge found that the Respondent was already signatory to the Agreement when it attempted to assign Union work to the Laborers. The Judge also found that the Union's attempt to enforce the Agreement does not create a jurisdictional dispute. The Judge further found that the Respondent sought to benefit from its refusal to adhere to the Agreement by assigning the Union's work to the Laborers and creating the dispute (Decision, p. 10, l. 27-32).

As discussed above, record evidence demonstrates that, on July 19, 1988, Vice President and Controller Raima signed the Signers Agreement (TR, 17; GC 2). Record evidence also demonstrates that the Respondent never sent any written notification to the Union seeking to terminate the signers Agreement or the Agreement as required by the Signers Agreement to which it is still bound (TR 18, 37). Record evidence further demonstrates that, at least since June 2, 2011, the Respondent has allowed members of Laborers Local #538 to perform bargaining unit work covered by the Agreement with the Union (TR 79, 95-96, 105; GC Ex 4; Resp. Ex 9). Therefore, the preponderance of record evidence supports the Judge's findings and

conclusions that the Respondent created a jurisdictional dispute between the Laborers and the Union regarding the work at issue (Decision, p. 10, l. 27).

IV. CONCLUSION

For the reasons stated above, the Counsel for the General Counsel respectfully requests that Respondent's exceptions be denied in their entirety and that the Administrative Law Judge's Decision be affirmed and her recommended order adopted.

DATED at Indianapolis, Indiana, this 14th day of January, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION was filed electronically with the Executive Secretary of the NLRB and was electronically served upon the following persons on this 14th day of January 2014:

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