UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

SEEDORFF MASONRY, INC.,	)	
	)	
Respondent,	)	
	)	Case No. 25-CA-88910
and	)	
	)	
INTERNATIONAL UNION OF	)	
OPERATING ENGINEERS,	)	
LOCAL NO. 150, AFL-CIO,	)	
	)	
Charging Party.	)	

ANSWERING BRIEF OF LOCAL 150 TO RESPONDENT'S EXCEPTIONS

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TABLE OF CONTENTS

CASES

I. STATEMENT OF CASE

Charging Party, International Union of Operating Engineers, Local 150, AFL-CIO ("Local 150," "Union," or "Charging Party"), hereby files this Answering Brief in opposition to the exceptions filed by Seedorff Masonry Inc. ("Seedorff," "Employer," or "Respondent").

Local 150 filed an unfair labor practice charge alleging that on or about April 12, 2012, Seedorff violated the National Labor Relations Act ("Act") by repudiating the parties' collective bargaining agreement. A Complaint was issued and the matter was heard on July 11, 2013, by Administrative Law Judge ("ALJ") Melissa M. Olivero. On November 19, 2013, ALJ Olivero issued a Decision making the following Conclusion of Law:

> By repudiating the collective-bargaining agreement between the International Union of Operating Engineers, Local 150, AFL-CIO and the Quad Cities Builders Association, Inc, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Sections 2(6) and (7) of the Act.[1] (ALJ Decision at 11).[2]

On December 17, 2013, Respondent filed nineteen exceptions and a supporting brief. Seedorff makes four arguments in its brief: 1. the Board lacks jurisdiction because of the one-person rule; 2. the charge is untimely because it was filed more than six months after Seedorff repudiated the collective bargaining agreement; 3. the Union terminated the collective bargaining agreement in March, 2006; and 4. the unfair labor practice is an effort by the Union to circumvent the Board's procedures to obtain work performed by the Laborers (Seedorff Brief 1). The ALJ correctly decided every issue and therefore, her decision should be affirmed in its entirety.

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[1] ALJ Olivero also concluded that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; and the Union is a labor organization within the meaning of Section 2(5) of the Act. (ALJ Decision 11).

[2] Future references shall be as follows: ALJ Decision shall be (ALJ Dec. ___); General Counsel Exhibits shall be (G.C. Ex. ___); Union Exhibits shall be (U. Ex. ___); Respondent Exhibits shall be (R. Ex. __); and transcript shall be (Tr. ____). Respondent's supporting brief shall be (Seedorff Brief ___).

II. STATEMENT OF FACTS

A. Local 150

Local 150, a labor organization within the meaning of the Act, represents employees working in the construction industry in northwest Indiana, northern Illinois, and eastern Iowa. Local 150 is divided into eight districts, District 8 covering the Illinois counties of Whiteside, Rock Island, Henry, and Mercer, and Iowa counties of Clinton, Scott, Cedar, Muscatine, Louisa, Des Moines and Lee (Tr. 23 and G.C. Ex. 4). Local 150 has numerous collective bargaining agreements covering contractors and their employees throughout its jurisdiction. Some contractors sign various collective bargaining agreements (*See* Tr. 84). Some signatory contractors work periodically in Local 150's jurisdiction, and when working in Local 150's jurisdiction, the contractor is bound by the relevant collective bargaining agreement.

B. Seedorff

Seedorff is an employer engaged in commerce within the meaning of the Act. It was established in or about 1958 (Tr. 13). Its headquarters is in Strawberry Point, Iowa, and it has offices in Omaha, Des Moines, and Eldridge (Tr. 14). Its main operation is the installation of brick, block, stone, etc., in commercial buildings such as universities, public buildings, federal buildings, etc. (Tr. 15). It works throughout the Midwest including Nebraska, Iowa, Illinois, Missouri, and Kansas. *Id*.

C. Seedorff's Work

Seedorff seasonally employs between ten and thirty bricklayers and between ten and thirty laborers in Local 150's jurisdiction (Tr. 79 and Seedorff Brief 6). Robert Marsh, president

of Seedorff since May, 2010 (Tr. 13) testified that he was not sure, but thought that the operators performed some of the work that was outlined in his June 2, 2011 letter to the Laborers Local 538 ("Laborers") addressing an assignment of work issue (Tr. 96 and R. Ex. 9). Seedorff admitted that there is work available for the operators to perform, but that the laborers performed the work in question (Tr. 105).

D. Seedorff's Collective Bargaining Agreement With Laborers, Local 538

On June 2, 2011, Marsh sent a letter to the Laborers, Local 538 ("Laborers") concerning the work performed by the laborers (R. Ex. 9). In the June 2, 2011 letter (R. Ex. 9), Marsh addressed the assignment of work to the laborers explaining that Seedorff is assigning the following work to the laborers: "hoisting and conveying of all materials used by masons by any mode or method . . . the starting, stopping, fueling, oiling, cleaning, operating and maintenance of all mixers . . . This assignment specifically includes the operation and maintenance associated with rough terrain forklifts . . . ." Likewise, the contract Seedorff has with the Laborers describes the jurisdiction to include the "conveying of all materials used by Masons by any mode or method . . . . [and] the starting, stopping, fueling, oiling, cleaning, operating and maintenance of all mixers, mortar pumps, grout pumps . . . ." (R. Ex. 3 at Art. IV Jurisdiction, p. 2).

E. Seedorff's Collective Bargaining Agreement With Operating Engineers, Local 234

The contract between the International Union of Operating Engineers, Local 234 ("Local 234") and Seedorff covers most of Iowa (all outside of the geographic jurisdiction of Local 150) and covers "Fork Lift (used for steel erection or machinery moving)" and "All Fork Lifts (other than Classification 2)" and "Concrete Mixers (1 yard and over)" (R. Ex. 6, Art. XVIII –

Classifications and Wage Rates, pp. 21 and 22). Seedorff regularly employs Local 234 members (Tr. 72). At times, Seedorff employees Local 234 members to work within Local 150's geographical jurisdiction. Local 150 has a reciprocity agreement with Local 234 which allows members of Local 234 to work within Local 150's jurisdiction. The reciprocity agreement establishes where the contractor should remit contributions. In order to have this reciprocity agreement with Local 234 and in order to direct where contributions must be remitted, Seedorff must be a signatory contractor with Local 150 and Local 234 (Tr. 40 - 41).[3]

F. The Agreements Between Local 150 and Seedorff

On July 18, 1988, Mark Rima, former Seedorff controller and vice president (Tr. 16) signed a "Participation Agreement" binding Seedorff to the terms and conditions of the International Union of Operating Engineers, Local 537 ("Local 537") Pension Fund Agreement and the Welfare Fund Agreement (G.C. Ex. 3 and Tr. 24).[4] The "Participation Agreement" provides, in pertinent part:

> [T]he undersigned employer [Seedorff] does hereby agree to abide by all of the terms and conditions of the aforesaid Pension Fund Agreement and the aforesaid Welfare Fund Agreement with respect to each and every employee of the undersigned who shall be employed within the bargaining unit represented by the aforesaid Labor Union and be eligible to be a participating employer in either or both of said funds. The amount of contribution to be made to each fund by the undersigned employer shall be that established in the applicable labor agreement, and obligations of the undersigned employer shall continue in effect for the period specified in such agreement. (G.C. Ex. 3).

The Participation Agreement has never been terminated (Tr. 18 and 37).

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[3] The parties' collective bargaining agreement is discussed more fully below.

[4] Local 537 was merged into Local 150 in or about 1991 (Tr. 19 and 24). Hereinafter, both Locals will be referred to as Local 150.

On July 19, 1988, Rima executed the "Building Agreement Individual Signers" with Local 537 (Tr. 17 and G.C. Ex. 2). This agreement provides:

> The undersigned employer [Seedorff] hereby becomes a signatory employer to this agreement between the Quad City Builders Association, Inc. and International Union of Operating Engineers, Local Union No. 537.
>
> The undersigned employer [Seedorff] signatory hereto who is not a member of the said Association agrees to be bound by any amendments, extension or changes in this Agreement agreed to between the Union and the Association, and <u>further agrees 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 employer notifies the Union in writing that it revokes such authorization</u>. Further, said non-member employer agrees that notice served by the Union upon said Association and Mediation Services for re-opening, termination or commencement of negotiations shall constitute notice upon and covering the non-member employer signatory hereto (G.C. Ex. 2) (emphasis added).

This agreement binds Seedorff to the Building Agreement negotiated between the Quad City Builders Association, Inc. ("QCBA") and Local 150, as well as any amendments, extensions or changes in the agreement agreed to between Local 150 and the QCBA unless Seedorff <u>revokes</u> the <u>QCBA's authority</u> which must be in writing ninety days prior to the expiration of the contract (Tr. 23 and G.C. Ex. 2) (hereinafter the collective bargaining agreements negotiated by the QCBA and Local 150 will be referred to as the "QCBA Agreement"). The QCBA is an association of contractors with which Local 150 bargains (Tr. 22). The QCBA covers seven counties in Iowa, two counties in Illinois, and portions of two counties in Illinois (Tr. 22). These counties are within the jurisdiction of Local 150 (Tr. 22). Seedorff never terminated the Building Agreement Individual Signers agreement (Tr. 18 and 37).

The QCBA Agreement at Article 1 – Jurisdiction, Section 1.1 – Recognition (G.C. Ex. 4) provides, in pertinent part:

> The Contractors recognize the Union as the sole collective bargaining agent for those employees of the Contractor 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, or any other power machine that may be used by the Contractor for the construction, alteration, repair or wrecking of a building or buildings . . . .

Article 11 – Wage Scales and Classifications of the Local 150 and QCBA collective bargaining agreement (G.C. Ex. 4, pp. 13-18) lists the following equipment: cranes; boom tractor or side boom; forklifts (both 6000 lb capacity and less); group equipment greaser; grout pump, loader (track, rubber tire, or articulated); mechanic-welder; skid loader, and oiler-deck hand mechanics helper.

Since 1988, QCBA and Local 150 have negotiated ten collective bargaining agreements running through May 31, 2014 (Tr. 26).[5] The negotiation process for a successor collective bargaining agreement begins with notice and then a successor agreement is negotiated. The latest/current collective bargaining agreement has a term of June 1, 2010 through May 31, 2014 (Tr. 27 and G.C. Ex. 4). Seedorff never terminated any agreement reached between Local 150 and the QCBA (Tr. 18 and 37).

[5] Seedorff stipulated that QCBA and Local 150 have negotiated ten collective bargaining agreements since 1988 (Tr. 26).

G. Seedorff's Contributions To Local 150 Funds

In July and August, 2009, Seedorff made various contributions to the Local 150 pension, health and welfare, apprenticeship, vacation, construction research fund, and industry benefits funds (collectively referred to as "Funds") (Tr. 29 and G.C. Ex. 5). These contribution reports were completed by Seedorff and submitted to Local 150 from Seedorff (Tr. 30). Seedorff submitted checks corresponding to the amounts it said it owed (Tr. 31-32 and G.C. Ex. 5). The contribution rates paid by Seedorff are consistent with the rates required by the QCBA Agreement (Tr. 29 and 38). The contribution reports provide when contributions are to be made and that if contributions are late, it is considered a violation of the contract (G.C. Ex. 5). Each contribution report provides that:

> The undersigned employer, <u>if not already signatory hereby becomes a signatory</u> party to the current applicable Collective Bargaining Agreement with the Union covering the type and area of work of the listed employee and also to each Agreement and Declaration of Trust and Amendments, establishing the Funds for which payment is made herewith (G.C. Ex. 5) (emphasis added).

If the Local 150 Funds receives contributions from a contractor that is not signed to one of Local 150's contracts, not only does the contractor become bound to the applicable collective bargaining agreement pursuant to the above language, but the Local 150 Funds sends a form to the responsible Local 150 business agent inquiring why the Local 150 Funds received the contributions (Tr. 38-39). Ryan Drew, the responsible Local 150 business agent, never received such an inquiry from the Local 150 Funds regarding Seedorff (Tr.38-39).

H. The Grievances

In summer, 2011, Local 150 filed a grievance concerning certain work being performed at the Fort Madison, Iowa State Penitentiary. In the grievance, Local 150 alleged that Seedorff

incorrectly assigned certain work to the Laborers instead of Local 150.[6] This grievance was heard pursuant to a project labor agreement ("PLA") to which Local 150 and Seedorff were parties.

On or about October 13, 2011, Drew filed a second grievance (Grievance # 11-8-004) alleging that Seedorff violated the QCBA Agreement on or about October 3 and 4, 2011 (R. Ex. 1). Drew filed a third grievance (Grievance # 11-8-005) on or about October 13, 2011, alleging that Seedorff violated the QCBA Agreement on or about October 5, 2011, and continuing (G.C. Ex. 7).[7] These grievances were consolidated for arbitration hearing purposes (U. Ex. 1). On November 3, 2011, Marsh sent an email to Drew stating, in part:

> To my knowledge, Seedorff Masonry, Inc. is not signatory to the current Local 150 Quad City Agreement and none of the memoranda that you sent to Mark Guetzko on September 9th appear to bind Seedorff Masonry to that agreement. If you disagree, please identify the document(s) upon which you are relying. We will need this information to be able to address your grievances further. . . . (R. Ex. 2) (emphasis added).

That same day, Drew responded by providing copies of various documents to Marsh (R. Ex. 2). Marsh never again discussed whether Seedorff was bound by the QCBA Agreement (Tr. 43). Rather, Seedorff continued to process the grievances pursuant to the QCBA Agreement and the rules of the American Arbitration Association (*See* U. Ex. 1). After November 3, 2011, Marsh agreed to consolidate the grievances (U. Ex. 1). Drew and Marsh continued to advance the grievances, agreed upon an arbitrator (Tr. 55), and continued to attempt to settle the grievances (Tr. 55). Then, on February 1, 2012, the arbitrator proposed hearing the grievances

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[6] The outcome of the arbitration is irrelevant because the NLRB is not bound by an arbitrator's decision, and therefore the ALJ was correct when she rejected Respondent's Exhibit 8.

[7] These two grievances were not filed pursuant to the PLA (Tr. 47).

on March 23, 27, or April 9, 2012. The parties agreed to conduct the arbitration hearing at the Quad City Builders Association office (Tr. 64). Rather than select a new hearing date, on April 12, 2012, Seedorff's attorney sent a letter to the Union's attorney repudiating the QCBA Agreement (Tr. 36 and G.C. Ex. 6).

I. Seedorff's Unfair Labor Practice Charge Against The Laborers

On January 31, 2012, Seedorff filed an 8(b)(4)(D) unfair labor practice charge against the Laborers alleging:

> Seedorff [], consistent with its collective bargaining agreement with the Laborers ... assigns to the Laborers the following work: . . . Local 150 [] has pressured [Seedorff] using a variety of actions to reassign the above-described work to members of Local 150. The Laborers have threatened to strike and picket [Seedorff] work sites if [Seedorff] reassigns any of the above-described work to members of Local 150. There is no voluntary method for adjusting this jurisdictional dispute between the Laborers and the Operators (R. Ex. 12, Basis of the Charge).

On February 21, 2012, the Regional Director declined to issue a notice of hearing pursuant to Section 10(k) of the Act and dismissed the charge (R. Ex. 13). The Regional Director addressed the issue of reassigning "the forklift, skidsteer, and other material transportation work to Operating Engineers' Local 150" from the Laborers on the project governed by a project labor agreement, and determined that there is an agreed upon method for resolving the dispute (R. Ex. 13). The Regional Director also determined that there were no competing claims for the work at the Burlington project, which was the project that was not covered by the project labor agreement (R. Ex. 13). Seedorff did not appeal the Regional Director's Dismissal.

III. ARGUMENT[8]

A. Seedorff's First Argument Must Fail Because It Employs More Than One Operator And Therefore The One-Person Unit Rule Does Not Apply

Seedorff argues that it does not employ more than one employee and therefore the Board lacks jurisdiction (Seedorff Brief 10-14). First and foremost, the ALJ correctly found that it is Seedorff's burden to establish a stable one-person unit (ALJ Dec. at 9, lines 11-14) and that Seedorff failed to do that (*id*. at 10, lines 3-4).

Seedorff argues that *Haas Garage Door Co*., 308 NLRB 1186 (1992) and *J. W. Peters, Inc. v. Bridge, Structural and Reinforcing Iron Workers, Local Union 1*, 398 F. 3d 967 (7th Cir. 2005) support its position that it may repudiate the collective bargaining agreement because of the one-person unit rule. However, the instant case does not involve a one-person unit. Crucial to the inquiry is a determination of "unit work." *See Haas Garage Door Co.*, 308 NLRB 1187 (determination that two of three persons performing unit work were independent contractors for more than 18 years, therefore the work performed by third person was not relevant because, at most, there was only one employee performing the work). Seedorff regularly employs employees performing work covered by the collective bargaining agreement between it and Local 150 (ALJ Dec. 9-10, Tr. 105). The Local 150 collective bargaining agreement provides, in pertinent part, as follows:

> The Contractors recognize the Union as the sole collective bargaining agent for those employees of the Contractor engaged in the operation and maintenance of all hoisting and portable machines and engines used on building

[8] Seedorff argues that the ALJ made erroneous credibility determinations (Seedorff Brief 11, 12, etc.). The ALJ's credibility determinations were correct and should not be reversed. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951).

> 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, or any other power machine that may be used by the Contractor for the construction, alteration, repair or wrecking of a building or buildings . . . .

Article 11 – Wage Scales and Classifications of the collective bargaining agreement (G.C. Ex. 4) lists the following equipment: cranes; boom tractor or side boom; forklifts (both 6000 lb capacity and less); group equipment greaser; loader (track, rubber tire, or articulated); mechanic-welder; and skid loader.

Instead of employing Local 150 operating engineers to perform the work, Seedorff has inappropriately employed others to perform the work. Currently, laborers and masons are performing Local 150 operator work. Seedorff admitted that it was assigning operator work to the Laborers instead of assigning the work to the Local 150 operators (Tr. 105). Despite the fact that the work is covered by the Local 150 collective bargaining agreement, and the Laborers do not claim the work (R. Ex. 13), Seedorff has unilaterally and improperly determined that the work is to be performed by the Laborers and the masons. A company may not avoid its obligations under a collective bargaining agreement by manipulating the workforce to become a one-person unit. *See NECA-IBEW Pension Trust Fund v. Bays Electric, Inc.*, 2011 WL 4435575 (C.D. Ill. Sept. 23, 2011) (One-person unit rule not applicable because the employer laid off the employees so that it employed only one man). Seedorff cannot assign the "operator's" work, such as forklift and skidsteer operation, to the Laborers - in an effort to avoid its obligations with Local 150. The QCBA Agreement Seedorff has with Local 150 covers these pieces of

equipment and therefore since Seedorff employees ten to thirty employees performing those functions, the bargaining unit is not a one-person unit.

Additionally, when Seedorff filed a charge against the Laborers because of the work in question, it did not argue at that time that it had no Local 150 members or that there was no unit work. Rather, it argued that the work belongs to the Laborers. The Regional Director determined that there were no competing claims for the work on the non-PLA projects. Therefore, since Seedorff employs ten to thirty employees performing this work (Seedorff Brief 6), it employs more than one employee and the one-person unit rule does not apply.[9]

Finally, Seedorff argues that General Counsel Exhibit 5 supports its position that it does not employ more than one operator at a time and argues that the ALJ was incorrect for drawing an adverse inference against Seedorff because it did not produce payroll records supporting Seedorff's argument (Seedorff Brief 11). The ALJ is correct that Seedorff did not produce any documents supporting its position. Seedorff relied exclusively on General Counsel Exhibit 5 to support its position. General Counsel Exhibit 5 does not establish the number of operators working for Seedorff, rather it is a snapshot in time that demonstrates that Seedorff has, at times, complied with the terms of the QCBA Agreement. General Counsel Exhibit 5 does not establish that there were no other operators on other projects. Seedorff could fail to report on the other projects, in which case the contribution reports would not reflect the actual number of operators.

[9] Additionally, even when the employer is absent from the Union's jurisdiction the employer remains bound by the agreement during its term. In *Cowboy Scaffolding Inc. and Carpenters District Council of Kansas City and Vicinity*, 326 NLRB 1050, fn. 2 (1998), the Board held that an employer absent from the union's jurisdiction for nearly four years during the term of an 8(f) agreement did not absolve it from its bargaining obligations during the term of the 8(f) agreement. *See John Deklewa & Sons*, 282 NLRB 1389 fn. 62 (1987) ("Respondent's defense that it employed no ironworkers when it repudiated the contract is without merit. An 8(f) contract is enforceable throughout its term, although at a given time there may not be any employees to which the contract would apply"). Therefore Seedorff is bound by the QCBA Agreement.

Seedorff presented conclusory testimony at the hearing concerning payroll, but failed to introduce any supporting documents and thus the ALJ correctly drew an adverse inference. (ALJ Dec. 9, lines 16-28).[10] The evidence presented at the hearing establishes that Seedorff employs more than the person performing the work and therefore the one-person unit does not apply.

B. Seedorff's Second Argument Must Fail Because The Charge Was Filed Within Six Months Of Its Repudiation And Therefore Is Timely[11]

Seedorff argues that Marsh's October 17, 2011, letter (R. Ex. 10) and his November 3, 2011 email (R. Ex. 2) gave clear and unequivocal notice that Seedorff repudiated the agreement and therefore the unfair labor practice charge filed on September 7, 2012, is untimely because it was filed more than six months after the letter and email (Seedorff Brief 15). Seedorff argues that the ALJ erroneously held that the letter and email were clear and unequivocal notice of the repudiation, particularly when reviewed together. *Id*. Seedorff argues that *St. Barnabas Medical Center*, 343 NLRB 1125 (2009) supports its position and that the ALJ ignored that case as well as Board precedent. *Id.*

There was no repudiation on October 17, 2011. Contrary to Seedorff's assertions concerning the October 17, 2011 letter, that letter simply and briefly explains that Seedorff "will not be available to attend the Step II meeting . . . We will not be sending a check." (R. Ex. 10).

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[10] Furthermore, no adverse inferences can be drawn against the General Counsel for its decision not to call a witness to disprove Seedorff's one-person unit theory because the General Counsel made its case without the need to call that particular witness and because the burden to establish a one-person unit is on Respondent, not the General Counsel or Charging Party.

[11] Seedorff also intertwines its argument that the ALJ should have considered the alleged fact that Seedorff has not employed more than one Operator at any time when considering the adequacy of the notice of the repudiation (Seedorff Brief 15), and its argument that the Union's March, 2006 letter terminated the bargaining relationship. The one-person unit issue is more fully discussed at pages 10 through 13 of this brief, and the March, 2006 letter is more fully discussed at pages 19 through 25 of this brief.

Essentially, Seedorff was denying the grievance, a practice that is common by some contractors. That letter does not advise that it is denying the grievance because it believes it is not bound by the collective bargaining agreement.

Likewise, Marsh's November 3, 2011, email was not a repudiation, rather it was a question. Marsh wrote:

> To my knowledge, Seedorff Masonry, Inc. is not a signatory to the current Local 150 Quad City Agreement and none of the memoranda that you sent to Mark Guetzko on September 9th appear to bind Seedorff Masonry to that agreement. If you disagree, please identify the document(s) upon which you are relying. We will need this information to be able to address your grievances further. We will also need this information before I can further address the information requests you made previously to Mark. (R. Ex. 2) (emphasis added).

Drew responded immediately, providing agreements dating back to the 1970s, and providing the QCBA Agreement. *Id*. Presumably, Marsh did not know about the agreements signed in the 1970s because that was before his employment with Seedorff. Regardless, after receiving "information [needed] to be able to address your grievance further" Marsh, consistent with the QCBA Agreement, proceeded to process the two grievances up to and including consolidating the grievances, selecting an arbitrator, continuing the arbitration date, and selecting a location for the arbitration. The parties agreed to conduct the arbitration at the QCBA's office, further establishing its connection with the QCBA. Marsh continued to process the grievance after he received the needed information in accord with his email and because he realized that Seedorff is bound by the QCBA Agreement. Had Seedorff truly repudiated the collective bargaining agreement, it would not have continued to process the grievance as it did and it would have repeated its contention that there was no collective bargaining agreement. Its continued processing of the grievances and its failure to hold firm to its belief that there was no agreement

establishes that its "repudiation" was neither clear nor unequivocal. Furthermore, contrary to Seedorff's position, it was not merely attempting to settle the issues, rather it was following the grievance procedure outlined in the QCBA Agreement. Therefore, there was no repudiation.

Seedorff also argues that Marsh's request for additional information demonstrates a good faith effort on his part and is not proof that the repudiation is unclear (Seedorff Brief 19). As stated above, had Marsh repudiated the QCBA Agreement, he would have repeated his assertion after receiving the additional information. Instead, he continued to process the grievances pursuant to the QCBA Agreement.

Seedorff argues that Marsh's statement in his November 3, 2011 email (R. Ex 2) concerning the project labor agreement ("PLA") and the QCBA Agreement establish that Seedorff was consistently maintaining that it was not bound by the QCBA Agreement (Seedorff's Brief 17). Contrary to that assertion, Marsh's statements concern a grievance he believed was covered by the "stand-alone PLA" and therefore was not covered by the QCBA Agreement (R. Ex. 2). Marsh also believed that the PLA did not bind Seedorff to the QCBA Agreement and that because he believed the grievance was covered by the PLA and not the QCBA Agreement, the grievance must be processed via the grievance procedure contained in the PLA. The fact that Seedorff is bound by the PLA does not establish that it is not bound by the QCBA Agreement for other projects. Many contractors sign various contracts and simply because the contractor signs one agreement does not mean it is not bound by a different agreement. In fact, Drew explained to Marsh that the PLA does not bind Seedorff to the QCBA Agreement, but that the memoranda bind Seedorff to the QCBA Agreement (R. Ex. 2). After

receiving Drew's response, Seedorff continued to process the grievances as described herein and never again questioned the validity of the QCBA Agreement until April 12, 2012.

Seedorff argues that because there is a PLA, the Union cannot file a grievance pursuant to the QCBA Agreement (Seedorff Brief 21). While it is true that the ALJ found that the PLA applies to work at the Iowa penitentiary, the ALJ did not find that the PLA precludes a determination that the QCBA Agreement applies to the grievances in question (ALJ Dec. 4, lines 8-11).

Seedorff also argues that the Union had constructive notice of the repudiation because 1) of the November 3, 2011 email; 2) it refused to follow the contract relative to the two grievances; 3) it refused to pay as the Union demanded to settle the grievances; and 4) because it refused to provide information related to the QCBA. (Seedorff Brief 22-23). There was no constructive notice. If the bar is set as low as Seedorff would have it, then every time a contractor refused to cooperate with the Union and/or questioned the Union, and denied a grievance and refused to settle the grievance the Union would be on notice that the employer repudiated the agreement between the parties. This obviously is not the standard. Moreover, Seedorff has omitted a number of facts as discussed above including but not limited to the facts that Seedorff continued to process the grievances after it allegedly thought there was no contract; attempted to settle the grievances (G.C. Ex. 6); and made contributions to the Funds pursuant to the QCBA Agreement which by the language in the contribution reports binds Seedorff to the QCBA Agreement (G.C. Ex. 5). In *E.S.P. Concrete Pumping*, 327 NLRB 711 (1999), the NLRB held that the rule of "adoption by conduct" applies to 8(f) agreements, and therefore an employer may adopt an 8(f) agreement by conduct demonstrating an intent to be bound by the agreement. In the instant case,

Seedorff's conduct demonstrates an intent to be bound by the QCBA Agreement. Thus, Seedorff's course of conduct establishes that it intends to be bound by the QCBA Agreement, and therefore it is bound by the QCBA Agreement. *See Advance Cast Stone Co. v. Bridge, Structural and Reinforcing Iron Workers, Local No. 1*, 376 F.3d 734, 737 fn. 2 (7th Cir. 2004) and cases cited therein.

Seedorff cites cases for the proposition that settlement discussions do not toll the Section 10(b) period (Seedorff Brief 22). However, Seedorff's communications after the November 3, 2011, email were not settlement discussions, rather they were communications to advance the grievances to arbitration. These communications were in accord with the QCBA Agreement.

Finally, Seedorff argues that *St. Barnabas Medical Center*, 343 NLRB 1125 (2009) supports its position. However, the instant case is readily distinguishable. In *St. Barnabas Medical Center*, the union requested information but the employer refused to provide the information because the employee involved was not part of the bargaining unit (*id*. at 1125-1126). Shortly thereafter, the union made a formal demand for recognition of the employees, but the employer refused and reiterated that the employees are not part of the bargaining unit (*id*. at 1126). The employer maintained that position throughout the process. The Board held that the union knew that the classifications were not covered by the contract when the employer refused to apply the contract to the disputed classification and thereafter when it maintained that position (*id*. at 1127-1128). The Board also noted that the employer refused to respond to an additional inquiry and three subsequent telephone calls as evidence that the repudiation was clear and unequivocal. *Id*. The Board also noted that the employer never agreed to apply the contract to the disputed employees (*id*. at 1128). In the instant case, the clear and unequivocal notice came

on April 12, 2012, not any time sooner. The prior emails were not clear and unequivocal. Further, Seedorff did not ignore communications from Local 150, rather it maintained constant and regular communication, and further agreed to apply the contract, i.e. to follow the grievance procedure including arbitrating the disputes. Additionally, Seedorff never repeated its assertion that it repudiated the collective bargaining agreement. Thus, the instant case is distinguishable.

Finally, assuming Marsh intended his November 3, 2011 statement to be a repudiation, such notice was improper. An innocuous statement buried in the middle of an email sent to business agent Ryan Drew is not proper notice. Such notice, to be proper, ought to be sent to an Officer of Local 150, such as James Sweeney, President-Business Manager, Steven Cisco, Recording-Corresponding Secretary, or Marshall Douglas, Treasurer, all of whom signed the QCBA Agreement. Drew did not sign the QCBA Agreement and did not participate in the negotiations culminating in the QCBA Agreement. Further, there is no evidence that Drew has any authority to accept and/or address such an alleged repudiation. Therefore, Seedorff did not repudiate the collective bargaining agreement on November 3, 2011, and because the charge was filed on September 7, 2012, within six (6) months of Seedorff's April 12, 2012 repudiation, it is timely.

For all of these reasons, there was no repudiation on November 3, 2011, and the time for the Section 10(b) period had not yet begun to run. Rather the Section 10(b) period began to run on April 12, 2012, and because the unfair labor practice charge was filed on September 7, 2012, it was filed within six months of the violation and is timely.

C. Seedorff's Third Argument Must Fail Because The March 1, 2006 Letter From Local 150 To The QCBA Did Not Terminate The Collective Bargaining Agreement Or The Relationship Between Local 150 And Seedorff[12]

The Local 150 March 1, 2006 letter to the QCBA did not terminate the QCBA Agreement or Local 150's relationship with the QCBA or Seedorff. First, the letter is from Local 150 to the QCBA, not Seedorff (U. Ex. 2). Second, the letter requests that the QCBA Agreement be reopened or "to start negotiations." *Id*. The 2006 letter does not seek to terminate the contract. *Id*. The Individual Signers agreement provides that the Union may serve notice "for reopening, termination or commencement of negotiations." (G.C. Ex. 2). Had the Union wanted to terminate the contract it would have used the word "terminate" but instead the Union sent a notice seeking "to start negotiations." In other words, the Union wanted to "commence [. . .] negotiations," not terminate the contract. Therefore, as the ALJ found, (ALJ Dec. 7 lines 25-35) the contract was not terminated.

Moreover, regardless of the interpretation of the Union's March, 2006 letter, Seedorff is bound by the subsequent contracts. Seedorff remains bound by virtue of fact that 1) Seedorff assigned its bargaining rights to the QCBA and never revoked the QCBA's authorization to negotiate subsequent contracts (G.C. Ex. 2); 2) as a member of the QCBA, Seedorff is bound by the agreements it reaches; 3) Seedorff is bound by the successor agreements by virtue of the Participation Agreement (G.C. Ex. 3); 4) Seedorff never terminated any agreement it had with

[12] Seedorff alleges in its brief that it repeatedly requested a copy of the March, 2006 letter and that it was only at the hearing that it received a copy of the letter (Seedorff Brief 18). This assertion is false. There is no record evidence that Seedorff made requests, either formal or informal, for this letter.

Local 150; and 5) the language in the contribution reports binds Seedorff to the QCBA Agreement (G.C. Ex. 5).

1. Seedorff assigned its bargaining rights to the QCBA and never revoked the QCBA's authorization to negotiate subsequent contracts (G.C. Ex. 2)

On July 19, 1988, Seedorff signed the "Building Agreement Individual Signers." The Building Agreement Individual Signers agreement provides that Seedorff "becomes a signatory employer to the agreement between the Quad City Builders Association, Inc. and [Local 150]" and "agree[s] 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 employer notifies the Union in writing that it revokes such authorization." (G.C. Ex. 2) (emphasis added). Seedorff thereby assigned its bargaining rights to the QCBA and is bound by any and all agreements negotiated between the QCBA and Local 150. Additionally, Seedorff remains bound to all successor agreements because it never revoked the QCBA's authority. Therefore, the QCBA remains Seedorff's bargaining representative and Seedorff is bound to whatever agreement QCBA and Local 150 negotiates, including the latest collective bargaining agreement with a term June 1, 2010 through May 31, 2014.

2. As a member of the QCBA, Seedorff is bound by the agreements it reaches

As a member of the QCBA, Seedorff is bound to the agreements the QCBA negotiates with Local 150. The QCBA's primary purpose is to negotiate collective bargaining agreements. Seedorff continues to be a member of QCBA and continues to receive correspondence relative to

negotiations with Local 150. Seedorff admitted that it did not terminate its relationship with QCBA. In fact, Seedorff was copied on the April 17, 2006 letter the QCBA sent to Local 150, as a signatory contractor which was a response to Local 150's March 1, 2006 contract reopener (R. Ex. 4). Therefore, Seedorff as a member of the QCBA, is bound to whatever agreement the QCBA and Local 150 negotiate, including the latest collective bargaining agreement with a term June 1, 2010 through May 31, 2014.

3. Seedorff is bound by the successor agreements by virtue of the Participation Agreement

On July 18, 1988, Rima signed a "Participation Agreement" on behalf of Seedorff (G.C. Ex. 3 and Tr. 24). The "Participation Agreement" binds Seedorff, providing in pertinent part:

> [T]he undersigned employer [Seedorff] does hereby agree to abide by all of the terms and conditions of the aforesaid Pension Fund Agreement and the aforesaid Welfare Fund Agreement with respect to each and every employee of the undersigned who shall be employed within the bargaining unit represented by the aforesaid Labor Union and be eligible to be a participating employer in either or both of said funds. The amount of contribution to be made to each fund by the undersigned employer shall be that established in the applicable labor agreement, and obligations of the undersigned employer shall continue in effect for the period specified in such agreement. (G.C Ex. 3).

Seedorff never terminated this agreement. Therefore, Seedorff continues to be bound by all successor agreements.

4. Seedorff never terminated any agreement it had with Local 150

Local 150 did not send the March 1, 2006 letter (U. Ex. 2), or any letter, to Seedorff, and Seedorff never received the March 1, 2006 letter (Tr. 114).[13] On April 17, 2006, the QCBA sent a letter to Local 150 acknowledging receipt of the March 1, 2006 letter (R. Ex. 4). The QCBA's April 17, 2006 letter was sent to all QCBA signatory contractors, including Seedorff, which Seedorff acknowledged receiving (Tr. 81 and R. Ex. 4). Seedorff never terminated the agreement (Tr. 18 and 37). There is no evidence that Seedorff responded adversely to either letter. Finally, successor QCBA Agreements were negotiated, and Seedorff continued to abide by the successor agreements as discussed throughout this brief.

5. The language in the contribution reports binds Seedorff to the QCBA Agreement (G.C. Ex. 5)

Assuming Seedorff is not bound to the QCBA Agreement via the "Building Agreement Individual Signers," "Participation Agreement," its membership in the QCBA, and/or the QCBA Agreement itself, it remains bound to the QCBA Agreement by virtue of the contribution reports which provide that:

> The undersigned employer, <u>if not already signatory hereby becomes a signatory</u> party to the current applicable Collective Bargaining Agreement with the Union covering the type and area of work of the listed employee and also to each Agreement and Declaration of Trust and Amendments, establishing the Funds for which payment is made herewith (G.C. Ex. 5).

Therefore, assuming Seedorff was not a signatory at the time it made the contributions in 2009, it became a signatory when it filed the contribution reports. Moreover, the fact that Local

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[13] The letter does not contain a cc. to Seedorff. Seedorff did not have a copy of the March, 2006 letter when it allegedly "repudiated" the contract, therefore Seedorff could not have relied upon that letter when it "repudiated" the contract.

150 has records that Seedorff is a signatory further establishes that it is a signatory.[14] Seedorff's contributions to various Local 150 Funds were consistent with its obligations under the QCBA Agreement. It is inconceivable that Seedorff would make such contributions and make the contributions precisely as required by the QCBA Agreement, if it were not bound by the QCBA Agreement.

Seedorff signed twice with Local 150 in 1988; has paid into the pension plan, health and welfare plan, and made other appropriate contributions on behalf of the employees working pursuant to the QCBA Agreement; and has processed grievances pursuant to the QCBA Agreement. Seedorff has never properly terminated any QCBA Agreement and it would not have engaged in any of these activities unless it was required to do so. Therefore, Seedorff is bound by the successor QCBA Agreement and must process the grievances.[15]

Seedorff cites *South Texas Chapter, Associated General Contractors,* 190 NLRB 383 (1971) to support its position that Local 150 terminated the contract (Seedorff Brief 24-25). *South Texas Chapter, Associated General Contractors* is distinguishable. In that case, the union described its notice as a "notice in writing of termination" and sought to negotiate "all matters

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[14] If Local 150 receives contributions from a contractor that is not signed to one of Local 150's contracts, not only does the contractor become bound to the applicable collective bargaining agreement pursuant to the above language, but a form is sent to the responsible Local 150 business agent inquiring why the Funds received the contributions (Tr. 38-39). Drew never received such an inquiry regarding Seedorff (Tr. 38-39). Drew did not receive such a notice because the records showed that Seedorff is a signatory contractor.

[15] Alternatively, assuming the QCBA and Local 150 did not negotiate a successor QCBA Agreement, the QCBA Agreements renew from year to year, in which case, Seedorff remains bound to the Agreement on a year to year basis. *See Contempo Design, Inc. v. Chicago and Northeast Illinois District Council of Carpenters*, 226 F.3d 535, 546 (7th Cir. 2000) (automatic rollover is valid and the agreement continues absent proper termination). (*See Trustees of the Sheet Metal Local No. 10 Control Board Trust Fund v. Genz-Ryan Plumbing & Heating*, 2009 WL 2171001 (D. Minn. 2009) (employer who was party to an 8(f) multi-employer agreement remained bound by the evergreen clause because the employer did not follow the express provisions to terminate its participation). If Seedorff argues that the QCBA Agreement runs year to year, then the April 12, 2012 repudiation/notice is not timely because the notice is less than sixty (60) days prior to the expiration of the contract year.

pertaining to wages, hours and all conditions of employment" (*id*. at 386). In the instant case, there is no evidence that the Union sought to terminate the contract in 2006 or desired to negotiate all of the terms. Rather, the Union simply sought to commence negotiations as provided for in the Individual Signers agreement (G.C. Ex. 2). More importantly, successor contracts were negotiated and Seedorff abided by the terms and conditions set forth therein as evidenced by the contributions it made in 2009 (G.C. Ex. 5) and the continued processing of grievances.

Seedorff cites *The Oakland Press Co.* 229 NLRB 476 (1977) to support its position (Seedorff Brief 25-26). In that case the employer took the position that the union's letter was insufficient to trigger negotiations for a successor contract and therefore the contract rolled over and the employer did not have to bargain with the union (*id.* at 478). The Administrative Law Judge in that case determined that there was a deliberate attempt by the employer to avoid its bargaining obligations. *Id*. In the instant case, Seedorff argues that "the March 1, 2006 letter served to terminate the QCBA agreement, and therefore it was no longer bound by the agreement or its successors" (Seedorff Brief 25). Thus, Seedorff is acting somewhat similarly to the respondent in The Oakland Press Co., i.e. attempting to manipulate the facts to avoid its obligations under the successor contract. Again, the March, 2006 letter did not terminate the agreement and successor contracts were negotiated, which Seedorff followed. Additionally, Seedorff became bound by the successor agreements because of its course of conduct, as discussed throughout this brief.

Seedorff relies on *Stevens Construction Corp. v. Chicago Regional Council of Carpenters, 464 F.3d 682 (7th Cir. 2006)* for the proposition that the Union's proposal that

Seedorff sign a new collective bargaining agreement demonstrates that the Union did not believe that it had a valid contract with Seedorff (Seedorff Brief 26). In *Stevens Construction Corp*., the district court considered that *Stevens Construction Corp.* cancelled its membership in the association; the association notified the union that it did not have authority to bargain for *Stevens Construction Corp.*; and that the union asked *Stevens Construction Corp.* to sign the successor agreement (*id*. at 686). In the instant case, the Union attempted to have Seedorff sign a completely unrelated agreement (*cf*. G.C. Ex 4 QCBA agreement and R. Ex. 5 Mid-America Bargaining Association, Illinois Building Agreement). It is common for contractors to sign different contracts, because the contracts might cover different geographic areas or different types of work. Additionally, Seedorff never cancelled its membership with the QCBA. Therefore, *Stevens Construction Corp.* does not support Seedorff's position. There is a valid QCBA Agreement and Seedorff is bound to it even though it did not sign a different contract.

D. Seedorff's Fourth Argument Must Fail Because Local 150 Is Not Attempting To Circumvent The Board's Procedures To Obtain Work Performed By The Laborers

Seedorff argues that Local 150's unfair labor practice charge is an attempt to circumvent the Board's processes (Seedorff Brief 27-29). Seedorff has turned the issue upside down. Contrary to Seedorff's assertion, Local 150 has the right to file an unfair labor practice charge – Seedorff illegally repudiated the agreement between it and Local 150. Seedorff is the party that is attempting to circumvent the Board's processes and the parties' collective bargaining agreement. Rather than arbitrate the various grievances pursuant to the QCBA Agreement, Seedorff has made several arguments all of which have been rejected by the ALJ. Seedorff has maintained its position even though it is bound by the QCBA as determined by the ALJ, and

despite the fact that the Regional Director dismissed its unfair labor practice charge concerning the alleged dispute over the work, to which Seedorff did not appeal. Seedorff ought not be allowed to ignore its legal obligations to Local 150 and it ought not be allowed to ignore the Board's processes and procedures.

Seedorff essentially argues that it should be excused from its contract with Local 150 because it assigns the work to others (Seedorff Brief 27-28). However, even if Seedorff paid another employee for the work, that fact does not diminish Seedorff's responsibility to honor the QCBA Agreement. If an employer enters into conflicting collective bargaining agreements, it may be required to pay two members from different unions for work performed by only one of them. *Hutter Construction Co. v. IUOE, Local 139*, 862 F.2d 641, 645 n. 16 (7th Cir. 1988). Seedorff presented evidence of the collective bargaining agreement it has with the Laborers to establish that the issue is a jurisdictional dispute and that the Laborers and not the Operators is the rightful representative. However, Seedorff admitted that there is work for the operators (ALJ Dec. 9, lines 30-41 through 10, lines 1-3; Tr. 105), and simply because Seedorff has employed laborers and has paid them pursuant to an agreement it has with the Laborers does not establish that there are no operators or that it is not bound by the QCBA Agreement with Local 150. Thus, an employer cannot escape its obligations by claiming a conflict between two unions; rather it may be bound to the agreement even though it followed a different agreement which overlaps with the other agreement. *Id*.; and *International Union of Operating Engineers, Local 139 v. Howard Immel, Inc.*, 102 F.3d 948, 953 (7th Cir. 1996). Thus, Seedorff's collective bargaining agreement with the Laborers is irrelevant. Moreover, contrary to Seedorff's assertion, the Regional Director determined that there are no competing claims for the non-PLA

work (R. Ex. 13). Seedorff did not appeal that decision. Therefore, Seedorff has illegally repudiated the agreement between it and Local 150 and Local 150 is not circumventing the Board's process.

IV. CONCLUSION AND PRAYER FOR RELIEF

The foregoing establishes that the unfair labor practice charge is timely; that Local 150 is not attempting to circumvent the Board's procedures; that the one-person unit rule does not apply; that Seedorff is a signatory contractor with Local 150; that Local 150 has a valid collective bargaining agreement binding Seedorff; that Seedorff is bound by the Participation Agreement; that Seedorff is bound by the Building Agreement Individual Signers; and that Seedorff violated the Act when it repudiated the collective bargaining agreement between it and Local 150 on April 12, 2012.

WHEREFORE, the International Union of Operating Engineers, Local 150 respectfully requests that the Respondent's exceptions be dismissed and that the Board affirm the Administrative Law Judge's Decision and adopt her recommended order in its entirety and order any and all additional relief deemed just and equitable.

Dated: January 14, 2014

Respectfully submitted,

IUOE, LOCAL 150, AFL-CIO
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CERTIFICATE OF SERVICE

The undersigned certifies that he caused a copy of the foregoing *Answer Brief of Local 150 to Respondent's Exceptions* to be served upon the following individuals this 14th day of January, 2014:

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