

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION SEVEN (*DETROIT*)

In the Matter of:

**ASSOCIATED GENERAL CONTRACTORS
OF MICHIGAN,**

Case No. 7-RC-64788

and

**ASSOCIATED CONCRETE CONTRACTORS
OF MICHIGAN,**

Case No. 7-RC-64796

and

CONSTRUCTION ASSOCIATION OF MICHIGAN,

Case No. 7-RC-64723

Employers,

and

**LOCAL 514, OPERATIVE PLASTERERS' AND
CEMENT MASONS' INTERNATIONAL
ASSOCIATION OF THE UNITED STATES AND
CANADA, AFL-CIO,**

Petitioner,

**LOCAL 1, INTERNATIONAL UNION OF
BRICKLAYERS AND ALLIED CRAFTWORKERS,
AFL-CIO,**

Intervenor.

**BROADCAST DESIGN & CONSTRUCTION
SERVICES, INC.,**

Case No. 7-RC-64603

Employer,

and

LOCAL 514, OPERATIVE PLASTERERS' AND

**CEMENT MASONS' INTERNATIONAL
ASSOCIATION OF THE UNITED STATES AND
CANADA, AFL-CIO,**

Petitioner,

and

**LOCAL 1, INTERNATIONAL UNION OF
BRICKLAYERS AND ALLIED CRAFTWORKERS,
AFL-CIO,**

Intervenor Local 1/Cross-Petitioner,

and

**INTERNATIONAL UNION OF BRICKLAYERS
AND ALLIED CRAFTWORKERS, AFL-CIO,**

Intervenor,

DEMARIA BUILDING COMPANY, INC.,

Case No. 7-RC-64870

Employer,

and

**LOCAL 514, OPERATIVE PLASTERERS' AND
CEMENT MASONS' INTERNATIONAL
ASSOCIATION OF THE UNITED STATES AND
CANADA, AFL-CIO,**

Petitioner,

and

**LOCAL 1, INTERNATIONAL UNION OF
BRICKLAYERS AND ALLIED CRAFTWORKERS,
AFL-CIO,**

Intervenor Local 1/Cross-Petitioner,

and

LOCAL 9, INTERNATIONAL UNION OF

**BRICKLAYERS AND ALLIED CRAFTWORKERS,
AFL-CIO,**

Intervenor Local 9,

AMALIO CORPORATION, INC.,

Case No. 7-RC-64611

and

E.L.S. CONSTRUCTION, INC.,

Case No. 7-RC-64787

Employer,

**LOCAL 514, OPERATIVE PLASTERERS' AND
CEMENT MASONS' INTERNATIONAL
ASSOCIATION OF THE UNITED STATES AND
CANADA, AFL-CIO,**

Petitioner,

and

**LOCAL 9, INTERNATIONAL UNION OF
BRICKLAYERS AND ALLIED CRAFTWORKERS,
AFL-CIO,**

Intervenor,

RONCELLI, INC.,

Case No. 7-RC-66599

and

BARTON MALOW COMPANY,

Case No. 7-RC-66611

and

ALBANELLI CEMENT CONTRACTORS, INC.,

Case No. 7-RC-66641

Employers,

and

**LOCAL 514, OPERATIVE PLASTERERS' AND
CEMENT MASONS' INTERNATIONAL**

**ASSOCIATION OF THE UNITED STATES AND
CANADA, AFL-CIO,**

Petitioner,

and

**LOCAL 1, INTERNATIONAL UNION OF
BRICKLAYERS AND ALLIED CRAFTWORKERS,
AFL-CIO,**

Intervenor Local 1/Cross-Petitioner,

and

**LOCAL 9, INTERNATIONAL UNION OF
BRICKLAYERS AND ALLIED CRAFTWORKERS,
AFL-CIO,**

Intervenor Local 9,

**LOCAL 514, OPERATIVE PLASTERERS' AND CEMENT MASONS'
INTERNATIONAL ASSOCIATION OF THE UNITED STATES AND CANADA,
AFL-CIO'S RESPONSE IN OPPOSITION TO INTERVENOR BAC LOCAL 1 AND
BAC INTERNATIONAL UNION'S REQUEST FOR REVIEW**

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NOW COMES Petitioner Local 514, Operative Plasterers' and Cement Masons' International Association of the United States, and Canada, AFL-CIO, by and through its attorneys, Miller Cohen, P.L.C., for its Response in Opposition to Intervenors BAC Local 1's and BAC International Union's Request for Review, and states as follows:

I. INTRODUCTION

Local 1 has requested review of the Regional Director's May 8, 2012 Decision and Direction of Election (DDOE), which granted Petitioner Local 514's petitions seeking 9(a) elections comprising three multi-employer construction associations and several independent construction companies.

Local 1 primarily argues that the DDOE was improper because multi-employer bargaining units are completely inappropriate—a proposition that enlarges the meaning of *John Deklewa & Sons*, 282 NLRB 1375, 1385 (1987) beyond its explicit terms and ignores other well-established Board precedent. The Regional Director correctly applied the applicable standard; namely, “to overcome the single-employer presumption and find a multiemployer bargaining unit appropriate, the Board requires ... evidence of an unequivocal intent to be bound by group action manifested by either participation in the group bargaining or delegation of authority to another to engage in such bargaining.” *Arbor Construction Personnel, Inc.* 343 NLRB 257, 258 (2004), *see also Hunts Point Recycling Corp.*, 301 NLRB 751, 752 (1991).

Here, the multi-employer associations have existed for forty to fifty years and have been given direct authority to negotiate over all labor agreements on behalf of their members either through executed powers of attorneys. Petitioner is not trying to “merge” employers together—they have already associated themselves together in the form of an association that bargains on their behalves.

Furthermore, there exists a significant community of interest between the employees in the requested bargaining units, including cement masons who work inside and outside. Even though Local 1 admits that they do not challenge the fact that “the same employees generally perform both types of work, the work is similar and requires similar skills, and there is an obvious community of interest as to both types of work,” they apparently are still challenging the community of interest between the employees. (Local 1’s Brief 2 fn 1; 12-13) In making such admissions, Local 1 states that they merely believe that they could have come up with a more appropriate bargaining unit, but, unfortunately for the interveners, that is not the test. The Board does not seek to find the most appropriate bargaining unit, just *an* appropriate bargaining unit, which Local 1 has admitted.

Finally, there are no applicable contract bars precluding elections as any overlap with 9(a) agreements has been carved-out of the petitioned for units. Local 1 argues that the DDOE should be reversed regarding two independent signatories of the association 8(f) agreements—Broadcast Design (BDC) and Albanelli—because there exists 9(a) agreements covering those employees. However, the 9(a) agreement alleged that relates to BDC does not contain sufficient terms and conditions of employment to constitute a contract bar. As for the Albanelli 9(a) agreement—the Heavy and Highway Agreement—that contract only applies to outside work, which is cement mason work past five feet away from buildings. The DDOE only granted an election pertaining to “building and heavy construction,” not to all “cement mason work.” This carve-out precludes an election bar.

Consequently, Local 1’s Request for Review should be denied, the DDOE affirmed, and the elections should move forward to provide the employees with free choice to decide their union representation.

II. STATEMENT OF FACTS

Local 514 filed petitions to represent the cement masons that are employed at various contractors. Local 514 filed petitions on the three multiemployer groups that it negotiates 8(f) agreements with and these include the Associated General Contractors of Michigan (“AGC”), the Construction Association of Michigan (“CAM”), and the Associated Concrete Contractors of Michigan (“ACCM”). These petitions cover all of the cement masons working in the State of Michigan excluding the County of Monroe¹ that are employees of any of the contractors that have voluntarily given one of the associations the legal authority to bargain on their behalf.

The only limitation on this is on the AGC petition where one of the employers has a 9(a) relationship with another union and negotiated a single employer agreement. One such situation is Sorenson Gross, which has a 9(a) certification under a year old for all cement mason work in the State of Michigan with OPCMIA Local 16 that covers the entire State. It has been entirely excluded from the AGC petition. Fessler Bowman also has a 9(a) relationship with Local 16. However, the agreement between Local 16 and Fessler Bowman excludes the counties of Macomb, Oakland, Wayne, Hillsdale, and Lenawee. Therefore, Fessler Bowman is included only for the purposes of cement mason work performed in the excluded counties in the Local 16 collective bargaining agreement.

Local 514 also filed petitions for two contractors that are independent signatories to the CAM agreement with 514. They have not granted CAM the authority to bargain on their behalf. However, they independently agreed to be bound by that agreement. These contractors are ELS and Amalio. Due to collective bargaining agreements with out of state unions, the geography of

¹ The county of Monroe is excluded to avoid issues with OPCMIA Local 886, which has jurisdiction that covers Monroe County. Local 886 has 9(a) relationships with some of the employers in the associations and the AGC itself. (Tr. 796)

the ELS petition was limited to the State of Michigan, except for Monroe County. There was no such evidence of any relationship with another union in regard to Amalio.

Local 514 has also filed petitions to represent four contractors that it does not have any contractual relationship. The cement masons for these contractors are represented by BAC Local 1 and in some cases, BAC Local 9. Barton Malow is a member of AGC and has granted it power of attorney to negotiate with the BAC. It has a 9(a) relationship with Local 9. That contract specifically excludes the counties of Wayne, Oakland, Macomb, St. Clair and Monroe, as well as the Upper Peninsula. It also has agreements with out of state unions. Therefore, Local 514's petition only seeks to represent a unit consisting of Wayne, Oakland, Macomb, and St. Clair. This is consistent with the scope of the 8(f) agreement Barton Malow has with Local 1.

Roncelli is an independent signatory to the CAM agreement with Local 1. It also has a 9(a) contract with Local 9. Therefore, Roncelli's petition does not seek any geographic area covered by the 9(a) agreement with Local 9.

DeMaria had been an independent signatory to the CAM Agreement with Local 1. They issued a power of attorney to AGC in April 2011.

Albennelli is an independent signatory to ACCM. It has a 9(a) contract with Local 9 and Local 1 that covers only heavy highway work. Therefore, Local 514's petition only covers the work performed under their 8(f) agreement—building and heavy construction.

A. Bargaining History Regarding Associations

(1) AGC: According to Local 514 Business Manager, Jim Oakley, the bargaining relationship between the AGC and Local 514 goes back 40 or 50 years. (Tr. 642) Prior to 2006, Local 1 and Local 514 bargained with the AGC jointly. In 2004, Local 514 sought to obtain an election to give the workers a choice in their bargaining representative. The NLRB blocked the

petition and held that the jointly bargained CBA, although an 8(f) contract, was a bar to the election. (Tr. 643). That particular CBA expired in 2006. Local 514 decided that it no longer desired to bargain a joint contract with Local 1 and the AGC. Local 514 and AGC negotiated separate agreements in 2006, 2009, and 2011.

There are exists the independent MITA Agreement. Some employers separate work based on whether the work is “inside” meaning work in or five feet around a building, or “outside” meaning road work. The MITA Agreement covers the “outside” work of a handful of AGC members. So far, as the record shows, the only contractors that are alleged to be a part of the MITA Agreement in the AGC are Fessler Bowman and Angelo Iafrate Construction Company. (Tr. 176, 314) However, no signature pages or any other documentation of this agreement were introduced. The parties were warned at the hearing that any party seeking 9(a) contract bars would have to introduce signature pages of the agreements. This was not done.

At any rate, the union signatory to the MITA agreement is the OPCMIA International. OPCMIA Vice President Daniel Rouke testified at the hearing that he could speak on behalf of the International. (Tr. 770) He admitted that the International had notice of these proceedings. (*Id.*) He admitted that the International chose not to intervene and not to seek a contract bar. (*Id.*)

Although the MITA Agreement is negotiated with the international, the Union members that perform the work are members of Local 514 and the fringe funds flow back to the Local. (Tr. 730) For all intent and purposes, the union in the MITA agreement is the same union here.

(2) CAM: This association began negotiating contracts with trade unions around 2003. (Tr. 489) In 2003, it negotiated a joint agreement with Local 514 and Local 1. (J.Ext 32) CAM then negotiated separate collective bargaining agreements in 2006, 2009, and 2011. (Tr. 560) In

2003, 2006, and 2009, CAM did not negotiate with Local 514 at the same time as the AGC and ACCM. (*Id.*) In 2011, it did negotiate alongside the other associations. (*Id.*) The CAM agreement is largely identical to the other associations' agreements but there are some minor differences. (*Id.*)

(3) ACCM: According to Local 514 Business Manager, Jim Oakley, the bargaining relationship between the ACCM and Local 514 goes back forty or fifty years. (Tr. 642) Prior to 2006, Local 1 and Local 514 bargained with the ACCM jointly. In 2004, Local 514 sought to obtain an election to give the workers a choice in their representative. The NLRB blocked the petition and held that the jointly bargained CBA, although an 8(f) contract, was a bar to the election. (Tr. 643) That particular CBA expired in 2006. Local 514 decided that it no longer desired to bargain a joint contract with Local 1 and the ACCM. Local 514 and ACCM negotiated separate agreements in 2006, 2009, and 2011. All of the ACCM contractors have regular cement mason crews. (Tr. 395)

Petitioner Exhibit 13 is a list of contractors that AGC and ACCM delivered to Local 514. (Tr. 727) These are the contractors that have assigned a power of attorney to AGC or ACCM to negotiate with Local 514. (*Id.*) These are the same contractors that appear in the petition for AGC and ACCM. Petitioner Exhibit 9 is a list of contractors that CAM delivered to Local 514. (Tr. 725-26) These are the contractors that have assigned a power of attorney to CAM to negotiate with Local 514. (*Id.*) These are the same contractors that appear in the petition for CAM.

B. Bargaining History Regarding Independent Signatories

(1) Barton Malow: Barton Malow is a member of AGC. (Tr. 334) It has bargained in the AGC for a long time. (Tr. 345) It has given AGC the authority to negotiate only with Local 1

and Local 9 in regard to Cement Masons and it does not authorize the AGC to negotiate with Local 514. (Tr. 345) Barton Malow has a set crew of twelve cement masons. (Tr. 335) However, if it works outside of the Metro Detroit area, it will draw most of its employees from the local area, not its pool of regular cement masons. (Tr. 336) If it performs work out of the state, it will rarely use its set crew of cement masons from the Metro Detroit area. (Tr. 339).

Local 9 has a 9(a) agreement covering all of the counties of the Lower Peninsula, except for Wayne, Oakland, Macomb, St. Clair, and Monroe. (J. Ext. 8, pg. 2) Therefore, the Petition covers the area in Michigan where work is performed by the described core group of 12 cement masons, which is Macomb, Oakland, Wayne, and St. Clair Counties. This also happens to be the area excluded in the Local 9 agreement. Barton Malow is a member of the AGC in Ohio, which has a 9(a) relationship that includes Monroe County. (Tr. 796) Barton Malow does not separate out the different types of cement mason work. It is not a signatory to any “outside” agreement like the MITA agreement.

(3) Broadcast Designs & Construction Services, Inc. (BDC): Since the split in 2006, Local 514 has not had a contractual relationship with BDC. (Tr. 128) Also, Local 9 has not had a contractual relationship with BDC. (Tr. 129) BDC is a member of CAM and is bound by CAM’s 8(f) agreement with Local 1. (Tr. 228)

On or about January 2, 2007, BDC signed the agreement between the BAC International and the International Council of Employers of Bricklayers and Allied Craftworkers (“ICE Agreement”). (J. Ext. 23) The ICE Agreement was a three year agreement that automatically rolled over, unless notice of termination was given. It has automatically rolled over. BDC entered into the ICE agreement because it had a job in Maryland back in 2007. (Tr. 232) It has not used the agreement since. (Tr. 233) It only entered into that agreement for that one job. (Tr.

243) The agreement does not contain any provisions for wages, benefits, or other economic terms and conditions of employment. It leaves all of those terms to the area Local agreement.

BDC has a core group of cement masons and will use additional cement masons as needed. (Tr. 227, 28) BDC performs most of its work in the Macomb, Oakland, and Wayne county area. (Tr. 228) It rarely does work out of the State. (Tr. 229) BDC was a designated contractor to the CAM Peace Agreement and the arguments below would be equally applicable. It is also not a signatory to any “outside” agreement like the MITA agreement.

(4) DeMaria: DeMaria is currently a member of the AGC. They only signed the power of attorney with the AGC recently in April 2011. (J Ext. 25) Prior to 2011, DeMaria was assigned its power of attorney to CAM. (Tr. 258-59) They are also members of the Washtenaw Contractors Association, which has an 8(f) agreement with Local 9. (J. Ext 14 and 16) It does not perform work outside of the State of Michigan. (Tr. 256) DeMaria assigned the power of attorney only to negotiate with a particular local, Local 1. (Tr. 260)

The peace agreement was no longer effective when DeMaria signed a power of attorney to the AGC. DeMaria was a “Designated Contractor” for CAM under the CAM peace agreement. (J. Ext. 30) That agreement states that the agreement not to file petitions “for as long as 1) the CAM retains the power of attorney for the Designated Contractors.” (*Id.* at ¶ 3)

In April 2011, DeMaria assigned its power of attorney to the AGC and CAM no longer retained the power of attorney for the Company. It revoked its power of attorney with CAM. (Tr. 265) Therefore, in addition to all of the reasons stated below, DeMaria was no longer bound by the peace agreement in April 2011. It is also not a signatory to any “outside” agreement like the MITA agreement.

(5) Amalio: Amalio is an independent signatory with Local 514 for many years. Most recently, it signed an agreement to be bound by the CAM – Local 514 agreement.² (P. Ext. 1) Amalio does not separate out the different types of cement mason work. It is not a signatory to any ‘outside’ agreement like the MITA agreement.

(6) Albennelli: Albennelli is an independent signatory to ACCM. It has a 9(a) contract with Local 9 that covers only heavy highway work. Therefore, Local 514’s petition only covers the work performed under their 8(f) agreement—building and heavy construction.

III. ARGUMENT

A. Board Law is Clear that Association-Wide Units Are Appropriate When There Is “evidence of an unequivocal intent to be bound by group action manifested by either participation in the group bargaining or delegation of authority to another to engage in such bargaining.”

Ironically, Local 1 claims to stand for the voting rights and free choice of their employees, yet, they are the ones opposing the election. The elections have already been granted by the Regional Director, hence, affirmatively promoting employee free choice and diminishing the argument of Local 1 that they are somehow the guardians of industrial democracy. It, however, ignores the reality that the employer could have filed individual petitions if there was a true desire to limit the bargaining unit to single employers. As discussed elsewhere in this brief, the Board protects free choice of employees who work with 8(f) contracts to determine the unit of their choice by permitting them to file petitions for single employers or for the multiemployer group. Here, the employees have not filed a petition for the individual employers in the associations. Instead, they have filed one petition for each association. Due to the transient

² The independent signatory page for ELS and for Amalio is a 9(a) agreement. With the petitions for these employers, Local 514 is seeking to certify a unit without geographic limitation.

nature of employees in the trades, most cement masons do not likely have an identifiable long lasting relationship with one particular employer.

As discussed below the precedent before the Board is clear that when a petition involves an association there are two analyses depending on whether the relationship between the union and the association is governed under 8(f) or 9(a) of the Act. If it is governed by 9(a), only an association-wide unit is appropriate and the Board will not entertain single employer units. On the other hand, if the relationship is governed by 8(f), the petitioner may seek an association-wide unit or a single employer unit because they are both appropriate.

Local 1 attempts to re-write *John Deklewa & Sons Inc.* to make that case determinative in the present matter. 282 NLRB 1375 (1987). Deklewa dealt with an independent signatory to an 8(f) multi-employer agreement who decided to withdraw and immediately repudiate the contract. The Union filed an unfair labor practice charge alleging violations of 8(a) (5) and (1) arguing that the 8(f) agreement was converted into a 9(a) agreement because the employer had only hired its iron workers from the union's hiring halls.

Local 1 attempts to interpret Deklewa expressly contrary to its express holding. Local 1 asserts that *Deklewa* forbids a regional director from finding that a multiemployer unit is an appropriate unit for bargaining in the construction industry. It misconstrues the character of the merger doctrine to formulate this incorrect assertion. Interestingly, Local 1 and Local 9 are asserting on one hand that a multiemployer unit cannot be an appropriate unit for Local 514 under section 9(a) of the Act and on the other hand asserts that its multiemployer unit recognized under section 9(a) of the Act is a bar to Local 514's petitions. Simply put – of course multiemployer units are appropriate under section 9(a) of the Act and this is well accepted by Local 1 and Local 9. It is hypocritical and disingenuous for them to assert otherwise.

Deklewa did not even deal with a representational petition or election; *Deklewa* merely dealt with immediate merger upon a showing that the union had majority support. That is not what Petitioner requested. Instead, Petitioner requested an election. The Board rendered its decision in *Deklewa* because “by allowing almost instantaneous conversions with an accompanying contract bar, the conversion doctrine effectively renders the second proviso nugatory. Such rules hardly advance the objective of employee free choice.” *Id.* at 1383. Here, Petitioners are seeking an election—the very epitome of employee free choice.

While the Board held that “single employer units will normally be appropriate,” there was more to *Deklewa* than Local 1 insists. *Id.* at 1385. The Regional Director did not ignore that general rule as alleged in Local 1’s Request for Review. (Decision 16) Instead, the Regional Director avoided the pitfall that Local 1’s analysis required him to make—specifically, Local 1 ignored the rest of *Deklewa* where the Board punted on the issue presented here: “we do not imply that multiemployer associations and multiemployer bargaining are no longer appropriate in the construction industry... Specific representation case matters are beyond the scope of this opinion.” *Id.* 282 NLRB at 1390 fn 42.

In fact, as recognized by the Regional Director, multiemployer bargaining units have long had the approval of the United States Supreme Court and *Deklewa* did nothing to disturb that. *NLRB v. Truck Drivers Local No. 449*. 353 U.S. 87, 95-96, 77 S.Ct. 643 (1957). Moreover, in *NLRB v. Sheridan Creations*, 357 F.2d 245 (2d Cir. 1966), the Second Circuit upheld the Board’s decision finding that the multiemployer unit was the appropriate unit under Section 9(a) of the Act. *Id.* at 248; *see also NLRB v. Sklar*, 316 F.2d 145, 149 (6th Cir. 1963), finding that multiemployer unit is appropriate, unless individual employers give intent to withdraw.

Local 1 attempts to confuse those who read their Brief into thinking that this case deals with the Merger Doctrine, which is simply untrue. The Merger Doctrine deals with single employers that newly join a multi-employer association. Here, the employers who are members of the AGC, CAM, or ACCM have been members and allowed those associations to bargain on their behalf for forty or fifty years. While *Deklewa* was about the Merger Doctrine, this case is not. This distinction is important because the issue of consent becomes an issue if a single employer is freshly “merged” into an association. However, when there is a long-term bargaining relationship on an association-wide basis, it makes little sense in the interest of industrial stability to disturb that relationship.

The Board should avoid Local 1’s cursory analysis and apply the following well-grounded Board standard for determining whether a multi-employer bargaining unit is appropriate: “[T]o overcome the single-employer presumption and find a multiemployer bargaining unit appropriate, the Board requires ...evidence of an unequivocal intent to be bound by group action manifested by either participation in the group bargaining or delegation of authority to another to engage in such bargaining.” *Arbor Construction Personnel, Inc.* 343 NLRB 257, 258 (2004),³ see also *Hunts Point Recycling Corp.*, 301 NLRB 751, 752 (1991).

Local 1 incorrectly states the law regarding the applicability of bargaining history to a determination of the appropriateness of a multi-employer bargaining unit. In fact, the Board has

³ Local 1 attempts to miss-interpret cases cited by the Regional Director. Namely, the Local 1 argues that *Arbor Construction Personnel*, 343 NLRB 257 (2004) and *Architectural Contractors Trade Association*, 343 NLRB 259 (2004) stand for the position that 8(f) agreements are only precluded by a pre-existing 9(a) relationship because there exists majority support among each single employer in the association. (Local 1’s Brief 9 fn 5) This statement of law is incorrect because 9(a) relationships preclude other representation because those bargaining units have been certified in an election before the Board—the exact procedure Petitioner seeks here. Contrary to the respect of elections that the Board promoted in *Arbor* and *Architectural*, Local 1 is requesting that the Board actually do the exact opposite. Namely, whereas those cases dealt with a pre-existing 9(a) relationship certified through a Board election trumping an 8(f) agreement, here, Local 1 believes an 8(f) agreement should trump a petition for a 9(a) election.

explicitly given great weight to bargaining history to overcome the single employer presumption: “The Board will not disturb an established bargaining relationship unless required to do so by the dictates of the Act or other compelling circumstance.” *Centra Inc.*, 328 NLRB 407, 409 (1999) (finding that an 8 year multiemployer bargaining history was sufficient to overcome single employer presumption).

On the other hand, there are circumstances that the Board may find that a multiemployer unit is not appropriate because it “is a heterogeneous aggregation of distinct groups of employees with widely differing interests and concerns.” *Maramount Corp.*, 310 NLRB 508, 511 (1993).

In *Taylor Motors Inc.*, 241 NLRB 711 (1979), an individual filed a decertification petition covering all six employers of a multiemployer bargaining unit. The union argued that the multiemployer unit was not appropriate and only single employer units would be appropriate. The Board found that only a petition on a multiemployer unit would be appropriate.

In *Donaldson Traditional Interiors*, 345 NLRB 1298 (2005), a BAC local filed three separate petitions for three single employer units. Each employer was a member of an association that had an agreement with an OPCMIA local. The sole issue in the case was whether the association/OPCMIA agreement was a 9(a) or 8(f) relationship. The Board found that the relationship with the association was a 9(a) relationship and, therefore, the single employer unit was not appropriate. *Id.* at 1300.

The 8(f) or 9(a) distinction is also shown in *Alley Drywall Inc.*, 333 NLRB 1005 (2001) where the employer was a member of a multiemployer unit that had an 8(f) agreement with the union. The Board found that a single employer unit was appropriate in that circumstance due to the 8(f) contract. *See also G.L. Milliken Plastering*, 340 NLRB 1169 (2003).

Perhaps the most comprehensive decision on this matter is *Arbor Construction Personnel, Inc.*, 343 NLRB 257 (2004). BAC Local 9 (a party in this case) petitioned for a single employer unit of an employer that was a member of an association that had a 9(a) collective bargaining relationship with OPCMIA Local 67. The Board held that an association-wide unit is appropriate when the single employers have demonstrated through bargaining history or delegation of authority to another to engage in such multi-employer bargaining. *Id.* at 258. This applies to both 8(f) and 9(a) relationships. However, if the relationship is governed by section 9(a) of the Act, “a petition for a single-employer will not be entertained.” *Id.*

Here, there is no dispute that all three associations have a history of bargaining with Local 514 on behalf of the contractors named in the petitions. Each association has negotiated with Local 514 separately in 2006, 2009, and 2011. CAM negotiated a joint Local 1/Local 514 agreement in 2003 and AGC and ACCM had done so for many years.

In *Sands Point Nursing Home*, 319 NLRB 390 (1995), the Board reversed the Regional Director’s decision finding that a single employer is appropriate based on the multiemployer bargaining history. The Board found that there was no evidence that the single employer ever negotiated its own terms and conditions of employment and only a multiemployer unit would be appropriate in that 9(a) situation. *Id.* at 391. The same is true here: a multiemployer unit is appropriate because there is no evidence that the contractors have or would ever want to negotiate individual agreements with Local 514.

Each of the single employers named in the association petitions have given the associations the power of attorney specifically to negotiate with Local 514. (AGC Ext. 3, see also CAM Ext 1 and ACCM Ext 1) This is relevant because this is an odd situation. The power of attorney is limited to a specific union by the explicit terms of the power of attorney form or by

subsequent statement of preference after the 2006 decision to negotiate separate contracts. Local 1 meekly argues that there is no evidence of consent to be bound by a 9(a) multi-employer bargaining relationship. However, the powers of attorney makes no such limitation. Therefore, the bargaining history and the scope of the voluntary agreement to relinquish bargaining authority to the association limits the appropriate unit to the employers covered under the Local 514 agreement with the association.

Local 1 attempts to argue that the Regional Director ignored the following dicta from *Deklewa*: “the employees of a single employer cannot be precluded from expressing their representational desires simply because their employer has joined a multiemployer association.” (Intervener Brief 5) (quoting *Deklewa*, 282 NLRB at 1385 fn 42). Yet, in Local 1’s Brief, Local 1 attacks the DDOE for not properly considering employee free choice. This is once again untrue. Specifically, the Regional Director considered both employee free choice and industrial stability and found that both would be served by granting the petitions:

[N]o individual Employer petitions have been filed for the Association employers; thus the employees’ rights to self-organization and freedom of choice will not be compromised in proceeding to an election in a multi-employer unit, whereas the stability of labor relations between Petitioner and the Associations would be compromised if the instant petitions could not go forward in light of Petitioner’s long standing bargaining relationships with the Associations.

(Decision 18)

Local 1 cites to easily distinguishable and unrelated cases. The first case that Local 1 relies on to support their claim that the DDOE bargaining units are not appropriate is *Comtel Systems Technology*, 305 NLRB 287 (1991). Yet, *Comtel* does not even deal with the appropriateness of a 9(a) multi-employer bargaining unit; instead, that case dealt with whether a

8(f) agreement could act as a contract bar for future elections with a single-employer that assented to inclusion in one multi-employer bargaining unit, but not another when the two multi-employer units merged.

The facts in this case are starkly inapposite in that the Petitioner is actually seeking an election, not trying to prevent one. Also, the matter currently before the Board does not deal with whether majority support amongst employees of the multi-employer unit is being used to support a 9(a) single-employer election. Finally, the single-employers in this case have all provided their assent either by signing power of attorney to the associations. However, Local 1 is correct in that *Comtel* stands for the proposition that denying employee voting rights in contrary to Board law—a principle that directly support Petitioner’s position that an election should be held.

Local 1 similarly argues that *Casals Industries, Inc.*, 311 NLRB 951 (1993) and *James Literacy Construction Co.*, 315 NLRB 976 (1994) are on-point. Both decisions were cited for the proposition that Petitioner would have required a majority showing among employees in each employer, not just the aggregate multi-employer associations.

In *Casals*, the Board found that the multi-employer association had an established 9(a) relationship with the unions prior to the petition that was eventually denied by the Board. 311 NLRB at 953. Consequently, the pre-existing 9(a) agreements precluded the petitions. Here, it is undisputed that the associations had 8(f) agreements with Petitioner and the interveners.

Just like *Deklewa, Luterbach* does not even deal with representation. 315 NLRB at 977. Instead, the issue as described by the Board was “whether the Respondent violated Section 8(a) (5) and (1) of the Act by failing to adhere to the agreement.” *Id.* The Board went on to further narrow the issue: “The issue posed here is whether an 8(f) employer, in a multiemployer unit, is

bound, by inaction, to the successor multiemployer contract.” *Id.* at 979. Local 1 cites to *Luterbach* in arguing that the Petitioner must have majority support amongst the employees of each individual employer—an argument that is unsupported by *Luterbach*. *Luterbach* does not stand for the proposition that Local 1 alleges, but instead held that an 8(f) relationship would not require the parties to bargain a successor agreement whereas 9(a) parties are bound by inaction. The excerpt that Local 1 cites does not state that there must be majority support in each single employer, but instead states that, once certified, each single employer is bound by the 9(a) relationship and cannot similarly withdraw as if it was a mere 8(f) agreement.

Accordingly, Local 514 has presented the appropriate evidence to find that multi-employer units are appropriate.

B. The Single-Employers Who Are Members of the Associations Have All Provided Unequivocal Consent to Multi-Employer Bargaining.

Once the Board determines that a multiemployer group is appropriate, the individual indicium of the single employers is immaterial. *Century Papers, Inc., supra*. The only issue for the Board to determine is whether the single employer has given an unequivocal intent to be bound by group action. *Arbor Construction Personnel, Inc.*, 343 NLRB at 258.

Peter Basile and Sons is the exception that shows the rule. This company indicated its desire to leave the association prior to negotiations in 2011. This company is no longer a member of the association. Petitioner agreed to amend the petition to exclude this company because they are not a member of the association. As a result, Peter Basile and Sons is not subject to the DDOE. However, there is no doubt that all of the other employers have given their unequivocal intent to be bound by group action through the respective power of attorney forms. Over forty to fifty years of group bargaining history exists.

The exclusive document evidencing the scope of each single employer's delegation of authority to the group is the terms of the agreements between individual employers and the multiemployer groups, referred to as the powers of attorney. On the other hand, Local 1 asserts that the evidence of the intent to be bound by group action is found in the agreements between the multiemployer group and the unions, i.e. the peace agreements and the collective bargaining agreements. That faulty reasoning is of no moment to this analysis that the Board has set out, which is the unequivocal intent to be bound by group action. *Arbor Construction, supra*. This evidence of intent to be bound by group action is the agreement between the single employer and the group, not the group and the union, which were not signed by any single employer. Therefore, their individual intent cannot be determined based on the language of these agreements.

Moreover, the terms of these agreements do not provide any language that indicates in any manner that an individual employer would leave the association if the Union sought a 9(a) relationship. In addition, Local 1 argues in a footnote to their Brief that the multi-employer petitions should have been dismissed because there are single employers that are named who do not currently have any cement masons, may not have had any cement masons for many years, or are currently not operating. (Local 1's Brief 14 fn 7) This argument is contrary to Board precedent. The individual elements of the single employers are immaterial in a multi-employer bargaining unit. *Century Papers, Inc.*, 284 NLRB 1151,1186 (1987). The rationale behind this rule is clear. Employers typically join multiemployer bargaining groups because they are small employers. They join with fellow employers to pool their resources and consolidate bargaining strength. In the construction industry, the employers utilize trade workers based on their needs on the job. Sometimes they may need a cement mason, sometimes they may not.

In the only case in which the Board has addressed this issue, that Petitioner could uncover, the Board found that companies in the multiemployer group that do not currently employ any individuals in the bargaining unit and those companies that are not currently operating still remain part of the multiemployer bargaining unit. *Sewanee Coal Operators' Association, Inc.* 152 NLRB 663 (1965).

Moreover, there is no harm if the single employers without cement masons are maintained in the group. So long as they do not have any cement masons, they have no obligations under the agreement. This is probably why they have continued to give the association the ability to bargain on their behalf. Just in case they need a cement mason in the future, they have a contract with Local 514 to provide such an employee.

Local 1 also argues that some of the older powers of attorney forms indicate the authority to bargain with Local 1 and Local 514. Of course, the evidence at the hearing showed that this joint bargaining was abolished in 2006. The employers then decided what union they would bargain with on an individual basis. (AGC Ext. 3, CAM Ext. 1, and ACCM Ext. 1)

Therefore, Local 1's arguments that Petitioner was unable to show unequivocal consent are simply untrue, and Local 1's Request for Review should be denied.

C. The DDOE Bargaining Units Include Employees Who All Engage in the Same Work, Require the Same Skills, and Share Terms and Conditions of Employment.

The unit sought is no more than a statutorily appropriate craft unit. Section 9(b) of the Act states:

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, **craft unit**, plant unit, or subdivision thereof.

There is specific instruction in the section protecting craft units; Section 9(b) continues:

Provided, that the Board shall not... (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation

There is no doubt that cement masons constitute an acceptable craft for purposes of forming an appropriate craft unit.

Whether a group of employees share a sufficient community of interest to constitute an appropriate unit, the Board weighs several factors including similarity of skills, functions, and working conditions throughout the proposed unit; the central control of labor relations; transfer of employees among the employer's other construction sites; and the parties bargaining history. *Alley Drywall Inc.*, 333 NLRB 1005, 1006 (2001).

It must be noted that these traditional factors are a little sloppy to apply because these are largely the same employees. Work inside finishing cement, falls under one contract. For a handful of contractors, when their cement finishers walk outside to work on the parking lot, they are working under another agreement. Just like in *A.C. Pavement Stripping Company, Inc.*, 296 NLRB 206, 210 (1989), “[a]ny differences that do exist are solely the result of differences in benefits set out in the collective bargaining agreements.” Furthermore, the Board in affirming the ALJ’s decision in *A.C. Pavement* found that splitting up a “clearly identifiable and homogeneous group” of employees into two units renders the units inappropriate. *Id.* The reasoning in that case was that “[t]he record reveals no identifiable characteristics which would separate and identify employees in one unit from those in the other unit in terms of job functions and characteristics.” *Id.*

Notably, Local 1 actually agrees with Petitioner and the Regional Director on this point. (Intervener Brief 2 fn 1) Yet, besides that difference, the work is the same, the employees are shared between employers, the working conditions are largely the same, and even the contract provisions are the same. (Tr. 177-78; 181-82; 188; 320)

Local 1's only argument for why there is insufficient community of interest between the employees is that there is "substantial interchange of employees" between the associations. (Local 1's Brief 13) In making this argument, Petitioner does not understand how a "substantial interchange of employees" indicates that there is no community of interest. Even Local 1 seems confused by their own argument as they recognize in their Brief: "In fact this show, **if anything**, that an *overall* unit of the three associations would likely be more appropriate." (Id.)(**emphasis added**) Yet, the Board need not determine the "most appropriate bargaining unit"—the Board merely determines whether the proposed bargaining unit is appropriate. *See e.g., MPC Restaurant Corp. v. NLRB*, 481 F.2d 75 (2d Cir. 1973); *Ochsner Clinic v. NLRB*, 474 F.2d 206 (5th Cir. 1973); *NLRB. v. Bogart Sportswear Mfg. Co., Inc.*, 485 F.2d 1203 (5th Cir. 1973); *Local 627, Intern. Union of Operating Engineers, AFL-CIO v. NLRB*, 595 F.2d 844 (D.C. Cir. 1979).

Consequently, Local 1 admits that there exists a community of interest between the employees in the petitioned-for bargaining units, and the Regional Director was right for granting the petitions for election.

D. Local 1's Request for Review Should Be Denied as to Broadcast Design, Barton, Roncelli, and E.L.S. Because Those Employers Did Not Have a 9(A) Agreement that Could Act as a Contract Bar to the Petitions.

1. The ICE Agreement does not act as a contract bar because that agreement has expired and the petitions were filed in the sixty to ninety day open period, and that agreement does not contain the sufficient terms and conditions of employment to constitute a bar.

Local 1 is asserting that the ICE agreement is a contract bar. The initial contract term was for three years following January 2, 2007. The contract had provisions for automatic renewals for yearly periods, unless notice was given thereafter. The 60 to 90 day window period is applicable here because the hearing and direction of election were after the 90 day window period. *See Crompton Company, Inc.*, 260 NLRB 417, 418 (1982) (“the contract-bar rules provide for an open period from 60 to 90 days prior to the expiration of the existing contract”); *see also Continental Can Company, Inc.*, 145 NLRB 1427, 1430 fn 3 (1964).

The last renewal would have been from January 2, 2011 to January 1, 2012. The open period would have October 3, 2011 to November 2, 2011. Local 514 filed the petition regarding BDC, prior to the October 3, 2011 date for the open window. However, if the hearing is held and the Board issues its decision after the 90th day, the contract will not bar the election. *See Continental Can Company, Inc., supra*. That is clearly the issue here.

Moreover, the “premature renewal” rule comes into play. That rule provides that if a contract is renewed during the term of the agreement prior to the window period, even if it is negotiated in good faith, it will not bar the election. The initial agreement was entered into in June 2006, with a three year term. (BAC 1 Ext 1) It was renewed on January 2, 2007 for a new three year period. (J. Ext. 23) In essence, it became a three and a half year contract, which is a

contract of unreasonable duration and any automatic extensions of such an agreement will not bar an election. See *Fawcett-Dearing Printing Co.*, 106 NLRB 21 (1953).

Furthermore, in order for a contract to bar an election, the actual contract itself must contain substantial terms and conditions of employment. *Raymond's, Inc.*, 161 NLRB 838, 839-40 (1966), citing *Appalachian Slate Products, Co.*, 121 NLRB 1160 (1958). The Board ruled that a contract will only bar an election under the Act, if “the contract undertakes to chart with adequate precision the course of the bargaining relationship, and the parties can look to the actual terms and conditions of their contract for guidance in their day-to-day problems.” *Id.* A contract that leaves substantial terms and conditions of employment to collective bargaining of other contracts will not act as a bar. *Burns International Security Service*, 257 NLRB 387 (1981).

Local 1’s citation to *Tristate Transportation Co.*, 179 NLRB 310 (1969) is misplaced. *Tristate* dealt with a master agreement and supplemental where, “The record reveal[ed] that most of the basic terms and conditions of employment are set out in the master agreement.” *Id.* at 311.

The ICE Agreement does not contain substantial terms and conditions of employment. It defers all economic terms, wages, paid time off, benefits, etc., to other agreements. The quotations to the ICE Agreement and the testimony cited to in Local 1’s Brief all acknowledge that the Regional Director’s basis of the DDOE—namely, “The ICE contract itself does not contain wage or many employee fringe benefit requirements but mandates that such terms would be developed in individual job agreements.” (DDOE 19) The Regional Director was right in that the ICE Agreement relied exclusively on other CBAs and that the ICE Agreement was only entered into for just one job. Therefore, this agreement is not sufficient to act a bar to the election.

Also, the language of ICE Agreement does not create a 9(a) relationship automatically. Instead, it is an agreement to recognize the union as a 9(a) representative *if* they make a showing of majority support. (J. Ext. 23 pg. 4 section C) When the Union submits proof of majority status, the employer agrees to voluntarily recognize. (*Id.*, section A)

Local 1 advocates that the Board should convert the 8(f) CAM agreement—to which BDC is an independent signatory—into a 9(a) agreement. The Board has adopted a rule that there is a rebuttable presumption that 8(f) of the Act governs a relationship in the construction industry. *Deklewa & Sons*, 282 NLRB 1375, 1385 fn. 41 (1987). This presumption can be rebutted through a voluntary recognition agreement based on a clear showing of majority support. *Id.* at 1387 fn 53. The initial inquiry of the Board is to look at the agreement as a whole and determine whether the agreement as a whole conclusively notifies the parties that a 9(a) relationship is intended. *Madison Industries, Inc.*, 349 NLRB 1306, 1308 (2007).

Here, Jim Brennen of BDC testified that this showing was never made or offered. (Tr. 241-42) However, BAC International Assistant Secretary Treasurer testified that this showing was offered, but not shown. Accordingly, the BAC International has not carried its burden to overcome the presumption of an 8(f) Agreement.

2. The Regional Director rightfully found that the statewide Heavy and Highway Agreement did not bar the petition regarding Albanelli Cement.

As for Albanelli, that employer has given the authority to the ACCM to bargain on its behalf as to Local 1 only. Albanelli is bound by the 8(f) agreement between the ACCM and Local 1. It is also a signatory to the Heavy and Highway Agreement with the BAC Locals 1 and 9. (J. Ext. 13) This agreement is a 9(a) agreement for “outside” work, which explicitly excludes work performed on buildings according to Article I Scope of Agreement. (JE 13) In addition,

Wayne Albanelli, owner of the company, testified during the hearing that the Heavy and Highway Agreement only applied to cement mason work performed more than five feet from a building. (Tr. 408-10) This is a 9(a) contract that splits the craft into two units. When it works “inside” it used the 8(f) multiemployer ACCM agreement with Local 1. When it works “outside,” it uses the same employees, but pays wages and benefits under the Heavy and Highway Agreement.

The Heavy and Highway Agreement splits the craft into two units—“inside” work is any cement mason work inside building or five feet away from buildings while “outside” work is beyond five feet of the structure. Local 1 attempts to argue that the 2008-2013 Heavy and Highway Agreement acts as a contract bar in regards to Albanelli, even though that agreement only applies to employees performing highway and airport construction exclusive of buildings. (JE13) Yet, the Petitioner is only seeking an election as to “building and heavy construction”—inside work performed by cement masons.

Local 1 attacks this carve-out on the basis that it would cut the craft unit in half and that employees would be covered under two collective bargaining agreements. Yet, that is the status quo between the parties prior to the petitions. In making this argument, they themselves fall victim to the same split in the craft that they claim that the DDOE creates—namely, an employee’s terms and conditions of employment would depend upon five feet.

The Regional Director recognized this and aptly pointed out that the only difference between outside and inside work is a “five foot dividing line” between work that is inside buildings or around the curtilage and work that is outside. (DDOE 28) “The record shows that inside and outside masons perform the same type of work and that the skills are

interchangeable.” (Id.) However, due to the 9(a) bar regarding “outside” work, the “inside” work that was already split had to be carved out.

Such a carve-out is appropriate under Board law. In *G.L. Milliken Plastering*, 340 NLRB 1169 (2003), BAC Local 9 sought a unit consisting of all plasterers of the employer, without geographic limitation. OPCMIA Local 16 had a 9(a) contract with the employer covering the Lansing and Jackson area. Local 9 carved that 9(a) unit out of the petitioned for unit. The Board held that the residual unit was appropriate, but remanded to the Regional Director to determine the effect, if any, of the traveler provisions of the Local 16 agreement. This case is informative in this Petition because it provides that it is appropriate to carve out 9(a) agreements and request a residual unit of all other employees.

The reason why Albanelli work under the Heavy and Highway Agreement must be carved out is because there is a pre-existing 9(a) agreement regarding outside work. That being said, the existence of a 9(a) agreement over outside work does not and cannot preclude a 9(a) agreement as to inside work. Local 1 advocates for a position that the cement masons do not have a right of self-determination under the Act. At the end of the 8(f) agreement covering the cement masons that work inside, the employer could leave the association and chose to end its relationship with the union. If the Board decides, consistent with Local 1’s argument, these cement masons would lose their right to have a bargaining representative for “inside” work because they could not file a petition for representation due to the 9(a) contract for ‘outside’ work. That is a ludicrous result. Therefore, it was proper for the Regional Director to reject Local 1’s argument that the petition must be dismissed due to the Heavy and Highway Agreement.

Local 1 once again cites to inapplicable authority. In *Sunray Ltd.*, 258 NLRB 517 (1981), the dual-function employees were represented by two different unions; however, neither union was certified under 9(a). *Id.* at 518. Here, there exists a 9(a) agreement pertaining only to “outside” work; consequently, that work should be appropriately carved-out and an election directed as to the residual cement work under *G.L. Milliken*.

Furthermore, under *General Cable Corp.*, 139 NLRB 1123 (1962), an agreement with a duration longer than three years only acts as a contract bar for three years. The contract bar regarding the Heavy and Highway Agreement would have expired on March 20, 2012, since the contract bar only lasts three years. Accordingly, a petition will not be dismissed if the decision is issued on or after ninety days prior to the expiration of a contract, which is exactly what happened in the case being considered by the Board. *Royal Crown Cola*, 150 NLRB 1624, 1625 (1965); *see also, Maramount Corp.*, 310 NLRB 508, 512 (1993).

Consequently, the Local 1’s Request for Review should be denied.

E. The Peace Agreement is Not in Effect.

1. Negotiations Leading to the Peace Agreement and the 2006 Collective Bargaining Agreements.

After Local 514 indicated that it wanted to negotiate separate contracts, the parties negotiated an agreement as to how that new arrangement would work for the 2006 negotiations. Mr. Oakley was the only person to testify that was involved in the negotiations of that agreement. He testified that the peace agreement only covered the 2006 negotiations. He described it as “an agreement that was developed that set out the terms and conditions of negotiating the 2006 successor agreement.” (Tr. 644). He testified further that in 2006, he was

not contemplating any negotiations other than the negotiations for the 2006 collective bargaining agreement. (Tr. 647)

The parties negotiated three separate, but identical, peace agreements. Each association has an agreement jointly with Local 1 and Local 514.

The language of the agreements is consistent with Mr. Oakley's testimony as to their scope. The peace agreements are specifically limited to the negotiations of the 2006-2009 CBA: "[t]he Parties agree that the following conditions shall govern negotiations of successor agreement to the current collective bargaining agreement between the parties." (J Ext. 29, 30, and 31, pg. 1)

The peace agreement is an important historical document because it sets out the bargaining arrangement that would maintain industrial stability, but result in separate contracts. The contractors designated which Union that they wanted a relationship. The designation was noted on each peace agreement. In the future, contractors designated which union they would like the association to negotiate with by only giving the association the authority to negotiate with one union at the exclusion of the other. (AGC Ext. 3, see also CAM Ext 1 and ACCM Ext 1)

The peace agreements also provide that the associations will bargain jointly with Local 1 and Local 514. (J Ext. 29, 30, and 31, ¶ 7) The associations agreed to negotiate parallel, but separate agreements with the unions. (J Ext. 29, 30, and 31, ¶ 7) The agreements would have equal terms and conditions of employment and scope of work. (J Ext. 29, 30, and 31, ¶ 8) The agreement was only applicable within Macomb, Oakland, and Wayne counties. (J Ext. 29, 30, and 31, ¶ 8)

The peace agreement also provided that the resultant collective bargaining agreements would have particular language as to subcontracting and anti-discrimination clauses regarding to members of the other union (in essence, members of the other union would be able to work under the other union's agreement). (J Ext. 29, 30, and 31, ¶ 9 and 10).

The parties came to an agreement on separate collective bargaining agreements for a term of 2006-2009. (the 2006-2009 agreements are admitted as AGC – Local 514, J Ext. 2, CAM – Local 514, J Ext. 4, ACCM – Local 514, J Ext. 5, AGC – Local 1, J Ext 18, CAM – Local 1, J Ext. 20, ACCM – Local 1, J Ext 19) These agreements incorporate portions of the peace agreements, but other portions were not incorporated. The anti-discrimination and subcontracting language was incorporated into the collective bargaining agreements. (Tr. 649) The agreement not to file petitions was not incorporated. (Tr. 648, see also 2006-2009 CBA's referenced above)

2. The Duration of the Peace Agreement Was Specifically for 2006 to 2009.

It seems that Local 1 ignores the plain language of the peace agreements limiting the agreement not to file petitions to the duration of the successor agreements with the respective association and Local 1 or Local 514. The non-petition agreement states in full:

OPCMIA Local 514, BAC Local 1, and the AGC agree that, upon the execution of this agreement and for as long as (1) the (AGC CAM or ACCM) retains the power of attorney for the Designated Contractors; and (2) the (AGC CAM or ACCM) bargains in good faith toward a contract ("Successor Contract") to succeed the joint (AGC CAM or ACCM)-OPCMIA Local 514/ BAC Local 1 collective bargaining agreement, then the parties hereto will not file any petition with respect to said Designated Contractors with the National Labor Relations Board **for the duration of the successor agreements.**

(J Ext. 29, 30, and 31, ¶ 3) The language is clear that the agreement not to file petitions has a duration limited to the successor agreements, which were the 2006-2009 agreements with each Local. The Regional Director was right for coming to this conclusion.

Local 1 argues that the duration covers every successor agreement that parties ever enter into for the next fifty years of the relationship. This is not supported by the evidence or the peace agreement as a whole. First, as stated above, Mr. Oakley testified that the document was only intended to cover the 2006 negotiations. The document itself is expressly limited to governing the 2006 negotiations. (J Ext. 29, 30, and 31, pg. 1) Moreover, when the term “agreements” or “contracts” are used in the plural in the remainder of the document, it is clear that the word or phrase is referring to the separate 2006 collective bargaining agreements of the unions, not future collective bargaining agreements of one particular union. (see J Ext. 29, 30, and 31, ¶ 5, 7, 8 , and 9) For example, the agreement states, [t]he resulting agreements shall include...” (J Ext. 29, 30, and 31, ¶ 8)

There is no good faith argument that the language of this agreement waives their members’ right forever from having a choice in their union representation.

3. Mr. Santos’ Understanding that Agreement to Have Parallel, Separate Agreement Was in Place in 2011 is of No Relevance.

Local 514 Business Manager Joel Santos testified that he believed in 2011 that the agreement to maintain parallel, but separate, collective bargaining agreements was in effect. (Tr. 718) He was not Business Manager at the time of the 2006 peace agreements. In fact, at the time in July/August of 2011, he had only been the Business Manager for three or four months. He testified that “he assumed” it was in effect. Moreover, the language of the peace agreements is somewhat unclear as to the agreement to have parallel, separate agreements. There is a

duration, as shown above, in the paragraph regarding the filing of petitions. However, that durational language is limited only to the agreement not to file petitions and it is not applicable to the remainder of the agreement; “parties hereto will not file any petition with respect to said Designated Contractors with the National Labor Relations Board **for the duration of the successor agreements.**” There is no durational language for the remainder of the document that is as clear. Therefore, it was reasonable for Mr. Santos to believe that the agreement to have parallel, but separate, agreements was still in force, even if the agreement not to file petitions had expired by its terms. Moreover the obligation to have parallel, separate agreements was incorporated into the collective bargaining agreement; the agreement not to file petitions was not. (J Ext. 2, 4 and 5, are identical to J. Ext. 18, 19, and 20)

After closer review of the agreement, Mr. Santos now believes that the entire agreement is no longer in force. That is also a reasonable interpretation because the agreement was limited to governing “negotiations of a successor agreement [sic] to the current collective bargaining agreement between the parties.” (J Ext. 29, 30, and 31, pg. 1)

At any rate, whether Mr. Santos believed that the agreement to have parallel, but separate, agreements was still in force matters little as to whether the agreement not to file petitions was still in force because the agreement not to file petitions had a different duration clause.

Moreover, the understanding of one party or all parties is never sufficient to base a waiver of the workers’ statutory right to choose their exclusive bargaining representative. The Board will only enforce such waivers if the agreement is “clear, knowing and unmistakable.” *Springfield Terrace LTD*, 355 NLRB No. 168 (2010). It is a “strict standard.” *Id.* The

Associations must “supply any contract language or other express agreements” that demonstrates that those 2006 agreements remain in force. *Id.*

The waiver cannot be based upon an “alleged understanding of the parties during contract negotiations.” *The Cessna Aircraft Company*, 123 NLRB 855 (1959). Mr. Baker testified that his understanding is that the agreement not to file petitions continues forever until a party gives notice. (Tr. 542) He admitted the agreement itself does not provide the basis for his understanding. (Tr. 542-543)

Moreover, in *Briggs Indiana*, 63 NLRB 1270 (1945), the Board held that such agreements would only be enforced if they are “for a reasonably short period.” *Id.* Apparently, the Associations interpret the agreement as having no end, which also raises evergreen issues. It has been five and one half years since the parties entered into the agreement have not negotiated any extensions to it. This is not reasonably short.

The provision currently before the Board providing that the parties cannot file petitions had a specific duration limited to the term of the successor agreement. Unlike many of the other provisions of the peace agreements, this agreement not to file petitions was not incorporated into any of the collective bargaining agreements and its term ended with the successor agreement in 2009.

4. The Parties Did Not Extend the Agreement Not to File Petitions.

Prior to the 2009 negotiations, Mr. Fisher sent a letter terminating all agreements including “the 2006-2009 AGC/OPCMIA collective bargaining agreement as well as any Memorandum of Agreement entered into by the AGC.” (P Ext 14) He stated that the AGC intended to “renegotiate all provisions” of the parties’ agreements. (*Id.*)

He then sent a separate letter indicating that the AGC intended to continue to negotiate jointly with Local 514 and Local 1 and come to an agreement with parallel, but separate agreements. (P Ext 15) There was no mention of petitions.

Mr. Oakley negotiated the 2009-2011 collective bargaining agreement with the associations. (Tr. 649) Wayne Albanelli was involved in the 2009 negotiations on behalf of ACCM. (Tr. 421) Patrick Baker was involved in the 2009 negotiations on behalf of CAM. (Tr. 536) Scott Fisher was involved in the 2009 negotiations on behalf of AGC. (Tr. 607) All of the witnesses agreed that the peace agreement was never raised and there was no agreement or discussion regarding the filing of petitions.

Therefore, if the agreement ended in 2009, there was no agreement to continue the agreement not to file petitions. On the other hand, Mr. Fisher cancelled all agreements that the AGC had with Local 514. The parties did not agree to not file petitions. On the other hand, the AGC did agree to negotiate separate but parallel collective bargaining agreements with the two unions.

5. The Associations' Material Breach of the Peace Agreement Nullified Any Obligation of the Local 514 to Not File Petitions.

The Board is clear that it follows the general contract principle that a material breach of an agreement by one party excuses performance of the other party. See *Arlan's Department Store of Michigan Inc.*, 133 NLRB 802 (1961).

Obviously, Local 514 believes that the peace agreement expired in 2009. However, assuming arguendo that the agreement continued into 2011, Local 514's obligations under the agreement ended with the associations' material breach on August 3, 2011. The evidence

demonstrates that as of August 3, 2011, the associations materially breached all of their obligations under the peace agreement.

The Associations' obligations under the peace agreement are clear. The obligation is to negotiate jointly with Local 514 and Local 1. They negotiate parallel but separate collective bargaining agreements and the resulting agreements will have equivalent terms and conditions of employment. (J Ext. 29, 30, and 31, ¶¶ 7 and 8) That means that unless both unions agree to equivalent terms and conditions of employment, all the parties have to continue to bargain.

Mr. Albanelli admitted that after August 3, 2011, ACCM stopped bargaining jointly with Local 1 and Local 514 and would only bargain with Local 514. (Tr. 428) He admitted that after August 3, 2011 ACCM did not have equivalent contracts with the two unions. (Tr. 429) They had different overtime and wage provisions. (*Id.*) He admitted that when he signed the agreement with Local 1 on behalf of ACCM, there would be different terms and conditions of employment for the two unions.

Similarly, Mr. Baker testified that he knew when he signed the Local 1 agreement on August 3, 2011 they would start applying separate terms and conditions of employment to the two unions. (Tr. 534-535) He admitted that CAM no longer had parallel agreements with the two unions. (Tr. 535) He admitted that CAM no longer bargained jointly after that date. (*Id.*)

Similarly, Mr. Fisher testified the same on behalf of the AGC. (Tr. 611-612) In fact, Mr. Fisher admitted that AGC had an obligation under the peace agreement to negotiate separate parallel agreements with the two unions. (Tr. 612) He admitted that in 2011 the AGC "did not negotiate parallel separate agreements." (*Id.*) He also admitted that AGC did not bargain jointly with the two unions after August 3, 2011. (Tr. 613)

Insofar that any parties' understanding of the peace agreement weighs into this analysis, which would frankly be incorrect, the Board should also include the understandings of Local 1 and the associations. Mr. Baker and Mr. Fisher did not seem to know much about the peace agreement at all. (Tr. 717, 785) Mark King, Business Manager of Local 1, did not think that it was worth the paper it was written on. (Tr. 718, 786)

Accordingly, on August 3, 2011, the Associations, and Local 1 for that matter, were in material breach of the peace agreement and Local 514 was under no duty to adhere to the peace agreement. On August 8, 2011, Mr. Santos sent a letter to all of the Associations indicating that they were in breach of the parallel, but separate, provisions of the peace agreements. (P Ext 8, AGC Ext 7, ACCM Ext 5)

6. All Contractual Agreements Ended on September 1, 2011.

The associations each extended their agreements with Local 514 until August 31, 2011. (P Ext 16) According to Fisher and Santos, the parties met on or about August 31, 2011 and they did not come to an agreement. (Tr. 614, 721) Local 514 asked for another extension. (*Id.*) The associations refused to grant an extension. (Tr. 615) The parties met again on September 15, 2011. (*Id.*) The contract was extended on that day. (*Id.*) On September 15, 2011, the parties made no agreement regarding the peace agreement or the filing of petitions. Local 514 filed the petitions regarding the associations on September 15, 2011.

There was no contractual relationship between the parties in any manner between September 1 and September 15, 2011. Admittedly, the record is unclear whether the petitions were filed first or the extension was agreed to first. At any rate, the entire contractual relationship extinguished as of September 1, 2011. The parties only agreed to extend the terms of the 2009-2011 collective bargaining agreements.

On or about September 27, 2011, the parties agreed to extend the 2009-2011 collective bargaining agreements to May 31, 2012 with some minor changes to the collective bargaining agreement. (ACCM Ext 4) The Local 514 membership ratified this agreement.

Accordingly, the agreement not to file petitions expired in 2009. If not, it expired on August 3, 2011 due to the material breach. If not then, it expired on August 8, 2011; the date of the notice of material breach. If not then, it expired on September 1, 2011. Even if it did not expire, it was for an unreasonable duration, over five years, and should not be enforced. See *Briggs Indiana, supra*.

IV. CONCLUSION

Local 1's Request for Review should be denied because the Regional Director rightfully decided that the petitions at issue in this case only requested residual units outside existing 9(a) units—a practice that is well accepted under Board law.

Respectfully submitted,

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