

**Seedorff Masonry, Inc. and International Union of
Operating Engineers, Local 150, AFL–CIO.**
Case 25–CA–088910

May 12, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND HIROZAWA

On November 19, 2013, Administrative Law Judge Melissa M. Olivero issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel. The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions, to

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, we agree with the judge that the Respondent violated Sec. 8(a)(5) and (1) by refusing to abide by the terms of the 2010–2014 collective-bargaining agreement between the Quad Cities Builders Association, Inc. (the Association) and the Union. The Respondent is bound to that agreement by virtue of its signing the 1988 individual building agreement. See *Twin City Garage Door Co.*, 297 NLRB 119, 119 fn. 2 (1989). In the 1988 individual building agreement, the Respondent expressly gave continuing consent to the Association to bind it to successive collective-bargaining agreements, and it never revoked that authorization.

We also agree with the judge that the Respondent failed to carry its burden to prove, as an affirmative defense, that the bargaining unit was a stable one person unit. The judge properly drew an adverse inference against the Respondent for its failure to produce any evidence, particularly its payroll records, which the Respondent's president testified that he reviewed in reaching his conclusion that the Respondent has not employed more than one operator at a time. See *Galesburg Construction*, 267 NLRB 551, 552 (1983) (approving the judge's adverse inference from employer's failure to produce documents in its control). Member Miscimarra agrees with his colleagues that the Respondent failed to prove a stable one person unit, but he finds it unnecessary to draw an adverse inference from the Respondent's failure to introduce its payroll records into evidence. In support of its defense, the Respondent relies on its president's testimony, which at most establishes that the Respondent consistently employed no more than *one member of Operators Local 150* to perform unit work. Although this testimony suggests that the Respondent consistently employed only one Local 150 member in the performance of bargaining unit work, the evidence suggests that additional individuals (nonmembers of Local 150) performed the same work. If two or more employees perform bargaining unit work, the situation is not converted into a "one-person unit" if the employer arranges for nonunit employees, with a single exception, to perform the work in question.

amend the remedy,² and to adopt the recommended Order as modified and set forth in full below.³

AMENDED REMEDY

Having found that the Respondent engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall require the Respondent to honor and comply with the terms and conditions of the 2010–2014 collective-bargaining agreement between the Quad Cities Builders Association and the Union. We shall also require the Respondent to make whole the unit employees for any loss of earnings and other benefits suffered as a result of the Respondent's unlawful repudiation of the collective-bargaining agreement with the Union. The make-whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

We shall further require the Respondent to make all contractually required contributions to the Union's fringe benefit funds that it has failed to make since April 12, 2012, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). Moreover, we shall require the Respondent to reimburse the unit employees for any expenses resulting from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891, 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). Such amounts are to be computed in the manner set forth in *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons*, supra, com-

² Although the judge's recommended Order and notice include language requiring the Respondent to reimburse the unit employees for any expenses resulting from its failure to make the contractually required payments to the Union's fringe benefits funds, the judge inadvertently failed to state this in the remedy section of her decision. We shall amend the remedy accordingly. We shall also amend the judge's remedy to require payment of any additional amounts due to benefits funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979), and to provide that all monetary awards be computed in accordance with applicable case law.

³ We shall delete the judge's reference to the Union's status as the "limited" collective-bargaining representative of the unit employees in her recommended Order and notice. See *Trade Show Supply*, 359 NLRB 997, 999 fn. 3 (2013) (During the term of a collective-bargaining agreement established under Sec. 8(f), the union is the employees' exclusive collective-bargaining representative, plain and simple. Referring to its representational status as limited is erroneous.) We shall conform the Order to our standard remedial language. We shall substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB 694 (2014).

pounded daily as prescribed in *Kentucky River Medical Center*, supra.

Finally, we shall require the Respondent to compensate the unit employees for any adverse income tax consequences of receiving their backpay in one lump sum and file a report with the Social Security Administration allocating the backpay to the appropriate calendar quarters for each employee.

ORDER

The National Labor Relations Board orders that the Respondent, Sedorff Masonry, Inc., Strawberry Point, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with the Union, International Union of Operating Engineers, Local 150, AFL-CIO, as the collective-bargaining representative of all employees performing work as set forth in articles 1 and 11 of the 2010–2014 collective-bargaining agreement between the Quad Cities Builders Association, Inc. (the Association) and the Union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Honor and comply with the terms and conditions of the 2010–2014 collective-bargaining agreement between the Association and the Union and, absent timely written notice to the Union, any automatic renewal or extension of it.

(b) Make whole all affected bargaining unit employees for any loss of earnings and other benefits suffered as a result of the Respondent's failure to honor the collective-bargaining agreement, in the manner prescribed in the amended remedy section of this decision.

(c) Make all contractually required contributions to the Union's fringe benefit funds that the Respondent has failed to make since April 12, 2012, and reimburse the unit employees, with interest, for any expenses resulting from its failure to make the required payments under the collective-bargaining agreement, in the manner prescribed in the amended remedy section of this decision.

(d) Compensate the unit employees for any adverse income tax consequences of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for each employee.

(e) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel rec-

ords and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Strawberry Point, Iowa facility copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 25, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 12, 2012.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to bargain in good faith with the Union, International Union of Operating Engineers, Local 150, AFL–CIO, as the exclusive collective-bargaining representative of all employees performing work as set forth in articles 1 and 11 of the 2010–2014 collective-bargaining agreement between the Quad Cities Builders Association, Inc. (the Association) and the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL honor and comply with the terms and conditions of the 2010–2014 collective-bargaining agreement between the Association and the Union, and, absent timely written notice to the Union, any automatic renewal or extension of it.

WE WILL make whole all bargaining unit employees for any loss of earnings and other benefits they may have suffered as a result of our failure to honor the collective-bargaining agreement.

WE WILL make all contractually required contributions to the Union’s fringe benefit funds that we have failed to make since April 12, 2012, and reimburse our employees, with interest, for any expenses resulting from our failure to make the required payments under the collective-bargaining agreement.

WE WILL compensate all unit employees adversely affected for any adverse income tax consequences of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for each employee.

SEEDORFF MASONRY, INC.

The Board’s decision can be found at www.nlrb.gov/case/25-CA-088910 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.



Raifael Williams, Esq., for the General Counsel.
Kelly R. Baier, Esq., for the Respondent.
Steven A. Davidson, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

MELISSA M. OLIVERO, Administrative Law Judge. This case was tried in Peoria, Illinois, on July 11, 2013. Charging Party International Union of Operating Engineers Local 150, AFL–CIO, filed the charge on September 7, 2012,¹ and the Acting General Counsel² issued the complaint on November 30. The complaint alleges that Seedorff Masonry, Inc. (Respondent) violated Section 8(a)(5) and (1) of the Act by refusing to adhere to a collective-bargaining agreement with the Union.³ (GC Exh. 1(d).) Respondent timely filed an answer to the complaint denying the alleged violation of the Act and asserting nine affirmative defenses. (GC Exh. 1(f).) The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record, including my own observation of the demeanor of the witnesses,⁴ and after considering the briefs filed by the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, is a masonry contractor engaged in the construction industry at its facility in Strawberry Point, Iowa, where it annually performs services valued in excess of \$50,000 in states other than the State of Iowa. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Furthermore, Respondent admits and I find that at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act. (GC Exh. 1(f).)

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview of Respondent’s Operations and Management Structure

Respondent is a masonry contractor with its headquarters in Strawberry Point, Iowa, and offices in Omaha, Nebraska, and Des Moines and Eldridge, Iowa. Respondent performs mostly commercial masonry work, installing brick, block, stone, and cast stone. Most of this work is performed in the Midwest, including in the States of Nebraska, Iowa, Illinois, Missouri, and Kansas.

¹ All dates are in 2012 unless otherwise indicated.

² For purposes of brevity, the Acting General Counsel is referenced as General Counsel.

³ Abbreviations used in this decision are as follows: “Tr.” for transcript; “R. Exh.” for Respondent’s Exhibit; “GC Exh.” for General Counsel’s Exhibit; “CP Exh.” for Charging Party’s Exhibit; “R. Br.” for Respondent’s Brief; “GC Br.” for the General Counsel’s Brief; and “CP Br.” for Charging Party’s Brief.

⁴ Although I have included citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are not based solely on those specific record citations, but rather on my review and consideration of the entire record for this case.

Robert Marsh has been Respondent's president since 2010 and previously served as Respondent's vice president. Prior to Marsh becoming Respondent's president, Mark Guetzko was Respondent's president for about 15 years. Mark Rima served as Respondent's vice president and controller for 10 to 15 years, but is no longer employed by Respondent. Respondent admits, and I find, that Marsh, Guetzko, and Rima are supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act. (GC Exh. 1(f).)

B. Respondent's Collective-Bargaining Agreements

On July 19, 1988, Respondent entered into an individual building agreement, becoming signatory to an agreement between the Quad Cities Builders Association, Inc. (QCBA), and the International Union of Operating Engineers Local Union No. 537. (GC Exh. 2.) Local 537 merged with Charging Party International Union of Operating Engineers Local 150, AFL-CIO (Union or Local 150), in the early 1990s. (Tr. 18, 24.)

The individual building agreement signed by Respondent in 1988 states:

The undersigned employer signatory hereto who is not a member of the said Association [QCBA] agrees to be bound by any amendments, extensions or changes in this Agreement agreed to by the Union and the [QCBA], and *further agrees to be bound by the terms and conditions of any subsequent contracts negotiated between the Union and the [QCBA]* 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.

[Emphasis added.] (GC Exh. 2.) Respondent has never sent written notice to the Union terminating the collective-bargaining agreement or revoking the authority of the QCBA to negotiate subsequent agreements. (Tr. 18.) The individual building agreement further provides that notice by the Union upon the QCBA of its intent to reopen, terminate, or commence negotiations for a successor agreement shall constitute notice upon the signatory employers. (GC Exh. 2.)

Between 1988 and the present time, the QCBA and Union have negotiated 10 successive collective-bargaining agreements. (Tr. 26.) The current collective-bargaining agreement, effective from June 1, 2010, to May 31, 2014, is contained in the record as General Counsel's Exhibit 4. This agreement states that it shall renew from year to year after its expiration, unless one of the parties serves notice upon the other of its intent to modify or terminate it. (GC Exh. 4, p. 53.)

The QCBA agreement recognizes the Union as the sole collective-bargaining representative for signatory contractor employees engaged in the operation or maintenance of all hoisting and portable machines and engines used on building and excavating work, or any other power machine that may be used for the construction, alteration, repair, or wrecking of a building or buildings within the Union's territorial jurisdiction.⁵ (GC Exh.

⁵ The Union's territorial jurisdiction is defined as Rock Island and Mercer Counties, and portions of Henry and Whiteside Counties in

4, art. 1.) The contract requires signatory contractors to obtain employees through Local 150's hiring hall. (GC Exh. 4, art. 3.) Furthermore, the contract forbids signatory contractors from subcontracting or subleasing the covered work of the Union.⁶ (GC Exh. 4, art. 1, sec. 1.1.)

In 2006 the Union sent a letter to the QCBA indicating that the Union would like to meet with the QCBA to begin negotiating a new contract, as the then existing contract was about to expire. (CP Exh. 2.) Respondent did not receive a copy of the letter, as the signatory agreement signed by Respondent only required notice of such intent to commence negotiations for a new agreement to be made upon the QCBA. (GC Exh. 2.) The QCBA responded to the Union's letter agreeing to meet with the Union under certain conditions.⁷ (R. Exh. 4; Tr. 20.)

Respondent is also party to a collective-bargaining agreement with International Union of Operating Engineers Local Union No. 234 (Local 234). (R. Exh. 6.) Locals 150 and 234 have a reciprocity agreement. (Tr. 39-40.) Local 234's territorial jurisdiction covers numerous counties in the State of Iowa, outside of the territorial jurisdiction of Local 150. (R. Exh. 6, art. XVII.) Respondent's agreement with Local 234 applies to work similar to that covered in its collective-bargaining agreement with Local 150. (GC Exh. 4, art. 1; R. Exh. 6, art. 1.)

Respondent has also entered into a Project Labor Agreement (PLA) with the Southeast Iowa Building and Construction Trades Council for the construction of a penitentiary in Fort Madison, Iowa. (R. Exh. 7.) The PLA, dated March 15, 2010, applies only to work performed on the new penitentiary. (Id.)

C. Respondent's Employment of a Union Operator

Respondent seasonally employs between 10 and 30 bricklayers and between 10 and 30 laborers. (Tr. 79.) Marsh testified that, based upon his review of Respondent's payroll records, Respondent has never employed more than one operator.⁸ (Tr. 79-80.)

Respondent has worked continuously in the Union's jurisdiction since 2006. (Tr. 79.) Respondent produced records at the hearing that it employed J. H., a union operator, in 2009. J. H. operated a boom truck on a school project in the Quad Cities area, which is within the Union's territorial jurisdiction. (Tr.

Illinois, and Cedar, Clinton, Des Moines, Lee, Louisa, Muscatine, and Scott Counties in Iowa. (GC Exh. 2.)

⁶ On July 18, 1988, Respondent further executed a participation agreement, binding it to Local 237's Pension Fund agreement and Welfare Fund agreement. (GC Exh. 3.)

⁷ Respondent received a copy of the QCBA's letter and claims that the letter established that the Union terminated the QCBA agreement in 2006. (R. Exh. 4; Tr. 20.) I do not find this to be the case. The letter produced by the Union at hearing clearly shows that the Union was seeking to commence negotiations for a new agreement (not terminate the agreement) and its service upon the QCBA was proper under the individual building agreement. (CP Exh. 2; GC Exh. 2.)

⁸ Respondent did not produce any documentary evidence, including these payroll records, supporting Marsh's assertion. Additionally, Respondent offered only nonspecific evidence regarding the operation of equipment covered by the QCBA agreement by persons other than union members at the hearing. (R. Exhs. 1, 2, 9, 11.) I do not credit Marsh's testimony on this point for reasons discussed more fully below.

87.) Pursuant to its employment of J. H. within the Union's territorial jurisdiction, Respondent remitted dues and fringe benefit payments to Local 150 for the months of July, August, and September 2009. (GC Exh. 5.)

During the hearing and in its brief, Respondent attempted to frame this dispute as a jurisdictional dispute.⁹ (Tr. 73, 92; R. Br. p. 19–21.) Respondent argued that it assigned certain work to members of Locals 309 and 538 of the Laborers' International Union of North America (Laborers). (R. Exhs. 1, 9.) Included in the work assigned by Respondent to the Laborers Local 538 was:

the tending of masons . . . the starting, stopping, fueling, oiling, cleaning, and operating and maintenance of all mixers, mortar pumps and other devices under the direction of Seedorff Masonry . . . This assignment specifically includes the operation and maintenance associated with rough terrain *forklifts* . . .

[Emphasis added.] (R. Exh. 9.) In a Board charge filed against Laborers Local 538, Respondent included the operation of grout pumps among the allegedly disputed work. (R. Exh. 12.) Listed among the equipment to be operated by members of the Union in the QCBA building agreement are forklifts and grout pumps. (GC Exh. 4, pp. 16, 18.) Respondent also provided as evidence a letter it sent to the Great Plains Laborers' District Council regarding the Union's alleged attempts to claim work assigned by Respondent to the Laborers.¹⁰ (R. Exh. 11.)

D. Grievances

The Union filed two grievances against Respondent in 2011. (GC Exh. 7; Tr. 36.) One of these grievances concerned work at the Fort Madison Penitentiary and was brought under the PLA. (R. Exhs. 1, 2; Tr. 46; 53.) The other grievance was brought under the QCBA agreement and concerned work at a church in Burlington, Iowa (Burlington grievance).¹¹ (GC Exhs. 6, 7; Tr. 93, 100.) The Burlington grievance asserted that Respondent failed to use a union member to operate a boom truck at the church site, instead allowing the work to be performed by a laborer. (Tr. 100). On October 10, 2011, Marsh sent an email to Ryan Drew, a business agent of the Union, indicating that Respondent had assigned operation of the boom truck to the Laborers. (R. Exh. 1, p. 7.) Marsh did not claim that Respondent was not signatory to the QCBA agreement in this email. (R. Exh. 1, p. 7.)

⁹ On or about January 31, 2012, Respondent filed an 8(b)(4)(D) charge against the Laborers in Region 14, alleging that the Union was seeking the work assignment referenced *infra* and that the Laborers had threatened a work stoppage. (R. Exh. 12.) This charge was dismissed by the Regional Director in that he found no competing claims for the same work. (R. Exh. 13.)

¹⁰ In July 2011, Respondent sent a letter to Laborers Local 309, purporting to assign work similar to that assigned to Laborers Local 538, to Local 309. (R. Exh. 1.) This work includes operation of forklifts, mortar pumps, mixers, and other devices under the control of Respondent. (Id.)

¹¹ I take judicial notice that Burlington, Iowa, is the county seat of Des Moines County in Iowa and thus is within the Union's territorial jurisdiction. (See the website of Des Moines County, Iowa, www.dmcounty.com.)

On October 17, 2011, Marsh sent a letter to the Union acknowledging receipt of the grievances. (R. Exh. 10.) Marsh stated that Respondent was not available to attend a grievance meeting at the Union's office. (Id.) Marsh's letter further indicated that Respondent was not interested in settling the grievances at that time. (Id.) Here again, Marsh did not mention Respondent's later position that it was not signatory to the QCBA Agreement.

On November 3, 2011, Marsh sent a follow up email to Drew regarding the grievances. (R. Exh. 2.) In his email Marsh stated:

To my knowledge, Seedorff Masonry, Inc. is not signatory to the current Local 150 [QCBA] Agreement and none of the memoranda 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.

(Id.) Drew responded to Marsh's email within a few hours, attaching copies of various documents supporting the Union's position that Respondent was indeed signatory to the QCBA agreement. (Id.)

Thereafter, Respondent continued to process the Burlington grievance. Specifically, Respondent proceeded through all of the steps of the grievance-arbitration procedure contained in the QCBA agreement, short of arbitration.¹² (Tr. 53–55.) An arbitrator was appointed and he subsequently sought to schedule a hearing date for both grievances. (CP Exh. 1; Tr. 53–55; 58.) The parties agreed to schedule the arbitration hearing for the Burlington grievance at the offices of the QCBA. (Tr. 63–64.)

Over 2 months later, on April 12, 2012, Respondent's counsel sent a letter to the Union addressing the Burlington grievance. (GC Exh. 6.) This letter indicated that Respondent did not believe that it had a current collective-bargaining agreement with Local 150. (Id.) In the letter, Respondent's counsel claimed that Respondent had consistently, since 1988, informed the Union that it had not assigned its bargaining rights to the QCBA. Respondent's counsel also claimed that the Union had notified the QCBA in 2006 that it was terminating their collective-bargaining agreement and that no new agreement was reached between Respondent and the Union. Therefore, Respondent's counsel stated, as no collective-bargaining relationship existed, there was no basis for the Burlington grievance.

DISCUSSION AND ANALYSIS

A. Credibility Findings

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), *enfd.* 56 Fed. Appx. 516

¹² Drew's testimony on this point stands uncontroverted and I credit it.

(D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, 335 NLRB at 622.

In this case, credibility is generally not at issue because the majority of the testimony that the witnesses provided was corroborated by other evidence. Additionally, the witnesses' testimony did not generally conflict with that of other witnesses. The findings of fact above incorporate the testimony of the witnesses who testified at trial, to the extent that their testimony was relevant, material, based on their personal knowledge, and was corroborated by other evidence.

B. Respondent Violated the Act in Repudiating its Contract with the Union

The QCBA agreement is an 8(f) agreement. Under Section 8(f) of the Act an employer who is primarily engaged in the building and construction industry is permitted to enter into a contract with a labor organization of which building and construction employees are members, without regard to whether the union's majority status has been established. *Coulter's Carpet Service*, 338 NLRB 732, 733 (2002). Such agreements are enforceable under Section 8(a)(5) of the Act. *John Deklawa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 109 S.Ct. 222 (1988). Generally, a party may not lawfully repudiate an 8(f) agreement during its term. *Cedar Valley Corp.*, 302 NLRB 823 (1991), enfd. 977 F.2d 1211 (8th Cir. 1992).

It is well settled that a construction industry employer may become bound to successive 8(f) contracts, all enforceable under Section 8(a)(5), if the employer has expressly given continuing consent to a multiemployer association to bind it to future contracts and that the employer has taken no timely or effective action, consistent with its own agreement, to withdraw that continuing consent from the association.¹³ *Haas Electric*, 334 NLRB 865, 866 fn. 7 (2001), enf. denied on other grounds 299 F.3d 23 (1st Cir. 2002); *Luterbach Construction Co.*, 315 NLRB 976, 981 fn. 11 (1994), citing *Kephart Plumbing*, 285 NLRB 612 (1987), and *Reliable Electric Co.*, 286 NLRB 834 (1987). In *Kephart*, a construction industry employer authorized an employer association to negotiate on its behalf and execute a collective-bargaining agreement with a union. 285 NLRB at 612. The authorization continued unless the employer took some action effectively withdrawing it. *Id.* The employer did not take any action, affirmative or negative, to divest the association of bargaining authority before the union and association negotiated and signed a successor collective-bargaining agreement. *Id.* The *Kephart* Board found that the employer was bound to the successor agreement, and that its refusal to abide by it violated Section 8(a)(5) and (1). 285 NLRB at 613.

This is similar a case. The agreement executed by Respondent in 1988 made it signatory to an 8(f) agreement. By way of

¹³ Withdrawal of negotiating authority from a multiemployer association is an action distinct from terminating a contract. *Rome Electrical Systems*, 349 NLRB 745, 747 (2007), enfd. 286 Fed. Appx. 697 (11th Cir. 2008).

the 1988 individual building agreement (GC Exh. 2), Respondent authorized the QCBA to bargain on its behalf with the Union. In addition, the QCBA remained Respondent's agent for purposes of binding it to the current agreement. The 1988 individual building agreement required Respondent to provide written notice to the Union, 90 days prior to the expiration of any subsequent agreement, that it had revoked the authority of the QCBA to negotiate subsequent agreements on its behalf. (GC Exh. 2.) No evidence was presented by Respondent that it has ever done so. As such, Respondent's refusal to abide by the terms of the current collective-bargaining agreement with the Union violates the Act.

Despite Respondent's arguments to the contrary, I cannot find that the Union terminated its collective-bargaining agreement by way of its 2006 letter to the QCBA. No evidence in the record supports Respondent's argument. The 2006 letter from the Union to the QCBA indicated that the Union sought to begin negotiations for a new agreement, not terminate the then-effective agreement. Thus, Respondent's argument in this regard is without merit.

Under all of these circumstances I find that the General Counsel has shown that the current QCBA agreement is valid and enforceable, and that Respondent is obligated to abide by the hiring hall and benefit provisions of the contract. I further find that Respondent violated Section 8(a)(5) and (1) of the Act by failing to abide by the terms of the agreement and by repudiating its collective-bargaining relationship with the Union, as alleged.

C. Respondent's 10(b) Defense

Respondent asserts that the charge filed by the Union was time barred by Section 10(b) of the Act. (GC Exh. 1(f).) Section 10(b) of the Act provides that "no complaint shall be based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. § 160(b). It is well settled that the 6-month limitations period prescribed by Section 10(b) begins to run only when a party has clear and unequivocal notice, either actual or constructive, of the violation of the Act. *Art's Way Vessels, Inc.*, 355 NLRB 1142, 1147 (2010). Thus, a union must file its charge within 6 months of receiving clear and unequivocal notice of a contract repudiation or a complaint based on the conduct will be time-barred, even with regard to contract violations within the 10(b) period. *Vallow Floor Coverings, Inc.*, 335 NLRB 20 (2001).

The burden of showing such clear and unequivocal notice is on the party raising the 10(b) defense. *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004). Where a delay in filing is a consequence of conflicting signals or otherwise ambiguous conduct by that party, a 10(b) defense will not be sustained. *A & L Underground*, 302 NLRB 467, 469 (1991); *Taylor Warehouse*, 314 NLRB 516, 526 (1994), enfd. 98 F.3d 892 (6th Cir. 1996).

Respondent's position that there was a clear and unequivocal repudiation of the collective-bargaining agreement contained in Marsh's October 17, 2011 letter and November 3, 2011 email is not supported by the record evidence. (R. Br. p. 13.) Instead, I find that the Union first received clear and unequivocal notice

of Respondent's total contract repudiation on April 12, 2012, the date of the letter from Respondent's counsel to the Union.

Nothing in Marsh's letter of October 17, 2011, indicated that Respondent was repudiating the QCBA agreement. Instead, Marsh merely advised the Union that he was unavailable to attend a grievance meeting and that Respondent was not amendable to settling the grievance. Thus, Marsh's letter did not constitute a clear and unequivocal notice of contract repudiation.

Furthermore, Marsh's November 3, 2011 email message did not serve as a clear and unequivocal notice of contract repudiation. Marsh's statement regarding Respondent's status as a signatory to the QCBA agreement is less than clear. Marsh stated, "*To my knowledge* [Respondent] is not signatory to the current Local 150 Quad City (sic) Agreement and none of the memoranda that you sent . . . appear to bind [Respondent] 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.*" (Emphasis added.) (R. Exh. 2.) Respondent's use of qualifying language such as "to my knowledge" and "if you disagree," make Marsh's statement less than a clear and unequivocal notice of a contract repudiation. Instead, it appears that Respondent was open to receiving proof from the Union of Respondent's signatory status. The Union responded almost immediately to Marsh's invitation to provide further proof by providing various documents and a narrative explanation. (Id.)

In addition, between October 11, 2011, and April 12, 2012, Respondent engaged in a series of actions inconsistent with a total contract repudiation. Drew's un rebutted testimony was that the parties proceeded through all of the steps of the grievance procedure related to the Burlington grievance short of arbitration. (Tr. 53-55.) An arbitrator was appointed and, in February 2012, he sought to schedule a date for an arbitration hearing. I find that Respondent's actions in continuing to process the Burlington grievance through at least February 2012, belie its assertion that it repudiated the QCBA agreement in 2011. Instead I have found that Respondent first clearly and unequivocally repudiated the QCBA agreement on April 12, 2012, and Respondent's actions in processing the Burlington grievance through 2012 defeat its 10(b) defense.¹⁴

D. Respondent's Single-Person Unit Defense

Respondent asserts as an affirmative defense that the bargaining unit at issue consisted of no more than a single employee. (GC Exh. 1(f).) As stated above, an employer's repudiation of an 8(f) agreement will generally violate Section 8(a)(5) of the Act. *Cedar Valley Corp.*, 302 NLRB 823 (1991), enf'd. 977 F.2d 1211 (8th Cir. 1992). However, an employer may lawfully repudiate an 8(f) agreement when there is no more than one employee in the bargaining unit. See *Stack Electric*, 290 NLRB 575, 578 (1988), and *Seals Refrigeration*, 297 NLRB 133, 135 (1989).

¹⁴ I also do not find that Respondent's letters to the Laborers and Great Plains Labor Council would have placed the Union on notice that Respondent was using Laborers to perform union work. There is no evidence that any of these documents were ever provided to the Union prior to the filing of the charge.

It is Respondent's burden of proof to establish the existence of a stable one person unit. See *Galicks, Inc.*, 354 NLRB 295 (2009), remanded on other grounds 188 L.R.R.M. 3024 (6th Cir. 2010). The Board requires proof that the purportedly single employee unit was a stable one, not merely a temporary occurrence. *McDaniel Electric*, 313 NLRB 126, 127 (1993).

Marsh testified that since 2003, Respondent has not employed more than one operator at a time within the Union's jurisdiction. (Tr. 80.) I have discredited Marsh on this point, as his testimony is not supported by appropriate documentary evidence. Marsh testified that he reviewed Respondent's payroll records in reaching his conclusion that Respondent has never employed more than one operator at a time. (Id.) These records were not produced at the hearing. The failure of a respondent to produce relevant evidence that is particularly under its control allows the trier of fact to draw an adverse inference that such evidence would not be favorable to it. *International Automated Machines*, 285 NLRB 1122, 1123 (1987); *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15 fn. 1 (1977). I draw an adverse inference from Respondent's failure to produce any evidence, particularly the payroll records referenced by Marsh, at the hearing to support its single-person unit defense. Therefore, I find that Marsh's conclusory testimony that Respondent has never employed more than one operator fails to meet Respondent's burden of establishing the existence of a stable one person unit.

More troubling in this regard is Respondent's apparent use of Laborers to perform work reserved for the Union in the QCBA agreement. Evidence adduced at trial indicated that Respondent has been using Laborers to perform union work. Letters sent by Respondent to the Laborers and the Great Plains Laborers' District Council clearly demonstrate that Respondent has attempted to assign work belonging to the Union, per the valid and enforceable QCBA agreement, to the Laborers.¹⁵ (See R. Exhs. 1, 9, 11, 12.) Respondent has not refuted that it used Laborers to perform union work, as I infer from these exhibits. Thus, I find that Respondent indeed used Laborers to perform union work as defined in the QCBA agreement.

As Respondent used Laborers to perform Union work as covered under the QCBA agreement, its actions arguably breached Respondent's contractual undertaking not to subcontract or assign the Union's work. Respondent should not be allowed to escape what would otherwise be its obligation to honor its collective-bargaining agreement on the basis of this situation, occasioned by its breach of the QCBA agreement. Accordingly, I find that Respondent's single-person unit defense fails.

E. Respondent's Remaining Defenses

Another of Respondent's affirmative defenses is that the charge and complaint represent an effort by the Union to circumvent Board procedures to obtain work. (R. Br. p. 19.) Stated another way, Respondent claims that this matter is, in

¹⁵ These documents are consistent with a statement made by Respondent's counsel at hearing that Laborers have performed union work. (Tr. 105.) When I asked Respondent's counsel whether during the relevant time period there was work available for a union operator and the Laborers claimed the work, he responded, ". . . the Laborers performed it." (Id.)

essence, a jurisdictional dispute. (GC Exh. 1(f).) I find that this affirmative defense is both without support and without merit.

On this point I agree with the General Counsel that even if the Union has filed this charge to circumvent the Board's procedures for resolving jurisdictional disputes, such action would not be unlawful. Respondent's evidence supporting its jurisdictional dispute defense consists of Marsh's testimony, evidence of an 8(b)(4)(D) charge filed with the Board, evidence regarding arbitration of the grievance brought under the PLA, and letters sent to the Laborers and the Great Plains Labor Council regarding Respondent's attempts to reassign Union work to the Laborers.

Respondent filed an 8(b)(4)(D) charge with the Board in late January 2012. In its charge, Respondent alleged that the Union was pressuring Respondent for work it had assigned to the Laborers (work I have already found was properly assigned to the Union by way of the QCBA agreement). (R. Exh. 12.) Respondent further alleged that the Laborers were threatening a work stoppage if Respondent "reassigned" this work. (Id.) This charge was rather swiftly dismissed by the Regional Director, who found no competing claims to the work. (R. Exh. 13.) Thus, a 10(k) hearing, the Board's mechanism for resolving jurisdictional disputes, was never held.

I find that it was Respondent who has created this "jurisdictional dispute." Respondent was already signatory to the QCBA agreement when it attempted to assign union work to the Laborers. The Union's attempt to enforce the QCBA does not create a jurisdictional dispute. Instead, Respondent seeks to benefit from its refusal to adhere to the valid and enforceable QCBA agreement by creating this dispute. Respondent should not benefit from its efforts to violate the QCBA agreement by "assigning" the Union's work to the Laborers.

Not surprisingly, Respondent provided no case law to support its jurisdictional dispute affirmative defense. Instead, Respondent's brief invites the reader to see *A & L Underground*, 302 NLRB 476 (1991). Respondent cites this case for the proposition that the Board should promote stable collective-bargaining relationships by precluding extended periods of uncertainty regarding the validity of collective-bargaining relationships. (R. Br. p. 21.) I find Respondent's citation to this case in support of its affirmative defense inappropriate. In a portion of the case regarding a 10(b) defense as it related to the theory of a continuing violation of the Act, the Board did indeed make the statement attributed to it by Respondent. See 302 NLRB at 468. However, nothing in *A & L Underground* implicated a jurisdictional dispute or "forum shopping." As such, I find Respondent's citation to this case as a basis for its jurisdictional dispute defense to be misplaced.¹⁶

¹⁶ Furthermore, Respondent's statement in its brief that the Union is seeking "another chance to convince an arbitrator that the work performed at the Burlington project by Laborers should have been performed by a member of the Union" is puzzling. (R. Br. p. 21.) The arbitrator's decision Respondent sought to present at hearing, an exhibit I rejected, concerned the grievance brought by the Union under the PLA, not the Burlington grievance. (R. Rejected Exh. 8.)

In addition to the affirmative defenses discussed above, Respondent raised a number of other affirmative defenses. (GC Exh. 1(f).) Specifically, Respondent alleged that: the complaint fails to allege sufficient facts to state a claim upon which any relief may be granted; the relationship between the parties was in accordance with Section 8(f) of the Act; the Union terminated the QCBA agreement in 2006; and the complaint seeks an impermissible remedy. (Id.) I have already discussed that the parties' relationship was valid under Section 8(f) and that extant Board law does not permit wholesale repudiation of an 8(f) agreement absent certain limited circumstances.¹⁷ I have further discussed that the Union did not terminate the QCBA agreement in 2006. Respondent presented no evidence supporting its other affirmative defenses at the hearing and the affirmative defenses were not raised in Respondent's brief. As Respondent seems to have abandoned these remaining affirmative defenses, I will not address them further.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. 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 Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. I recommend that the Respondent be ordered to implement and adhere to the terms of the collective-bargaining agreement between the Union and the Quad Cities Builders Association, Inc., effective for the period June 1, 2010, through May 31, 2014, and to make whole the unit employees for any loss of wages or other benefits that they sustained as a result of Respondent's repudiation of its responsibilities and obligations under this contract. I also recommend that Respondent be ordered to pay to the appropriate union funds all health, welfare, pension, and other fringe benefits as provided for in the contract. I further recommend that Respondent file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate any discriminatee(s) for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.*, 359 NLRB 518 (2012).

[Recommended Order omitted from publication.]

¹⁷ I have not found any such circumstances to be present in this case.