UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TOP GRADE EXCAVATING, INC., Employer, and RUSSELL J. HORSFIELD, Petitioner, and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 150, Union.	CASE NO. 25-RD-124878 **TOP GRADE EXCAVATING, INC.'S BRIEF IN SUPPORT OF REQUEST FOR REVIEW OF DECISION AND ORDER OF REGIONAL DIRECTOR**

Top Grade Excavating, Inc. ("Top Grade") hereby files a brief in support of its request for review of the decision and order of the regional director, dated May 5, 2014, and respectfully states as follows:

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I. INTRODUCTION

For the past ten years, Top Grade Excavating, Inc. ("Top Grade") and the International Union of Operating Engineers, Local No. 150 ("Local 150") have had a relationship defined not by the terms of any written agreement but rather by three unwritten agreements between Top Grade and Local 150. On paper, Top Grade signed two memorandums of agreement which purported to adopt two master agreements imposing upon the parties a comprehensive set of requirements for work performed by Top Grade in the territorial jurisdiction of Local 150. In practice, Top Grade periodically performed work within the territorial jurisdiction of Local 150, Local 150 then contacted Top Grade and dictated that Top Grade sign a document, make a monetary payment to Local 150, or even hire a member of Local 150, and Top Grade obliged. At no point was the relationship governed by the terms and conditions set forth in the master agreements or any other alleged written agreement between Top Grade and Local 150.

Irrespective of the nature of Top Grade's relationship with Local 150, Local 150 believes each operator employed by Top Grade is currently represented by Local 150 for any work he has performed, is performing, or in future will perform within the territorial jurisdiction of Local 150. As a result of the reality of this situation, Petitioner Russell J. Horsfield ("Petitioner"), one of seven operators employed by Top Grade subject to this representation by Local 150, filed a petition to decertify Local 150 as the bargaining representative of Top Grade's operators, imploring the National Labor Relations Board (the "NLRB" or the "Board"):

> **Basically what I don't want is -- from what I understand listening to this, if I do go into their jurisdiction, then I am basically represented by them again. I don't want that, I don't want any part of that.**

(*Hearing Transcript at 24:25-25:3.*)

Local 150 objected to the petitioned for election on the grounds that the petitioned for collective bargaining unit was improper. However, in its post-hearing brief, Local 150 additionally challenged the eligibility of the Top Grade operators to vote in a decertification election, not just their membership in the collective bargaining unit. Local 150 advocated an anomalous situation in which the appropriate collective bargaining unit consists of more than one Top Grade operator but none of those operators is eligible to vote in the petitioned for election. A closer analysis of the facts and applicable law reveals the obvious reasons for which Local 150 takes this incongruent position. If the collective bargaining unit is determined to include more than one operator and any of those operators are eligible to vote in the decertification election, it is probable that the operators will vote to decertify Local 150. At least three of the seven operators necessarily supported the decertification petition or it would have been dismissed by the Board for lack of a sufficient showing of interest, and each of the seven operators voted to decertify a different local just two years ago. As a result, Local 150 is in the precarious position of arguing that there are operators of Top Grade within the collective bargaining unit represented by Local 150 but that those operators should not get to vote on whether to maintain that representation, the necessary effect of which is to indefinitely bind each of Top Grade's seven operators to representation by Local 150 in spite of the demonstrated desire of at least three of them to the contrary.

Although there were ample grounds on which to find the petitioned for collective bargaining unit appropriate, the Regional Director considered and ruled upon issues advanced by Local 150 in its post-hearing brief which were different from the issue stipulated to by Local 150 as the issue for the Hearing. The Regional Director then conflated

the determination of eligible voters under Daniel Construction Co. with geographic limitations ostensibly relevant to the determination of the members of the collective bargaining unit but in no way relevant to the application of Daniel Construction Co. The Regional Director also erroneously concluded that the relationship between Top Grade and Local 150 is governed by Section 9(a) rather than Section 8(f) of the NLRA. Finally, the Regional Director incorrectly determined that the jurisdiction statements in the master agreements set forth the appropriate collective bargaining units for purposes of the representation election and then incorrectly interpreted the jurisdiction statements in the master agreements to impose a geographic limitation on the collective bargaining unit narrower than that purportedly recognized by Top Grade in the memorandums of agreement. To the extent the Regional Director's determinations were correct interpretations of Board rules and/or policies, there are compelling reasons for reconsideration of such Board rules and/or policies. In any event, compelling reasons justify the Board's grant of Top Grade's request for review of the decision of the Regional Director to address the substantial questions of law and policy raised by the Regional Director's decision.

II. BACKGROUND FACTS

Top Grade is an Iowa corporation with its principal place of business located in Farley, Iowa. (*Board Ex. 2 ¶ 8.*) Top Grade is in the business of excavating, which includes, without limitation, general earth moving, sewer and water projects, municipality projects, and department of transportation projects. (*Official Report of the Proceedings before the National Labor Relations Board, dated April 1, 2014 (the "Hearing Transcript") at 27:25-28:5.*) Top Grade was started by its owner, Todd Horsfield, in 2004 (*Hearing Transcript at 27: 14-24*), and Top

Grade is engaged in commerce within the meaning of Section 2(6) and Section 2(7) of the National Labor Relations Act (the "NLRA" or the "Act"). (*Board Ex. 2 ¶ 8.*)

At the time Mr. Horsfield started Top Grade in 2004, Top Grade had a collective bargaining agreement with International Union of Operating Engineers, Local No. 234 ("Local 234"). (*Hearing Transcript at 28:9-13.*) Local 234 is a labor organization within the meaning of Section 2(5) of the Act. (*See id. at 49:5-50:10.*) Local 234's territorial jurisdiction includes work performed in some but not all of Iowa, including Dubuque County where Top Grade's headquarters are physically located. (*Id. at 49:5-50:16.*)

Local 150 is also a labor organization within the meaning of Section 2(5) of the Act. (*Board Ex. 2 ¶ 3.*) Local 150's territorial jurisdiction is different from Local 234's territorial jurisdiction, includes work performed in certain counties in Illinois, Indiana, and Iowa, and is broken into eight districts. (*Hearing Transcript at 49:5-50:16; Union Ex. 3 at 2; Union Ex. 4 at 2.*) District Eight of Local 150 ("District Eight") includes Cedar, Clinton, Des Moines, Lee, Louisa, Muscatine, and Scott Counties in Iowa and Mercer and portions of Henry and Whiteside Counties in Illinois. (*Union Ex. 3 at 2; Union Ex. 4 at 2.*)

Petitioner is an operator employed by Top Grade. (*Hearing Transcript at 39:12-20.*) There are seven operators employed by Top Grade. (*Id. at 37:1-14, 39:12-17.*) The operators include Petitioner, Jeff Bradley, Jeff Frasher, Jordan Kirsch, Todd Kluesner, Tony Kramer, and Jim Seymour. (*Id.*)

The record demonstrates that Top Grade has performed operating work within the territorial jurisdiction of Local 150 on four occasions since 2004: a job in 2005; a job in 2007; a job in Clinton, Iowa, in late 2009 and 2010; and a job in Low Moor, Iowa, which

involved some work in each of 2010, 2011, and 2012. (*See Hearing Transcript at 28:22-35:13; 36:7-12.*)

When Top Grade performed work within the territorial jurisdiction of Local 150 in 2005, Top Grade was contacted by Local 150. (*Hearing Transcript at 30:22-31:2.*) On or about October 28, 2005, Mr. James P. Seymour, then Vice President of Top Grade, signed a Memorandum of Agreement (the "2005 Memorandum of Agreement") on behalf of Top Grade (*Board Ex. 2 ¶ 4*), which 2005 Memorandum of Agreement claims to be an agreement made and entered into by and between Top Grade and Local 150. (*Employer Ex. 1.*) The 2005 Memorandum of Agreement provides:

> 1. The EMPLOYER recognizes the UNION as the sole and exclusive bargaining representative for and on behalf of the employees of the EMPLOYER within the territorial and occupational jurisdiction of the UNION. Prior to recognition, the EMPLOYER was presented and reviewed valid written evidence of the UNION's exclusive designation as bargaining representative by the majority of appropriate bargaining unit employees of EMPLOYER.

(*Employer Ex. 1 ¶ 1.*) In spite of the above language contained in the 2005 Memorandum of Agreement, Top Grade was not presented and did not review valid written evidence of Local 150's purported exclusive designation as bargaining representative by the majority of appropriate bargaining unit employees as the uncontroverted evidence demonstrates that Top Grade was not handed anything to read when Mr. Seymour signed the 2005 Memorandum of Agreement. (*Hearing Transcript at 35:15-36:4.*)

The 2005 Memorandum of Agreement purports to adopt the Master Agreement, dated June 1, 2005, entered into by and between Local 150 and the Quad City Builders Association (the "2005 Q.C. Builders Master Agreement"). (*Employer Ex. ¶ 3.*) The 2005 Memorandum of Agreement further purports to adopt any master agreement entered into

between Local 150 and the Quad City Builders Association (Building Construction Agreement) subsequent to the expiration date of the 2005 Q.C. Builders Master Agreement unless notice of termination or amendment is given in the manner prescribed in the 2005 Memorandum of Agreement. (*Id.* ¶ *4.*) Top Grade was not provided a copy of the 2005 Q.C. Builders Master Agreement when it signed the 2005 Memorandum of Agreement.[1]

Top Grade never operated under the master agreements purportedly adopted by the 2005 Memorandum of Agreement. For example, although Mr. Seymour signed the 2005 Memorandum of Agreement as Vice President of Top Grade, Top Grade did not have any financial obligation to Local 150 under the 2005 Memorandum of Agreement. (*Hearing Transcript at 29:1-3.*) "It was basically, here, sign to keep working." (*Id. at 36:6.*) In 2005, Top Grade did not make any financial payments to Local 150 pursuant to the 2005 Memorandum of Agreement. (*Id. at 29:4-6.*) Instead, Top Grade made contributions on each of its operators to Local 234 pursuant to Top Grade's collective bargaining agreement with Local 234. (*Id. at 34:10-12.*) Similarly, Top Grade did not make any benefit contributions to Local 150, and Top Grade did not pay any union dues to Local 150. (*Id. at 33:6-10.*) For the work performed by Top Grade in 2005, no money went from Top Grade to Local 150. (*Id. at 33:11-13.*)

When Top Grade performed work within the territorial jurisdiction of Local 150 in 2007, Top Grade was again contacted by Local 150. (*Hearing Transcript at 30:22-31:2.*) And, on or about August 16, 2007, Mr. James Seymour again signed a Memorandum of

[1] Upon information and belief, the current master agreement between Local 150 and the Quad City Builders Association (Building Construction Agreement) is the Industrial, Commercial, Residential and Building Construction Agreement between International Union of Operating Engineers, Local No. 150 and Quad City Builders Association, effective June 1, 2010, through May 31, 2014 (the "2010 Q.C. Builders Master Agreement"). (*See Union Ex. 4.*)

Agreement (the "2007 Memorandum of Agreement") on behalf of Top Grade (*Board Ex. 2 ¶ 4*), which 2007 Memorandum of Agreement claims to be an agreement made and entered into by and between Top Grade and Local 150. (*Employer Ex. 2.*) The 2007 Memorandum of Agreement again provides:

> 1. The EMPLOYER recognizes the UNION as the sole and exclusive bargaining representative for and on behalf of the employees of the EMPLOYER within the territorial and occupational jurisdiction of the UNION. Prior to recognition, the EMPLOYER was presented and reviewed valid written evidence of the UNION's exclusive designation as bargaining representative by the majority of appropriate bargaining unit employees of EMPLOYER.

(*Employer Ex. 2 ¶ 1.*) In spite of the above language contained in the 2007 Memorandum of Agreement, Top Grade was again not presented and again did not review valid written evidence of Local 150's purported exclusive designation as bargaining representative by the majority of appropriate bargaining unit employees as the undisputed evidence demonstrates that Top Grade similarly was not handed anything to read when Mr. Seymour signed the 2007 Memorandum of Agreement.[2] (*Hearing Transcript at 35:15-36:4.*)

The 2007 Memorandum of Agreement purports to adopt the Master Agreement, dated June 1, 2006, entered into by and between Local 150 and the Associated Contractors of the Quad Cities (the "2006 Heavy and Highway Master Agreement"). (*Employer Ex. 2 ¶ 3; see also Employer Ex. 7.*) The 2007 Memorandum of Agreement further purports to adopt any master agreement entered into between Local 150 and the Associated Contractors of the Quad Cities (Heavy & Highway Agreement) subsequent to the expiration date of the 2006

[2] Local 150 presented no evidence regarding which, if any, of the Top Grade operators were members of the collective bargaining unit on or before August 17, 2007, or any evidence regarding which, if any, of such Top Grade operators designated Local 150 as the exclusive bargaining representative of the bargaining unit employees of Top Grade. In fact, the evidence shows that only two Top Grade operators work in the territory of Local 150 in 2007: Todd J. Kluesner, from September through November, 2007; and Anthony J. Kramer in November, 2007. (*Employer Ex. 6.*)

Heavy and Highway Master Agreement unless notice of termination or amendment is given in the manner prescribed in the 2007 Memorandum of Agreement.[3] (*Id.* ¶ *4.*)

Top Grade never operated under the master agreements purportedly adopted by the 2007 Memorandum of Agreement. Instead, Top Grade only had a limited financial obligation to Local 150 for the work performed by Top Grade in 2007. (*Hearing Transcript at 29:7-10.*) Under the unwritten agreement between Top Grade and Local 150 in 2007, there "was an administrative due that [Local 150] charged to basically work in their area." (*Id. at 29:11-13.*) According to Mr. Todd Horsfield: "We signed the memorandum of agreement in '07 and basically the Union told us what to pay as far as an administrative due for working in their territory." (*Id. at 29:14-18.*) Top Grade paid the administrative dues to Local 150 (*id. at 34:13-15*), and Local 150 then furnished Top Grade documentation with regard to the administrative dues. (*Id. at 29:19-21.*) The amount of administrative dues that Top Grade paid to Local 150 is detailed on Employer Exhibit 6.[4] (*Id. at 29:23-30:6; Employer Ex. 6.*) In 2007, Top Grade made payment to Local 234 for all other contributions required (*Hearing Transcript at 34:16-18*), and Top Grade did not make any contributions, union dues, or other payments to Local 150. (*Id. at 33:14-17.*)

When Top Grade performed additional work within the territorial jurisdiction of Local 150 in 2009 – a job in Clinton, Iowa – Local 150 again contacted Top Grade. (*Hearing Transcript at 30:7-13, 32:8-16.*) This time, Local 150 required Top Grade to pay administrative

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[3] Upon information and belief, the current master agreement between Local 150 and the Associated Contractors of the Quad Cities (Heavy & Highway Agreement) is the Heavy and Highway Agreement between International Union of Operating Engineers, Local No. 150 and Associated Contractors of the Quad Cities, effective June 1, 2010, through May 31, 2014 (the "2010 Heavy and Highway Master Agreement"). (*See Union Ex. 3.*)

[4] Employer Exhibit 6 demonstrates that Top Grade first paid an administrative due on September 8, 2007, for one operator, Todd J. Kluesner. (Employer Ex. 6.) Top Grade paid administrative dues weekly through November 24, 2007, on Mr. Kluesner, with the exception of three weeks. (Id.) Top Grade then paid an administrative due for a second operator on November 3, 2007. (*Employer Ex. 6.*)

dues to Local 150 for two of Top Grade's operators who were working on the job and also hire one of Local 150's members for the job. (*Id. at 30:10-16.*) Top Grade made health and welfare payments to Local 150 for the one operator hired at the direction of Local 150. (*Id. at 34:2-6.*) For the two operators who were employees of Top Grade, according to the agreement with Local 150, Top Grade paid only administrative dues to Local 150. (*Id. at 24:7-9.*) Top Grade made payment to Local 234 for all other contributions required. (*Id. at 34:19-21.*)

After 2009, Top Grade performed work on a sanitary sewer project in Clinton County, Iowa, for the City of Low Moor. (*Hearing Transcript at 31:3-25.*) The Low Moor project commenced following completion of the Clinton job in 2010 (*id. at 32:8-16*), and it included work over more than one year. (*Id. at 32:1-2.*) Top Grade completed its project in Low Moor in 2012. (*Id. at 70:21-25.*) There is no evidence that Top Grade or Local 150 operated pursuant to the 2010 Q.C. Builders Master Agreement or the 2010 Heavy and Highway Master Agreement related to the work performed at Low Moor, there is no evidence of any unwritten agreement between Top Grade and Local 150 related to the work performed at Low Moor, and there is no evidence of any payments otherwise made to Local 150 or services otherwise provided by Local 150 related to the work performed at Low Moor.

Mr. Horsfield summarized the agreements through which Local 150 permitted Top Grade to work in the geographic jurisdiction of Local 150:

> Q. Did they tell you that was pursuant to the Local 150 collective bargaining agreement?
>
> A. Yes, we paid whatever they told us to pay, basically.

> Q. My point is, did they say that that was under the collective bargaining agreement or did they just tell you to pay the fee?
>
> A. Pay the fee.

(*Hearing Transcript at 77:22-78:3.*) Under this arrangement, the relationship between Top Grade and Local 150 was not governed by the terms of the 2005 Memorandum of Agreement, the 2007 Memorandum of Agreement, or the master agreements purportedly adopted by the 2005 Memorandum of Agreement and the 2007 Memorandum of Agreement:

> Q. If you had been working under the 150, the contract wouldn't cover? Is that what you're saying?
>
> A. I would say we would follow the rules.
>
> Q. In other words, if they called and told you to do something, you'd do it?
>
> A. We had to in the past.

(*Id. at 79:7-12.*)

In approximately 2012, the Top Grade operators were "upset over things" with Local 234 and filed a decertification petition. (*Hearing Transcript at 28:17-21.*) The operators then unanimously voted to decertify Local 234. (*Id. at 28:17-21; 35:7-13.*)

At some time before February 26, 2014, Top Grade learned that Local 150 claims that it has at least one collective bargaining agreement in effect with Top Grade resulting from the 2005 Memorandum of Agreement and/or the 2007 Memorandum of Agreement. (*Hearing Officer Ex. 1 at 1.*) Top Grade denies that there are any such collective bargaining agreements in effect between Top Grade and Local 150, so, on February 26, 2014, in an abundance of caution and not as an admission against interest, Top Grade terminated and cancelled the 2005 Memorandum of Agreement, the 2007 Memorandum of Agreement, and any collective bargaining agreement in effect between Top Grade and Local 150, including

but not limited to the 2010 Q.C. Builders Master Agreement and the 2010 Heavy and Highway Master Agreement. (*Hearing Officer Ex. 1.*)

On or about March 21, 2014, Petitioner filed a petition with the Board to decertify Local 150 as the certified or currently recognized bargaining representative of all full-time and regular part-time operators employed by Top Grade from its Farley, Iowa, facility. (*Board Ex. 1.*) Petitioner testified:

> Basically what I don't want is -- from what I understand listening to this, if I do go into their jurisdiction, then I am basically represented by them again. I don't want that, I don't want any part of that.

(*Hearing Transcript at 24:25-25:3.*) The petition defines the collective bargaining unit as all seven Top Grade operators and is supported by the requisite thirty percent (30%) showing of interest. (*Id.*)

On April 1, 2014, the Board held a representation hearing (the "Hearing") to determine the appropriateness of the petitioned for bargaining unit. (*Board Ex. 2 ¶ 2.*) The parties stipulated that the sole issue for the Hearing was the appropriateness of the petitioned for bargaining unit:

> The parties agree that the issue for hearing today is the appropriateness of the petitioned for bargaining unit, specifically, whether the bargaining unit described in the petition is the appropriate bargaining unit or whether the bargaining unit described in either of the collective bargaining agreements is the appropriate bargaining unit.

(*Board Ex. 2 ¶ 10.*) The parties further stipulated to the formula for the determination of voting eligibility:

> The parties agree that the formula for determining the voting eligibility of employees will be that found in Daniel Construction Co., 133 NLRB 264 (1961), meaning that employees in any bargaining unit found appropriate by the Regional Director will be eligible to vote who either (1) were employed a total of 30 working days or more within the 12 months preceding the election eligibility date or (2) had some employment in the 12 months preceding the

> election eligibility date and were employed 45 working days or more within the 24 months immediately preceding the election eligibility date.

(*Id.* ¶ *7.*) It is uncontroverted that each of the seven Top Grade operators has been employed by Top Grade a total of 30 working days or more within the last 12 months. (*Hearing Transcript at 39:18-20.*)

On April 15, 2014, Local 150 filed IUOE's Post-Hearing Brief. (*IUOE's Post-Hearing Br.*) In spite of the fact that the parties stipulated that the sole issue for hearing was the appropriateness of the petitioned for collective bargaining unit, Local 150's post-hearing brief nonetheless argued that no question concerning representation exists because there are no eligible voters under Daniel Construction Co. (*IUOE Local 150's Post-Hearing Br. at 12-15.*) In making this contention, Local 150 argues that "no Top Grade employees worked **in the Local 150 bargaining units** at all in the 12 month period prior to any relevant date related to the [P]etition in 2014." (*Id. at 13.*) (emphasis supplied).

On May 5, 2014, the Regional Director entered a Decision and Order Dismissing Petition. (*Decision and Order Dismissing Pet.*) The Regional Director considered and ruled based on Local 150's additional argument regarding the eligibility of the members of the collective bargaining unit to vote in a representation election:

> [Local 150] asserts that [the petitioned for collective bargaining unit] is not the appropriate unit and that the appropriate unit is contained in [Local 150's] most recent collective bargaining agreements with the Quad City Builders Association and the Associated Contractors of the Quad Cities since [Top Grade] had previously agreed to be bound by those contracts. [Local 150] further asserts that the bargaining units described in those two contracts do not currently contain any employees who would be eligible to vote in a decertification election, and, thus, the petition should be dismissed.

(*Decision and Order Dismissing Pet. at 1-2.*) The Regional Director concluded that the appropriate collective bargaining units are those contained in Local 150's most recent

collective bargaining agreements with the Quad City Builders Association and the Associated Contractors of the Quad Cities but that there are currently no eligible voters in the appropriate units. (*Id. at 2.*) As a result, the Regional Director dismissed the Petition. (*Id.*)

III. LEGAL STANDARD

"The Board will grant a request for review only where compelling reasons exist therefor." 29 C.F.R. 102.67(c). "[A] request for review may be granted only upon one or more of the following grounds:

> (1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) departure from, officially reported Board precedent.
>
> ...
>
> (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

29 C.F.R. 102.67(c).

IV. ARGUMENT

A. Compelling reasons exist for the NLRB to review the Decision and Order Dismissing Petition entered by the Regional Director.

The Board should grant Top Grade's request for review of the Decision and Order Dismissing Petition because substantial questions of law and policy are raised because of the absence of or departure from officially reported Board precedent and there are compelling reasons for reconsideration of an important Board rule or policy.

The Regional Director considered and ruled upon issues advanced by Local 150 in its post-hearing brief which were different from the issue stipulated to by Local 150 as the issue for the Hearing. In doing so, the Regional Director accepted Local 150's newly posited argument which conflated the determination of eligible voters under Daniel Construction

Co. with geographic limitations ostensibly relevant to the determination of the members of the collective bargaining unit but in no way relevant to the application of Daniel Construction Co. The Regional Director concluded erroneously that the relationship between Top Grade and Local 150 is governed by Section 9(a) rather than 8(f) of the Act. And, the Regional Director incorrectly determined that the jurisdiction statements in the master agreements set forth the appropriate collective bargaining units for purposes of the representation election and then incorrectly interpreted those jurisdiction statements to impose a geographic limitation on the collective bargaining unit narrower than that purportedly recognized by Local 150 in the memorandums of agreement.

The Regional Director's determinations on these issues work to deprive rather than further the Section VII rights of Top Grade's operators. To the extent the Regional Director's determinations were correct interpretations of Board rules and/or policies, there are compelling reasons for reconsideration of such Board rules and/or policies.

1. Substantial questions of law and policy are raised because of the absence of or departure from officially reported Board precedent.

Substantial questions of law and policy are raised by the Regional Director's decision in at least five regards.

a. The Regional Director considered and ruled based on issues which were different from the issue stipulated to by Local 150 as the issue for the Hearing.

Substantial questions of law and policy are raised by the Regional Director's departure from officially reported Board precedent in considering and ruling upon issues different from the issue stipulated to by Local 150 as the issue for the Hearing. See Bennett Industries, Inc., 313 NLRB 1363 (1994) (holding that "the Board should seek to narrow the issues and limit its investigation to areas in dispute"). In this case, the Decision and Order

Dismissing Petition relies upon the Regional Director's consideration and adoption of Local 150's newly advanced formula for the determination of the voting eligibility of members of the collective bargaining unit in spite of Local 150's stipulation that the sole issue for the Hearing was the appropriateness of the petitioned for collective bargaining unit. The Regional Director's decision constitutes a departure from Board precedent which raises substantial questions of law and policy.

Prior to Hearing, the parties stipulated that the lone issue for the Hearing was the appropriateness of the petitioned for collective bargaining unit. The parties stipulations are set forth in Board Exhibit 2, which provides in pertinent part:

> 10. The parties agree that the issue for hearing today is the appropriateness of the petitioned for bargaining unit, specifically, whether the bargaining unit described in the petition is the appropriate bargaining unit or whether the bargaining unit described in either of the collective bargaining agreements is the appropriate bargaining unit.

(*Board Ex. 2 ¶ 10.*) In spite of the foregoing stipulation, Local 150 nonetheless advanced two arguments in its post-hearing brief in addition to its argument as to the appropriate collective bargaining unit, one of which advocated a formula for determining the voting eligibility of members of the collective bargaining unit in direct contravention of Daniel Construction Co.[5] (*IUOE Local 150's Post-Hearing Br. at 12-15.*) Local 150 argued that "no Top Grade employees can meet the first *Steiny-Daniel* alternative as having been 'employed a total of 30 working days or more within the 12 months preceding election eligibility'...[n]or can any Top Grade employees meet the first condition of the second *Steiny-Daniel* alternative of having 'had some employment in the 12 months preceding the

[5] The second additional argument advanced by Local 150 contended that the Regional Director should dismiss the Petition on the grounds that there is no certified or recognized existing bargaining unit. (*IUOE Local 150's Post-Hearing Br. at 15-16.*) The Regional Director did not base its Decision and Order Dismissing Petition on this argument. (*Decision and Order Dismissing Pet.*)

election eligibility date'" because no Top Grade employees worked "in the Local 150 bargaining units" in the 12 month period prior to any relevant date. (*Id. at 13.*) This argument advanced by Local 150 in its post-hearing brief implicates an issue fundamentally different than that stipulated to by Local 150 as the sole issue for the Hearing, and it was on this argument that the Regional Director based his Decision and Order Dismissing Petition.

Not only does this newly posited argument exceed the scope of the limited issue presented to the Regional Director, it controverts the Daniel Construction Co. formula stipulated to by Local 150 at the Hearing. At the Hearing, Local 150 stipulated to the formula for the determination of voting eligibility of members of the collective bargaining unit found appropriate by the Regional Director as follows:

> 7. The parties agree that the formula for determining the voting eligibility of employees will be that found in Daniel Construction Co., 133 NLRB 264 (1961), meaning that employees in any bargaining unit found appropriate by the Regional Director will be eligible to vote who either (1) were employed a total of 30 working days or more within the 12 months preceding the election eligibility date or (2) had some employment in the 12 months preceding the lection eligibility date and were employed 45 working days or more within the 24 months immediately preceding the election eligibility date.

(*Board Ex. 2* ¶ *7.*) There is no qualification to the employment contemplated by the Daniel Construction Co. language stipulated to by Local 150 – any employee will be eligible to vote if they were employed 30 working days or more in the year preceding the election eligibility date or had some employment in the 12 months preceding the lection eligibility date and were employed 45 working days or more within the 24 months immediately preceding the election eligibility date. (*See id.*) The stipulated to language imposed no requirement that the employee have been employed "in the Local 150 bargaining unit" the requisite days of work, as now advocated by Local 150. (*Id.*) The language required only that the employee

have been employed the requisite days of work. (*Id.*)The Regional Director nonetheless considered and ruled based on Local 150's argument regarding the voting eligibility formula. (*Decision and Order Dismissing Pet.*)

The Board should grant Top Grade's request for review to adjudicate the propriety of the Regional Director's consideration of and ruling upon an issue beyond the limited issue stipulated to by Local 150 as the issue for Hearing.[6]

b. The Regional Director conflated the determination of eligible voters under Daniel Construction Co. with geographic limitations ostensibly relevant to the determination of the members of the collective bargaining unit but in no way relevant to the application of Daniel Construction Co.

Substantial questions of law and policy are also raised by the absence of officially reported Board precedent to support the Regional Director's conflation of the determination of eligible voters under Daniel Construction Co. with geographic limitations ostensibly relevant only to the determination of the appropriate collective bargaining unit. At the Hearing, the parties stipulated that "the formula for determining the voting eligibility of employees will be that found in Daniel Construction Co., 133 NLRB 264 (1961)..." (*Board Ex. 2* ¶ *7.*) Under this formula, the parties stipulated that:

> "employees in any bargaining unit found appropriate by the Regional Director will be eligible to vote who either (1) were employed a total of 30 working days or more within the 12 months preceding the election eligibility date or (2) had some employment in the 12 months preceding the election eligibility date and were employed 45 working days or more within the 24 months immediately preceding the election eligibility date."

(*Id.*) The Associate General Counsel of the NLRB has explained Daniel Construction Co.:

[6] The Board should alternatively grant Top Grade's request for review and determine that Local 150 waived its argument regarding the voting eligibility formula and that Local 150 is estopped from now advocating a voting eligibility formula different from that stipulated to by Local 150 at the Hearing. See R.P.C., Inc., 311 NLRB 232, 233 (1993) ("[A] party that, in obtaining a benefit, engages in conduct that causes a second party to reasonably rely on the 'truth of certain facts' that are assumed may not controvert those facts later to the prejudice of the second party.")

> ...In Daniel Construction, supra, the issue was what criteria should be applied in a representation case in determining whether construction industry employees who admittedly are members of a bargaining unit should be permitted to vote in a representation election where the employees, because of the intermittent nature of employment in the industry, were not working for an employer on the eligibility date but had previously been employed by the employer...

Subject: Ohio Construction & Engineering Co., 1983 WL 29301 (N.L.R.B.G.C.).[7] Contrary to Daniel Construction Co., the formula adopted by the Regional Director conflates the determination of which employees are members of the collective bargaining unit with which of those members of the collective bargaining unit should be eligible to vote.

The decision of the Regional Director unjustifiably reads language into the Daniel Construction Co. formula to require the employees to not only have been employed by Top Grade for a certain quantity of work in a certain period of time but to have been employed by Top Grade within the territorial jurisdiction of Local 150 for a certain quantity of work within a certain period of time. (*See Decision and Order Dismissing Pet.; see also IUOE's Post-Hearing Br. at 12-15.*) There is no support for this additional limiting language in the Daniel Construction Co. formula stipulated to by Local 150, nor does there appear to be any NLRB case law to support the Regional Director's application of the Daniel Construction Co. formula to infer such language. Daniel Construction Co. addresses the intermittent nature of employment in the construction industry by permitting members of the collective bargaining unit to vote in a representation election even if such member is not working for the employer on the election eligibility date so long as the member performed a certain quantity of work for the employer within a certain period of time preceding the election eligibility

[7] Top Grade has provided the NLRB with an employee contact list which lists the seven operators employed by Top Grade: Petitioner, Jeff Bradley, Jeff Frasher, Jordan Kirsch, Todd Kluesner, Tony Kramer, and Jim Seymour. (*Id. at 37:1-14, 39:12-17.*) It is uncontroverted that each of the seven operators has been employed by Top Grade a total of 30 working days or more within the last 12 months. (*Id. at 39:18-20.*) As a result, each of the seven operators is eligible to vote if the Board determines that they are in the collective bargaining unit found appropriate.

date. See Daniel Construction Co., 133 NLRB 264 (1961); see also Subject: Ohio Construction & Engineering Co., 1983 WL 29301 (N.L.R.B.G.C.). Daniel Construction Co. does **not** address nor license an attempt by a putatively incumbent union to prevent members of the collective bargaining unit from voting in a representation election to decertify that union on the grounds that such members, although employed by the employer the required number of days in the relevant period of time and members of the collective bargaining unit, have not worked in the territorial jurisdiction of the union a certain number of days in the relevant period of time.

The Board should grant Top Grade's request for review to adjudicate the propriety of the Regional Director's application of Daniel Construction Co. advanced by Local 150 in its post-hearing brief.

c. The Regional Director erroneously concluded that the relationship between Top Grade and Local 150 is governed by Section 9(a) rather than 8(f) of the Act.

Substantial questions of law and policy are raised by the Regional Director's departure from officially reported Board precedent when the Regional Director determined the relationship between Top Grade and Local 150 is governed by Section 9(a) rather than 8(f) of the Act. Section 8(f) permits unions and employers in the construction industry to enter into collective bargaining agreements without the union's having established that it has the support of a majority of the employees in the covered unit. 29 U.S.C § 158(f). Agreements under Section 8(f) are unique to the construction industry and were born of the temporary, transitory, and seasonal nature of employment in that industry. Iron Workers Tri-State Welfare Plant v. Carter Const., Inc., 530 F. Supp. 2d 1021, 1028 (N.D. Ill. 2008) (citing Jim McNeff, Inc. v. Todd, 461 U.S. 260, 266 (1983)). In the instant case, there were

three agreements between Local 150 and Top Grade, each of which is a Section 8(f) agreement.

As an initial matter, the relationship between Top Grade and Local 150 is not governed by the master agreements on which Local 150 attempts to justify deviation from the petitioned for collective bargaining agreement but rather on three unwritten agreements between Top Grade and Local 150. Each time Top Grade performed work within the jurisdiction of Local 150, its obligations changed from those previously imposed by Local 150, and those obligations never coincided with the obligations set forth in the 2005 Memorandum of Agreement, the 2007 Memorandum of Agreement, or any master agreement purportedly adopted thereby. In 2005, Top Grade performed work under one unwritten agreement with Local 150. In 2007, Top Grade performed work pursuant to a different unwritten agreement with Local 150. In 2009, Top Grade performed work under a third unwritten agreement with Local 150. There is no evidence of any agreement between Top Grade and Local 150 after Top Grade completed its work in Clinton, Iowa, in 2010, which applied to the work that Top Grade performed in Low Moor, Iowa, from 2010 through 2012.

When Top Grade performed operating work within the territorial jurisdiction of Local 150 in 2005, the relationship between Top Grade and Local 150 was not governed by the 2005 Memorandum of Agreement or the 2005 Q.C. Builders Master Agreement. Top Grade did not have any financial obligation to Local 150 for the work performed in 2005. (*Hearing Transcript at 29:1-3.*) Although Mr. Seymour signed the 2005 Memorandum of Agreement as Vice President of Top Grade, "[i]t was basically, here, sign to keep working." (*Id. at 36:6.*) In compliance with the collective bargaining agreement in effect with Local

234, Top Grade made contributions on each of its operators to Local 234. (*Id. at 34:10-12.*) Top Grade did not make any benefit contributions to Local 150, and Top Grade did not pay any union dues to Local 150. (*Id. at 33:6-10.*) For the work performed by Top Grade in 2005, no money actually went from Top Grade to Local 150. (*Id. at 33:11-13.*)

Similarly, when Top Grade performed operating work within the territorial jurisdiction of Local 150 in 2007, the relationship between Top Grade and Local 150 was not governed by the 2007 Memorandum of Agreement or the 2006 Heavy and Highway Master Agreement. Top Grade had only a limited financial obligation to Local 150 for the work performed by Top Grade in 2007 – "an administrative due that [Local 150] charged to basically work in their area." (*Hearing Transcript at 29:7-13.*) "[Top Grade] signed the memorandum of agreement in '07 and basically [Local 150] told [it] what to pay as far as an administrative due for working in their territory." (*Id. at 29:14-18.*) Top Grade then paid the administrative dues to Local 150. (*Id. at 34:13-15.*) Top Grade did not make any contributions, union dues, or other payments to Local 150. (*Id. at 33:14-17.*) Top Grade continued to honor its collective bargaining agreement with Local 234 and made payment to Local 234 for all other contributions required. (*Id. at 34:16-18.*)

When Top Grade performed operating work in Clinton, Iowa, from 2009 to 2010, the relationship between Top Grade and Local 150 was again not governed by the 2007 Memorandum of Agreement or the 2006 Heavy and Highway Master Agreement. Local 150 again required Top Grade to pay administrative dues to Local 150 for two of Top Grade's operators who were working on the job, as with the second Section 8(f) agreement between Top Grade and Local 150, but this time Local 150 required Top Grade to hire one of Local 150's members for the job. (*Hearing Transcript at 30:10-16.*) Top Grade made health

and welfare payments to Local 150 for the one operator hired at the direction of Local 150. (*Id. at 34:2-6.*) For the two operators who were employees of Top Grade, Top Grade paid only administrative dues to Local 150. (*Id. at 24:7-9.*) Top Grade again complied with its collective bargaining agreement with Local 234 and made payment to Local 234 for all other contributions required on its seven operators. (*Id. at 34:19-21.*)

Finally, when Top Grade performed operating work at Low Moor, Iowa, between 2010 and 2012, the relationship between Top Grade and Local 150 was not governed by the 2007 Memorandum of Agreement or the 2010 Heavy and Highway Master Agreement. There is no evidence that either Top Grade or Local 150 performed any obligations under the 2010 Heavy and Highway Master Agreement. Accordingly, neither the memorandums of agreement nor the master agreements govern the relationship between Top Grade and Local 150.[8]

Contrary to the summary conclusion of the Regional Director, Top Grade and Local 150 did not enter into a Section 9(a) relationship by virtue of the boiler plate language in the 2005 Memorandum of Agreement and 2007 Memorandum of Agreement indicating that "the EMPLOYER was presented and reviewed valid written evidence of the UNION's exclusive designation as bargaining representative by the majority of appropriate bargaining unit employees of EMPLOYER." See NLRB Office of the General Counsel, Advice Memorandum, February 3, 2014 (opining that "despite the wording of the parties' agreement, which meets the Board's Central Illinois requirements for establishing a Section

[8] The Regional Director avoided the question regarding the effect of the unwritten agreements and concluded that the unwritten agreements, if they existed, did not affect the recognized unit set forth in the master agreements. (*Decision and Order Dismissing Pet. at 5.*) One unaddressed import of the unwritten agreements between Local 150 and Top Grade is that the relationship between Top Grade and Local 150 is governed by Section 8(f) of the Act rather than Section 9(a).

9(a) relationship, there is conclusive extrinsic evidence that the Union did not have majority support at the time that the Employer extended recognition" and that "[i]n these circumstances it would not effectuate the purposes and policies of the Act to conclude the parties had entered into a Section 9(a) relationship.") In this case, there is conclusive extrinsic evidence that Local 150 did not have such majority support at the time of execution of the 2005 Memorandum of Agreement or the 2007 Memorandum of Agreement because there is uncontroverted testimony that Top Grade was not offered anything to read when Mr. Seymour signed the 2005 Memorandum of Agreement or the 2007 Memorandum of Agreement.[9] (*See Hearing Transcript at 35:15-36:4.*)

Furthermore, there would have been no reason for Local 150 to require Top Grade to enter into the 2007 Memorandum of Agreement if the 2005 Memorandum of Agreement created a Section 9(a) relationship and the 2005 Q.C. Builders Master Agreement, or any subsequently adopted master agreement, were thus in effect. Unlike Section 9(a), the employer does not have an obligation to bargain with the union for a successor contract under Section 8(f), and an employer must take some affirmative act that would reasonably lead the union to believe that the employer intended to be bound by a successor contract of an employer association, such as the Q.C. Builders Association or Heavy and Highway Association. Iron Workers Tri-State Welfare Plant v. Carter Const., Inc., 530 F. Supp. 2d

[9] This uncontroverted testimony is corroborated by Employer Exhibit 6. To the extent Local 150 contends the bargaining unit consists not of all Top Grade operators but only those operators working in the territorial jurisdiction of Local 150, which contention the Regional Director agreed, there is uncontroverted evidence that there were not any such operators working in the territorial jurisdiction of Local 150 at the time the 2007 Memorandum of Agreement was executed. (*Employer Ex. 6.*) Because there were no such operators at the time the 2007 Memorandum of Agreement was executed, there were no members of the collective bargaining unit at the time the 2007 Memorandum of Agreement was executed. Because there were no members of the collective bargaining unit at the time the 2007 Memorandum of Agreement was executed, Top Grade could not have been presented and reviewed evidence of Local 150's exclusive designation as bargaining representative by a majority of bargaining unit employees. As a result, the 2007 Memorandum of Agreement did not create a Section 9(a) relationship. If it did, the bargaining unit necessarily consists of all Top Grade operators, as petitioned for by Petitioner, not just those performing operating work within the jurisdiction of Local 150.

1021, 1029-30 (N.D. Ill. 2008) (citing James Luterbach Const. Co., Inc., 315 NLRB 976 (1994). If the 2005 Memorandum of Agreement had created a Section 9(a) relationship between Top Grade and Local 150, Top Grade would have been bound by the successor contract to the 2005 Q.C. Builders Master Agreement when it performed work in the territory of Local 150 in 2007. (*See Employer Ex. 1.*) However, Local 150 required Top Grade to sign an additional memorandum of agreement and then comply with obligations completely independent and distinct from those obligations set forth in the master agreements adopted by the 2005 Memorandum of Agreement. (*See Employer Ex. 2.*) As a result, the parties' actions demonstrate that the relationship between Top Grade and Local 150 was governed by a series of contracts under Section 8(f) of the Act.

The absence of any agreement between Top Grade and Local 150 for the work Top Grade performed in Low Moor further demonstrates that the nature of the relationship between Local 150 and Top Grade is governed by Section 8(f). As set forth above, under Section 8(f), an employer must take some affirmative act that would reasonably lead the union to believe that the employer intended to be bound by a successor contract of an employer association. The 2006 Heavy and Highway Master Agreement terminated on May 31, 2010. (*Employer Ex. 7.*) Furthermore, the Section 8(f) agreement between Top Grade and Local 150 terminated upon Top Grade's completion of its work in Clinton, Iowa, in 2010. As a result, by the time Top Grade subsequently performed work in Low Moor, Iowa, Top Grade was not bound by either the unwritten Section 8(f) agreement between Top Grade and Local 150 for the work in Clinton, Iowa, or any master agreement purportedly adopted by the 2007 Memorandum of Agreement, as such master agreement terminated on May 31, 2010. The lack of any contractual relationship between Top Grade and Local 150 for the

work performed by Top Grade in Low Moor, Iowa, in 2010, 2011, and 2012 under Section 8(f) and the parties' lack of relationship for work subsequently performed in Low Moor, Iowa, further demonstrates the parties' intent and understanding that their relationship was governed not by Section 9(a) but rather Section 8(f) of the Act.

Based on the foregoing, it would not effectuate the purposes and policies of the Act to conclude the parties had entered into a Section 9(a) relationship. Top Grade and Local 150 entered into a series of unwritten agreements pursuant to Section 8(f) of the Act, those agreements were not renewed upon their termination, and there is no agreement currently in existence between Local 150 and Top Grade. The Board should grant Top Grade's request for review to adjudicate the propriety of the Regional Director's determination that the relationship between Top Grade and Local 150 is governed by Section 9(a), and, to the extent the Board determines the relationship is governed by a series of agreements pursuant to Section 8(f), the Board should dismiss the Petition not on the grounds that there are no eligible voters for a representation election but rather solely on the grounds that there is no agreement in effect between Top Grade and Local 150 and Local 150 is not the currently recognized or certified bargaining representative of any of Top Grade's operators.

d. The Regional Director incorrectly determined that the jurisdiction statements in the master agreements set forth the appropriate collective bargaining units for purposes of the representation election.

Substantial questions of law and policy are also raised by the Regional Director's departure from officially reported Board precedent in his determination that the jurisdiction statements in the master agreements set forth the appropriate bargaining units.[10] The

[10] Top Grade states that under a proper application of Daniel Construction Co., as stipulated to by Local 150 at the Hearing, the petition should not have been dismissed, irrespective of the propriety of the petitioned for collective bargaining unit. Under the petitioned for collective bargaining unit, the unit would consist of seven Top Grade operators, each of whom would be eligible to vote in the representation election under Daniel Construction Co.

National Labor Relations Board has broad discretion in determining the appropriate bargaining unit in order to assure employees the fullest freedom to exercise their rights guaranteed by the National Labor Relations Act:

> The primary responsibility for determining the appropriateness of a unit for collective bargaining rests with the Board. It is given broad discretion in determining bargaining units to assure to employees the fullest freedom in exercising the rights guaranteed by (the Act). The Board is not required to select the most appropriate bargaining unit in a given factual situation; it need choose only an appropriate unit within the range of appropriate units. It follows that Board unit determinations are rarely to be disturbed.

N.L.R.B. v. Chicago Health & Tennis Clubs, Inc., 567 F.2d 331, 334-35 (7th Cir. 1977) (internal citations and quotations omitted).

> Collective-bargaining agreements are to be given a reasonable construction, not one which results in injustice and absurdity. They are *sui generis* and are not to be treated as orthodox contracts, but their implications must be determined from the connection in which it appears. To hold, therefore, that the agreement to arbitrate should be negated because Local 229 was not a party to the Respondent Company's and Respondent Local 869's agreement or that Local 869 is not a party to the contract executed by the Company and Local 229, is a restrictive interpretation which would frustrate rather than serve the purpose of the Act; it would disregard the realities of the situation here presented, favor form over substance, place a premium upon a mechanistic approach and disregard the compelling equitable considerations pertaining to the predicament of the three employees involved herein.

Woodlawn Farm Dairy Co., Div. of Dolly Madison Foods, Inc., 162 NLRB 48, 72 (1966) (internal citations omitted). The Regional Director's decision relies on a restrictive interpretation of the record which disregards the realities of the situation presented and frustrates the purposes of the Act, favors form over substance, places a premium upon a mechanistic approach and disregards the compelling equitable considerations pertaining to the predicament of the Top Grade operators involved herein. Neither the memorandums of

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Because each of Top Grade's operators was employed by Top Grade a sufficient number of days to satisfy Daniel Construction Co., under any other bargaining unit, the number of eligible voters would coincide with the number of operators in the appropriate collective bargaining unit, and an election would be proper.

agreement nor the master agreements govern the relationship between Top Grade and Local 150, and any language therein that purports to recognize a collective bargaining unit different from that petitioned for should not have been a basis on which to deviate from the petitioned for collective bargaining unit of all Top Grade operators.

Even if the nature of the relationship between Top Grade and Local 150 were governed by the alleged written agreements, the Board should nonetheless adopt the collective bargaining unit defined by Petitioner because the petitioned for collective bargaining unit is consistent with the collective bargaining unit purportedly recognized by the 2005 Memorandum of Agreement and the 2007 Memorandum of Agreement. Petitioner defines the collective bargaining unit as "[a]ll full-time and regular part-time operators employed by the Employer from its Farley, IA facility[,]" which includes each of the seven operating employees of Top Grade. (*Board Ex. 1.*) The 2005 Memorandum of Agreement and the 2007 Memorandum of Agreement each provides, in relevant part:

> 1. The EMPLOYER recognizes the UNION as the sole and exclusive bargaining representative for and on behalf of the employees of the EMPLOYER within the territorial and occupational jurisdiction of the UNION. Prior to recognition, the EMPLOYER was presented and reviewed valid written evidence of the UNION's exclusive designation as bargaining representative by the majority of appropriate bargaining unit employees of EMPLOYER.

(*Employer Ex. 1 ¶ 1; Employer Ex. 2 ¶ 1.*) As set forth by the first clause of the first sentence of the above recognition language, Top Grade recognized Local 150 as the exclusive bargaining representative for and on behalf of the employees of Top Grade. (*Id.*) The second clause of the first sentence then limits the first clause by adding the language, "within the territorial and occupational jurisdiction of [Local 150]." (*Id.*) The required interpretation of this language compels the conclusion that the language modifies Top Grade's recognition of

Local 150 rather than the employees of Top Grade for whom such recognition was made. (*Id.*) As a result, the collective bargaining unit defined by Petitioner is consistent with the collective bargaining unit purportedly recognized by the memorandums of agreement.

Under a straightforward reading of the recognition language, Top Grade recognized Local 150 as the exclusive bargaining representative for and on behalf of the employees of Top Grade, but Top Grade only recognized Local 150 as such exclusive bargaining representative "within the territorial and occupational jurisdiction of [Local 150]." (*Id.*) In other words, the limitation in the second clause of the first section of the recognition language modifies Top Grade's recognition of Local 150 ("The EMPLOYER recognizes the UNION as the sole and exclusive bargaining representative") rather than the employees for and on behalf of whom the recognition is made ("for an on behalf of the employees of the EMPLOYER"). Taking away the unmodified language and leaving in the modified language, the sentence reads: "The EMPLOYER recognizes the UNION as the sole and exclusive bargaining representative...within the territorial and occupational jurisdiction of the UNION." (*Id.*)

This reading makes sense and is most compelling given the circumstances surrounding the adoption of the memorandums of agreement. Top Grade could not recognize Local 150 as the sole and exclusive bargaining representative outside of the territorial jurisdiction of Local 150, as Top Grade had already recognized Local 234 as the sole and exclusive bargaining representative for operators in its territorial jurisdiction. Thus, the territorial limitation <u>has to</u> modify the recognition given by Top Grade to Local 150 not the employees for whom the recognition was given. Otherwise, Top Grade could not have made such recognition based on its prior recognition of Local 234.

This interpretation is also consistent with the intent of Top Grade and Local 150 that each of the seven Top Grade operators be covered by the agreement between Top Grade and Local 150 when that operator performs work in the territorial jurisdiction of Local 150. It cannot be disputed that, had any one of the seven operators performed work within the territorial jurisdiction of Local 150, Local 150 would have considered those operators subject to the agreement between Top Grade and Local 150 – whatever form that agreement had taken. In fact, Local 150 compelled a representation hearing dedicated in part to determining which of Top Grade's seven operators performed work within the territorial jurisdiction of Local 150. This would only make sense if Local 150 intended each of Top Grade's operators to be subject to the master agreements purportedly adopted by the memorandums of agreement signed by Top Grade and this would only make sense if Local 150 considered each of Top Grade's operators to continue to be subject to the 2010 Q.C. Builders Master Agreement and 2010 Heavy and Highway Master Agreement. Based on the language of the memorandums of agreement as well as the intent of the parties, the appropriate collective bargaining unit consists of each of the seven Top Grade operators.[11]

[11] The problem with the Regional Director's conception of the collective bargaining unit is evident in the event an election of such unit were conducted and Local 150 decertified. See Woodlawn Farm Dairy Co., Div. of Dolly Madison Foods, Inc., 162 NLRB 48, 72 (1966) ("Collective-bargaining agreements are to be given a reasonable construction..." rather than "a restrictive interpretation which would frustrate rather than serve the purpose of the Act" and "would disregard the realities of the situation here presented...") The scope of the recognition provided to Local 150 by the memorandums of agreement exceeds the scope of the collective bargaining unit adopted by the Regional Director based on its narrow interpretation of the master agreements. Based on the Regional Director's interpretation of the collective bargaining unit, operating work within District Eight of Local 150 was required to be a member of the collective bargaining unit. However, the memorandums of agreement purportedly recognized Local 150 as the representative of Top Grade's operators in the territorial jurisdiction of Local 150, not just District 8 of Local 150. And, pursuant to those memorandums of agreement, the memorandums of agreement continue in full force and effect following the termination of any master agreement adopted therein. Thus, if the collective bargaining unit for purposes of the election is only District 8 of Local 150, even if Local 150 were decertified through the election, Local 150 would only be decertified as the representative of Top Grade's operators in District 8 of Local 150. Local 150 would still be purportedly recognized as the representative of Top Grade's operators in Districts 1 through 7 of Local 150. That continued recognition by Top Grade and representation by Local 150 is exactly what the petitioning operators of Top Grade seek to avoid. Petitioner has petitioned for a

e. The Regional Director incorrectly interpreted the jurisdiction statements in the master agreements to impose a geographic limitation on the collective bargaining unit narrower than that purportedly recognized by Top Grade in the memorandums of agreement.

Substantial questions of law and policy are raised by the Regional Director's departure from officially reported Board precedent in his interpretation of the jurisdiction statements in the master agreements. Collective-bargaining agreements are to be given a reasonable construction, not one which results in injustice and absurdity. Woodlawn Farm Dairy Co., Div. of Dolly Madison Foods, Inc., 162 NLRB 48, 72 (1966). The Board is not required to select the most appropriate bargaining unit in a given factual situation; it need choose only an appropriate unit within the range of appropriate units. N.L.R.B. v. Chicago Health & Tennis Clubs, Inc., 567 F.2d 331, 334-35 (7th Cir. 1977) (internal citations and quotations omitted). The recognition statements in the master agreements can be read in a way that is consistent with the memorandums of agreement and the petitioned for collective bargaining unit. The recognition statement of the 2010 Heavy and Highway Master Agreement includes all operating employees of Top Grade, and provides:

> **SECTION 1.1 – RECOGNITION**
> The Contractor recognizes the Union as the sole exclusive collective bargaining agency for those employees of the Contractor engaged in the operation and maintenance of all hoisting and portable machines and engines used in all open and heavy construction work whether operated by steam, electricity, gasoline, diesel, compressed air or hydraulic power, including those machines and similar machines as listed in the wage classifications included herein, used by the Contractor at asphalt, concrete mixing plants, construction materials recycling sites and in the construction, alteration or repair of bridges, streets, alleys, highways, airports, water mains, pipe lines (distribution systems), railroads, and **farm improvement work. In addition, work pertaining to locks and dams, levees, docks and drainage soil conservation which relates to** the Mississippi River and all tributaries from the Northern boundary of Clinton County in Iowa to the southern boundary

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decertification election to remove this recognition of and representation by Local 150. The petitioned for election of the petitioned for collective bargaining unit is appropriate to do so.

> of Lee County in Iowa, including Lake Odessa, and on such work, or work which pertains thereto, in the following counties: Scott in Iowa, Rock Island and Mercer County, the west half of Henry and the following described portion of Whiteside County in Illinois; which shall include all territory in the west portion of Whiteside County from the fifth (5th) sectional line east of Morrison, Illinois, running directly north and south.

(*Union Ex. 3 at 1.*)(emphasis supplied). The only geographic limitation in this language is set forth in the second sentence of this provision related to work pertaining to locks and dams, levees, docks and drainage soil conservation. (*Id.*) However, operators performing any of the work set forth in the first sentence of this section are subject to representation by Local 150, without regard to the location of any such work. (*See id.*) This is consistent with the petitioned for collective bargaining unit of all operators of Top Grade.

The proper interpretation of this language is further understood through examination of its predecessor, the 2006 Heavy and Highway Master Agreement. The recognition clause set forth in Article I of the 2006 Heavy and Highway Master Agreement provided:

> **SECTION 1.** The Contractor recognizes the Union as the sole exclusive collective bargaining agency for those employees of the Contractor engaged in the operation and maintenance of all hoisting and portable machines and engines used in all open and heavy construction work whether operated by steam, electricity, gasoline, diesel, compressed air or hydraulic power, including those machines and similar machines as listed in the wage classifications included herein, used by the Contractor at asphalt or concrete mixing plants, and in the construction, alteration or repair of bridges, streets, alleys, highways, airports, water mains, pipe lines (distribution systems), railroads, **locks and dams, levees, and docks and on drainage soil conservation, farm improvement work, or work pertaining thereto which relates to** the Mississippi River from the Northern boundary of Clinton County in Iowa to the southern boundary of Lee County in Iowa, and on such work, or work which pertains thereto, in the following counties: Scott in Iowa, Rock Island and Mercy County, the west half of Henry and the following described portion of Whiteside County in Illinois; which shall include all territory in the west portion of Whiteside County from the fifth (5th) sectional line east of Morrison, Illinois, running directly north and south.

(*Employer Ex. 7 at 1.*)(emphasis supplied). A review of both versions demonstrates that the drafters of the 2010 Heavy and Highway Master Agreement separated the recognition clause into two sentences, while the drafters of the 2006 Heavy and Highway Master Agreement attempted to use just one sentence, without numerous commas and qualifiers.

This separation of the recognition clause from one to two sentences did one of two things, either of which demonstrates that the appropriate collective bargaining unit is broader than that advocated by Local 150. First, the change in language may have clarified which work was subject to territorial limitation and which work was not subject to the territorial limitation because of the confusion and/or ambiguity caused by the numerous commas and qualifiers in the 2006 version. In this case, the intent of the change would be to leave the 2006 version and the 2010 version substantively the same but clarifying that each Top Grade operator performing any of the work set forth in the first sentence of the 2010 version is subject to representation by Local 150, without regard to the location of any such work. In the alternative, the intent of the change in language may have been to substantively change the recognition provided. Under this interpretation of the changed language, the entirety of the 2006 version would have been subject to the territorial limitation but the 2010 version expanded the scope of recognition by splitting the recognition statement into two sentences with only the work set forth in the second sentence subject to a territorial limitation. Such a change could not have occurred unless the 2007 Memorandum of Agreement already recognized Local 150 as the bargaining representative for a broader group of operators than that purportedly recognized by the 2006 Heavy and Highway Master Agreement.[12] Under either interpretation, Local 150 is recognized as the exclusive

[12] The 2006 Heavy and Highway Master Agreement is functionally the same as the 2010 Q.C. Builders Master Agreement. As set forth above, the memorandums of agreement necessarily recognized Local 150 broader

bargaining representative for some of the Top Grade operators' work, without territorial limitation, and the memorandums of agreement necessarily make at least as broad of recognition.[13]

2. There are compelling reasons for reconsideration of an important Board rule or policy because the Regional Director's Decision deprives Top Grade's operators of their rights under Section VII of the NLRA.

The Regional Director's determinations on the previously discussed issues work to deprive rather than further the Section VII rights of Top Grade's operators. To the extent the Regional Director's determinations were correct interpretations of Board rules and/or policies, there are compelling reasons for reconsideration of such Board rules and/or policies. As set forth above, collective bargaining agreements are to be given a reasonable construction, not one which results in injustice and absurdity. Woodlawn Farm Dairy Co., Div. of Dolly Madison Foods, Inc., 162 NLRB 48, 72 (1966).Under the Regional Director's decision, there are ostensibly members of the collective bargaining unit who are subject to representative by Local 150; however, none of those members are eligible to vote in a representation election to opine on that continued representation. At least three of the seven have requested an election for the purposes of decertifying Local 150 as their representative. In order to maintain its putative recognition of the Top Grade operators, Local 150 nonetheless seeks to deprive those same operators of their Section VII rights to vote in a representation election. To the extent the Regional Director's decision correctly applied Board rules and/or policies, a contention with which Top Grade disagrees, the Regional

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than the 2006 Heavy and Highway Master Agreement, and thus the 2010 Q.C. Builders Master Agreement. Local 150's narrow collective bargaining unit would be inappropriate.

[13] In the alternative, the recognition statements of the master agreements are ambiguous and do not justify deviation from the petitioned for collective bargaining unit.

Director has disregarded compelling equitable considerations pertaining to the predicament of the Top Grade employees involved. There are ample interpretations of the realities of the situation here presented that would serve rather than frustrate the purposes of the Act, and the Board should grant Top Grade's request for review to reconsider the Regional Director's decision.

V. CONCLUSION

WHEREFORE, Top Grade Excavating, Inc. respectfully requests that the Board grant Top Grade Excavating, Inc.'s request for review of the Decision and Order Dismissing Petition entered by Regional Director Rik Lineback on May 5, 2014, and, upon such review, enter an order reversing the decision of the Regional Director and directing the petitioned for election based on the petitioned for collective bargaining unit. In the alternative, Top Grade Excavating, Inc. respectfully requests that the Board grant Top Grade Excavating, Inc.'s request for review of the Decision and Order Dismissing Petition entered by Regional Director Rik Lineback on May 5, 2014, and, upon such review, enter an order reversing the decision of the Regional Director and dismissing the petition solely on the grounds that there is no agreement in effect between Top Grade Excavating, Inc. and the International Union of Operating Engineers, Local No. 150 and the International Union of Operating Engineers, Local No. 150 is not the sole and exclusive bargaining representative of any of the employees of Top Grade Excavating, Inc. and for such other relief as the Board deems just and appropriate under the circumstances.

Date: May 19, 2014

Respectfully submitted,

/s/ Robert E. Konchar

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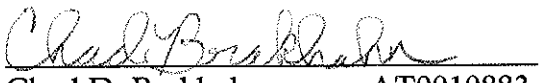

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on May 19, 2014, he caused the foregoing to be electronically filed with:

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In addition, the undersigned certifies that on May 19, 2014, he caused the foregoing to be served upon the following:

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