

**UNITED STATES OF AMERICA  
THE NATIONAL LABOR RELATIONS BOARD  
REGION 8**

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INTERNATIONAL UNION OF OPERATING ENGINEERS,  
LOCAL 18

*Charged Party; and*

NERONE & SONS, INC.  
R.G. SMITH COMPANY, INC.

Case No. 08-CD-135243

Case No. 08-CD-143412

*Charging Parties; and*

LABORERS' INTERNATIONAL UNION OF  
NORTH AMERICA, LOCAL 310

*Party-in-Interest*

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LABORERS' INTERNATIONAL UNION OF  
NORTH AMERICA, LOCAL 310

*Charged Party; and*

NERONE & SONS, INC.  
R.G. SMITH COMPANY, INC.

Case No. 08-CD-135244

Case No. 08-CD-143415

*Charging Parties; and*

INTERNATIONAL UNION OF OPERATING ENGINEERS,  
LOCAL 18

*Party-in-Interest*

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**INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 18'S  
MOTION TO QUASH**

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Now comes the International Union of Operating Engineers, Local 18, by and through counsel, and hereby moves to quash the Regional Director's February 12, 2015 Order and Notice of Hearing issued in the above-captioned matter. A Brief in Support of this Motion is attached hereto and incorporated herein by reference.

Respectfully Submitted,

*/s/ Timothy R. Fadel*

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## **BRIEF IN SUPPORT**

### **I. Introduction**

This matter is set for hearing on March 26, 2015, conducted under the provisions of Section 10(k) of the National Labor Relations Act (“Act”). The hearing will be held pursuant to Region 8’s investigation of unfair labor practice (“ULP”) charges filed by Nerone & Sons, Inc. (“Nerone”) and R.G. Smith Company, Inc. (“R.G. Smith”), in which it was alleged that both the Laborers’ International Union of North America, Local 310 (“LIUNA 310”) and the International Union of Operating Engineers, Local 18 (“Local 18” or “Union”) had violated Section 8(b)(4)(D) of the Act by engaging in proscribed conduct in order to force the Employers to assign work to the unions’ respective members.

However, the February 12, 2015 Order and Notice of Hearing for this matter should be quashed on two grounds. First, Local 18’s substantive and procedural due process rights were critically abridged by the February 12 Order and Notice of Hearing. Specifically, the Regional Director acted without jurisdiction under Section 10(b) of the Act by originating a Order and Notice upon his own initiative that fails to afford Local 18 appropriate procedural due process for the purpose of presenting its arguments in the present 10(k) hearing. Second, there is no reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated because Local 18’s actions in filing grievances against the employers in this matter constitute are lawful attempts to protect and preserve the work traditionally, historically, consistently, and continuously performed by Local 18 members. Accordingly, for all the foregoing reasons, the Employers’ allegations are not amenable to resolution under Section 10(k) of the Act.

### **II. Statement of the Facts**

#### A. Nerone

Nerone is an industrial contractor based in Cleveland, Ohio, and primarily operates throughout Northeast Ohio. Nerone is a signatory to the current CEA Agreement, and accordingly enjoys the benefits of the bargain contained therein, including, but not limited to the obtainment of operating engineers via usage of the Union's referral system. On or about July 30, 2014, Local 18 documented an instance wherein Nerone elected to assign construction equipment properly within Local 18's contractually mandated craft jurisdiction to someone other than a Local 18 member. Specifically, a Local 18 representative was visiting Nerone's jobsite at the Hilton Project in downtown Cleveland, Ohio, and documented an instance wherein Nerone assigned the operation of a skid steer to someone other than an operating engineer. Pursuant to the provisions contained within the CEA Agreement, Local 18 sought to preserve its members' work by filing a work preservation grievance. However, after nearly a month of attempts to resolve the matter, Nerone ultimately denied Local 18's grievance and filed the instant ULP charges.

B. R.G. Smith

R.G. Smith is an industrial contractor based in Canton, Ohio, and primarily operates throughout the State of Ohio. R.G. Smith is a signatory to the current AGC Agreement, and accordingly enjoys the benefits of the bargain contained therein, including, but not limited to the obtainment of operating engineers via usage of the Union's referral system. On or about November 3, 2014, Local 18 documented an instance wherein R.G. Smith elected to assign construction equipment properly within Local 18's contractually mandated craft jurisdiction to someone other than a Local 18 member. Specifically, a Local 18 representative was visiting a R.G. Smith jobsite at the Foltz Industrial Parkway project in Strongsville, Ohio, and documented an instance wherein R.G. Smith assigned the operation of a forklift to someone other than an

operating engineer. Pursuant to the provisions contained within the AGC Agreement, Local 18 sought to preserve its members' work by filing a work preservation grievance. However, after nearly two months of attempts to resolve the matter, R.G. Smith filed the instant ULP charges.

### **III. Statement of Case**

On August 22, 2014 Nerone filed ULP charges only alleging that Local 18 and LIUNA 310 "engaged [sic] in and induced individuals to engage in a strike or refusal to perform services, and/or threatened, coerced, or restrained the Charging Party, where the object is and was to force or require the Charging Party to assign forklift work and related work to employees who are members of the Charged Party." ("Nerone Case.") The charges did not identify the jobsite nor the scope of the equipment at issue. On October 29, 2014, Nerone filed amended ULP charges which identified the jobsite as the Hilton Project and the equipment at issue as forklifts and skid steers. On October 30, 2014, the Regional Director issued an Order Consolidating Cases and Notice of Hearing, notifying the parties that it was consolidating Nerone's ULP charges against LIUNA 310 and Local L18, as well as exercising its authority under Section 10(k) of the Act to conduct a hearing on November 18, 2014 concerning the jurisdictional dispute alleged in Nerone's ULP charges. The Notice identified the specific work at issue to be "[t]he operation of forklifts, bobcats and/or skidsteer loader with any and all attachments used at the Hilton Hotel construction site in downtown Cleveland, Ohio." Subsequently, the Regional Director issued an Order Rescheduling Hearing on November 12, 2014, hearing date for January 7, 2015.

On December 23, 2014, R.G. Smith filed ULP charges alleging that Local 18 and LIUNA 310 "engaged in and induced individuals to engage in a strike or refusal to perform services, and/or threatened, coerced, or restrained the Charging Party, where the object is and was to force or require the Charging Party to assign forklift work and related work to employees who are

members of the Charged Party[.]” (“R.G. Smith Case.”) The charges identified the jobsite as the Foltz Project, and identified forklifts and skid steers as the equipment at issue.

On December 29, 2014, before the Regional Director, Nerone and LIUNA 310 jointly moved that the hearing in the Nerone Case be postponed indefinitely until it could be consolidated with the R.G. Smith Case. While Local 18 did not oppose this Motion for Postponement and Consolidation, it made clear that its lack of opposition did not constitute an agreement that the Nerone Case should or would be consolidated with the R.G. Smith Case, and further reserved its right to contest any determination by the Region regarding such consolidation. Region 8 acquiesced to the Motion for Postponement and Consolidation on January 5, 2015, but did so in a very particular manner. Rather than indefinitely postponing the hearing until consolidation, the Region issued an Order Rescheduling Hearing for the Nerone Case *only* to February 9, 2015. Further, the Region did *not* consolidate the Nerone and R.G. Smith Cases in that Order.

On the afternoon of January 29, 2015, Local 18 was served with the Region’s Order Further Consolidating Cases and Notice of Hearing. Pursuant to this Order and Notice, a hearing under Section 10(k) in the Nerone and R.G. Smith Cases was scheduled to open on February 9, 2015. In addition to consolidating the Nerone Case and R.G. Smith Case, the Region’s January 29 Order Further Consolidating Cases also greatly expanded upon the scope of the dispute as alleged in the charges filed by Nerone and R.G. Smith. Specifically, pursuant to the Order, the scope of the hearing under Section 10(k) was to include “[w]hether an area-wide award is appropriate, and if so, (1) whether it should only cover similar work done by the Employer-parties to all instant cases or whether it should cover similar work being done by all employers and (2) the geographical scope of the area-wide award.” On February 12, 2015, the Board issued

an Order and Notice of Hearing, rescheduling the instant hearing for March 26, 2015. (“February 12 Order.”)

#### **IV. Law and Analysis**

##### **A. The Regional Director’s February 12 Order Should be Quashed Because Local 18 Was Denied its Substantive and Procedural Due Process Rights.**

The process utilized by the Region in scheduling a hearing in this case is procedurally and substantively flawed. First, in issuing its February 12 Order, the Regional Director acted without jurisdiction under Section 10(b) of the Act by originating a complaint upon his own initiative. Indeed, the broad description of the hearing’s scope encompasses a plethora of factual and legal issues that were not alleged, cited, or related to any of the charges giving rise to the present hearing. Specifically, the Order in this case goes well outside the discreet disputes alleged in the charges filed by R.G. Smith and Nerone to include an amorphous dispute between Local 18 and unknown entities that is cryptically identified as “all employers” performing “similar work.” Second, in addition to impermissibly exceeding the scope of the allegations contained within the underlying charges filed in this matter, the Region’s Order contains insufficient facts to afford Local 18 appropriate substantive and procedural due process for the purpose of presenting its arguments. Indeed, by cryptically identifying the issues to be determined to include a dispute between Local 18 and unknown entities that are mysteriously identified as “all employers” performing “similar work,” the Region’s Order failed to identify, let alone specify, the legal, procedural, and factual issues encompassed within the greatly increased scope of the consolidated hearing. In sum, Region 8’s February 12 Order and Notice of Hearing should be quashed because Local 18 was deprived of its substantive and procedural due process rights.

*1. The February 12 Order Should Be Quashed As The Regional Director Acted Without Jurisdiction Under Section 10(b) of the Act by Originating a Complaint Upon His Own Initiative.*

Section 10(b) of the Act provides: “Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board . . . shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect[.]” This section of the Act has been declared to perform two separate yet equally important functions. *Ross Stores v. NLRB*, 235 F.3d 669, 677 (D.C. Cir.2001) (Randolph, J., concurring).

Section 10(b):

“sets down a condition for the Board’s exercise of jurisdiction,’ namely, that the Board, which here acts through the General Counsel, may investigate and prosecute conduct only in response to the filing of a ‘charge,’ that is, a formal allegation made (by a union, an employer, or an employee) against a union or an employer. Second, § 10(b) ‘functions much like a statute of limitations,’ restricting the proper subject of any complaint issued by the General Counsel to conduct about which a charge was filed within six months of its occurrence.”

*Precision Concrete v. NLRB*, 334 F.3d 88, 90 (D.C. Cir.2003), quoting *Ross Stores*, 235 F.3d at 677. As such, the Board has long conceded that Section 10(b) of the Act “obliges it to await a charge before it may initiate an investigation or issue a complaint.” *G.W. Galloway Co. v. NLRB*, 856 F.2d 275, 278 (D.C. Cir.1988). Section 10(b) therefore circumscribes the Board’s power so that “when the Board ventures outside the strict confines of the charge, it must limit itself to matters sharing a significant factual affiliation with the activity alleged in the charge.” *Id.*, at 280 (citations omitted). *Accord Lotus Suites v. NLRB*, 32 F.3d 588, 591 (D.C. Cir.1994).

In *Redd-I, Inc.*, the Board adopted a three-part test in order to determine whether uncharged allegations contained within a complaint are so closely related as to permit litigation of both sets of allegations before the Board. 290 NLRB 1115, 1118 (1988). While this test was originally developed with the Section 10(b)’s statute of limitations in mind (in that the uncharged

allegations were also untimely) it has been expanded to include any allegations presented by the Board that appear to be factually unrelated to those in the charge. *Precision*, 334 F.3d at 92. *Accord Nickles Bakery of Indiana, Inc.*, 296 NLRB 927, 928 (1989). The touchstone of the *Redd-I* test is whether the charges as described by the Board are similar enough to the ULP charges such that they share a “significant factual affiliation.” *G.W. Galloway Co.*, 835 F.2d at 280. *See also NLRB v. Fant*, 360 U.S. 301, 309, 79 S.Ct. 1179, 3 L.Ed.2d 1243 (1959). Under the *Redd-I, Inc.* test, the Board will look to (1) whether the uncharged allegations involve the same legal theory as the allegations in the charge; (2) whether the uncharged allegations arise from the same factual circumstances or sequence of events as the charged allegations; and (3) whether a respondent would raise similar defenses to both the charged allegations and the uncharged allegations. *Id.* A challenge to the Board’s authority to hear and address allegations not raised by a charge constitutes a direct challenge the Board’s jurisdiction. *Precision Concrete*, 334 F.3d at 91. As such, “it is incumbent upon the Board to establish its authority to act, at least once its jurisdiction has been put in issue.” *Id.* *See Lotus Suites, Inc. v. NLRB*, 32 F.3d at 592 (“Because the Board has failed to (nor could it) establish a sufficient factual connection between the general terms of the charge and the specific allegations of the complaint, the Board’s order must be set aside”). *See also Drug Plastics & Glass Co., Inc. v. NLRB*, 44 F.3d 1017, 1022 (D.C.Cir.1995) (“Where the Board is unable to connect the allegations in its complaint with the charge allegation, we are unable to find that the Board has jurisdiction over the unrelated complaint allegations”). The burden is therefore upon the Board to establish its jurisdiction by demonstrating that the uncharged allegations contained within the February 12 Order involve the same legal theory, arise from the same factual circumstances or sequence of events, and invoke similar defenses as the ULP charges.

The facts presented by this case, however, do not support a finding that the uncharged allegations contained within the Region's February 12 Order are so closely related as to share a significant affiliation with the charges filed by Nerone and R.G. Smith. As to the issues of same legal theory and defenses, the charges filed by Nerone and R.G. Smith specifically allege that a jurisdictional dispute as defined by Section 8(b)(4)(d) is taking place between LIUNA 310 and Local 18 with regard to the operation of forklifts at two specific locations; to wit, the Hilton Project and the Foltz Project. Meanwhile, that portion of the February 12 Order addressing an amorphous dispute between Local 18 and unknown entities that is cryptically identified as "all employers" performing "similar work" utterly fails to identify the specific employers involved or the location of the jobsite where the dispute is taking place. At best, the only relation between the uncharged and charged allegations is that both assert a violation of Section 8(b)(4)(D). That fact alone, however, does not establish a shared legal theory. *Brockton Hosp. v. NLRB*, 294 F.3d 100, 108 (D.C.Cir.2002), *rev'd on other grounds*, No. 01-1219, 2002 U.S. App. LEXIS 16521 (D.C.Cir.2002). Rather, in order to be closely related in legal theory, both the charged and uncharged allegations must share a specific and identical legal basis. *Id.* In this case, the failure on the part of the Region to identify the entities constituting "all employers" performing "similar work" necessarily precludes a finding that the charged allegations regarding the jurisdictional dispute allegedly taking place between Local 18 and LIUNA 310 at the Hilton Project or Foltz Project share a specific and identical legal basis with the uncharged allegations.

Turning to the question of whether the charged and uncharged allegations arise from the same factual circumstances or sequence of events, the fact that the charged and uncharged allegations are temporally related does not in and of itself establish an identical factual circumstances or sequence of events. *E.g., G.W. Galloway Co. v. NLRB*, 856 F.2d at 280-81

(allegations one day apart not factually linked). *Accord Ross Stores v. NLRB*, 235 F.3d at 674 (coincidence of two separate violations during the same organizing campaign does not of itself create a close factual relationship). Rather, the evidence in this matter clearly indicates that the charged and uncharged allegations each address entirely separate and distinct job locations, labor organizations, and collective bargaining agreements. On the one hand, the charges filed by Nerone and R.G. Smith specifically allege that a jurisdictional dispute as defined by Section 8(b)(4)(d) is taking place between LIUNA 310 and Local 18 with regard to the operation of forklifts or skid-steers at two specific locations. On the other hand, the Regional Director has presented an uncharged allegation addressing an amorphous dispute between Local 18 and unknown entities that is cryptically identified as “all employers” performing “similar work.” In so doing, the Region utterly fails to identify the conduct allegedly proscribed by the Act, the specific employers involved, or the location of the jobsite where the dispute is taking place. Thus, there is no way to determine whether the charged and uncharged allegations arise from the same factual circumstances or sequence of events. Given this fact, it cannot be said that the Regional Director’s uncharged allegations arise from the same factual circumstances or sequence of events as the allegations contained within the charges filed by Nerone and R.G. Smith.

Clearly, the Region’s February 12 Order exceed the scope of the charged allegations by including therein matters related to unknown entities that are only identified as “all employers” performing “similar work.” More importantly, the uncharged allegations contained within the Region’s February 12 Order cannot be said to share a significant affiliation with the allegations contained in the ULP charges filed by Nerone and R.G. Smith. Accordingly, the Region’s February 12 Order should be quashed as the Regional Director acted without jurisdiction under Section 10(b) by originating a complaint upon his own initiative.

2. *The Region's February 12 Order Should be Quashed Because it Contains Insufficient Facts to Afford Local 18 Appropriate Procedural Due Process for the Purpose of Presenting its Arguments.*

Pursuant to Section 102.90 of the Board's Rules and Regulations, if the Regional Director believes that a ULP charge alleging violations of Section 8(b)(4)(D) has merit and the parties to the dispute have not submitted proper evidence of voluntary adjustment of such a dispute, the Regional Director will serve a notice of hearing pursuant to Section 10(k) of the Act on all the parties. This notice must contain, pursuant to Section 102.90, a "statement of the issues involved." Such a statement must comport with notions of fairness, as "[d]ue process requires that a respondent have notice of the allegations against it so that it may present an appropriate defense." *KenMor Electric Co.*, 355 NLRB 1024, 1029 (2010). *Accord Earthgrains Co.*, 351 NLRB 733, 735 (2007). The factual requirements of a complaint issued by a Regional Director in an unfair labor practice proceeding may be reasonably said to guide the requirements of a notice of hearing. Thus, the requirements that a complaint contain "a clear and concise description of the acts which are claimed to constitute unfair labor practices, including . . . the approximate dates and places of such acts and the names of respondent's agents or other representatives by whom committed," *Soule Glass & Glazing Party Co. v. NLRB*, 652 F.2d 1055, 1073-1074 (1st Cir.1981), are also binding on a notice of hearing. Indeed, the requisite subject matter "is designed to notify the adverse party of claims to be adjudicated so he may prepare his case, and sets the standard of relevance at the hearing before the ALJ." *Id.*

The requirement to comport with procedural due process in Board hearings and adjudications is hardly a novel concept. Federal courts have long-recognized that in complex cases before the Board involving multiple charges based on a variety of occurrences, "[f]ailure to clearly define the issues and advise . . . [a party] charged with a violation of the law of the

specific complaint he must meet and provide a full hearing upon the issue presented is, of course, to deny procedural due process of law.” *NLRB v. Pepsi-Cola Bottling Co.*, 613 F.2d 267, 274-275 (10th Cir.1980), quoting *J.C. Penney Co. v. NLRB*, 384 F.2d 479, 483 (10th Cir.1967). “In short, the ‘charge’ must allege the unfair labor practice to invoke the jurisdiction of the Board; and, by way of limitation, the complaint issued by the Board must deal with the same subject matter and sequence of events . . .” *Douds v. Internatl. Longshoremen's Assn., Independent*, 241 F.2d 278,284 (2nd Cir.1957).

The Region’s February 12 Order has failed to comport with these elementary requirements of due process. The test for evaluating a due process violation is one of “fairness” under the circumstances of each case in determining whether the party aggrieved by the due process violation “knew what conduct was in issue and had a fair opportunity to present his . . . [argument].” *Soule Glass & Glazing Party Co.*, 652 F.2d at 1073-1074. If the aggrieved party could not know of the operative conduct, there are multiple allegations and the legal elements do not substantially overlap, it is “fair to say” the aggrieved party would be unable to have a fair opportunity to present his argument. *Id.* In the present matter, Local 18 was not afforded any meaningful semblance of due process, as the Region failed to identify, let alone specify, the legal and procedural issues encompassed within the greatly expanded scope of the consolidated Nerone and R.G. Smith 10(k) hearing. Indeed, there is no way for Local 18 to prepare for the legal and procedural requirements implicated in a Section 10(k) hearing when the only notice afforded to Local 18 regarding the purported jurisdictional dispute amorphously cites to a dispute between Local 18 and unknown entities that are cryptically identified as “all employers” performing “similar work.” Similarly, the Region’s failure to identify the involved parties and operative conduct at issue in this case denies Local 18 the opportunity to know the relevant

factual and evidentiary issues to be determined during the hearing. Such issues include what constitutes “similar work” and what constitutes “all employers.” As it presently stands, Local 18 is left to guess as to what entities constitute similar employers and what constitutes similar work.

In accordance with the “fairness” test elucidated by *Soule Glass & Glazing Party Co.*, the Region’s February 12 Order patently denies Local 18’s procedural due process rights because the Region’s identification, such that it is, of the scope of hearing will preclude the Union from determining the critical factual, evidentiary, and legal concerns which govern the present matter.

B. The Regional Director’s February 12 Order Should be Quashed Because No Reasonable Cause Exists to Believe that Section 8(b)(4)(D) of the Act Has been Violated.

Despite the allegations levied by the Charging Parties, these matters do not concern rival unions, each making a claim to an innocent employer for the assignment of work. Rather, LIUNA 310, R.G. Smith, and Nerone have colluded to manipulate the provisions of the Act. These parties are attempting to use Section 10(k) proceedings as a tool to bypass the duly negotiated work preservation clause contained within Local 18’s CBAs. However, under established principles of Board jurisprudence, a union’s enforcement of a work preservation clause is not within the aegis of the Board’s jurisdiction.

Here, it is *indisputable* that Local 18’s members have historically, traditionally, consistently, and continuously operated forklifts and skid steers for construction employers bound to each and every collective bargaining agreement negotiated by the Union including those agreements that bind both Nerone and R.G. Smith. Nor is there any dispute that both R.G. Smith and Nerone have the right to control the assignment of forklifts and skid steers. Indeed, these facts were laid bare in a recent hearing before Administrative Law Judge (“ALJ”) Mark Carissimi in *International Union of Operating Engineers, Local 18 (Donley’s, Inc.)* Case No. 08-

CD-081840. (“*Donley’s I*”) In that case, the parties<sup>1</sup> were litigating whether Local 18’s pursuit of work preservation grievances related to forklifts and skid-steers constituted proscribed activity under Section 8(b)(4)(D) of the Act. In response to that allegation, Local 18 introduced a plethora of evidence demonstrating that its pursuit of grievances related to the assignment of forklifts and skid steers was designed to preserve and protect the work traditionally performed by its members in the appropriate multi-employer bargaining unit.

In light of the ostensible similarity of issues between the two matters, Local 18 hereby incorporates the entire record in *Donley’s I* into its present Motion to Quash. To that end, the entire transcript of the hearing before ALJ Carissimi in *Donley’s I* has been electronically scanned to a compact disc and is attached hereto and identified therein as “Attachment A.” The exhibits introduced by Counsel for the General Counsel have been electronically scanned to that compact disc and marked as “Attachment B.” Finally, the exhibits introduced by Local 18 have been electronically scanned to that compact disc and marked as “Attachment C,” “Attachment D,” “Attachment E,” and “Attachment F.” In addition, Local 18 also incorporates its Post-Hearing Brief for that proceeding, which is publically available through the Board’s website.

As the record produced before ALJ Carissimi in *Donley’s I* demonstrates, there is no reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated in the present case. Indeed, Local 18 is only asserting its rights under its contractually negotiated work preservation clause to collect damages under the terms of its CBAs which specify a financial penalty in the event equipment within the Union’s craft jurisdiction is assigned to someone other than an operating engineer. Therefore, the Employers’ allegations are not amenable to resolution under Section 10(k) of the Act.

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<sup>1</sup> LIUNA 310 was a party in *Donley’s I* and is represented by the same counsel for that case as in the present matter. Similarly, both R.G. Smith and Nerone are represented by the same legal counsel that represented the employers in *Donley’s I*.

### III. Conclusion

Accordingly, for all the forgoing reasons, Local 18 hereby requests that the Regional Director's February 12 Order and Notice of Hearing be quashed and the hearing in this matter canceled.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

A copy of the foregoing was filed with National Labor Relations Board, Region 8, and served in person to the following on this 26th day of March 2015:

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