

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 25  
SUBREGION 33**

Needham Excavating, Inc.,	)	
	)	
Employer,	)	
	)	
and	)	
	)	
Jake Madden,	)	Case 25-RD-195949
	)	
Petitioner,	)	
	)	ORAL ARGUMENT REQUESTED
and	)	
	)	
International Union of Operating	)	
Engineers, Local 150, AFL-CIO,	)	
	)	
Union.	)	

**LOCAL 150's REQUEST FOR REVIEW AND SUPPORTING BRIEF**

Pursuant to Section 102.67 of the Rules and Regulations of the National Labor Relations Board, the International Union of Operating Engineers, Local 150, AFL-CIO (“Union”), hereby submits its Request for Review of the Regional Director’s Decision and Direction of Elections in regard to the above-captioned Decertification Petition on the grounds that a substantial question of law or policy is raised because of the departure from officially reported Board precedent.<sup>1</sup> In what follows, the Union shall set forth its Brief in support of its Request for Review.

**I. STATEMENT OF FACTS**

The Union represents heavy equipment operators in the construction industry and related industries such as material production and steel mill slag production (T. 338-339). The Union has 23,000 members, and its geographical jurisdiction includes northwest Indiana, northern

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<sup>1</sup> In parenthetical citation references, the Union shall refer to the Regional Director’s Decision and Direction of Elections as “DDE” (attached hereto as Exhibit 1), Board exhibits from the representation hearing as “B. #,” Union exhibits as “U. #,” Employer exhibits as “E. #,” Petitioner exhibits as “P. #,” and references to pages of the transcript as “T.”

Illinois, and eastern Iowa (T. 338). Ryan Drew is the Business Representative employed by the Union who is responsible for Iowa (T. 341). Needham Excavating, Inc. (“the Employer”), is a construction industry employer located in Walcott, Iowa (DDE at 1 fn. 1). Joe Needham is the President and a principal of the Employer (DDE at 2; T. 276). Nick Needham is his son and general manager (T. 68). Nick Needham testified that “[c]ommercial building sites [have] been our main focus over the years. [Specifically], site grading and site utilities” (DDE at 2; T. 73).

The Union and the Employer are signatory to five memoranda of agreement that incorporate the terms of five separate master agreements (U. ##1-5). The five master agreements apply to different types of work in different geographic areas (*cf.* U. ##6-10). One such master agreement is the Quad Cities Building Agreement (alternately “QCBA”), which applies to building construction work in certain counties in Illinois, and several counties in Iowa (U. #7 at 1). Another agreement is the Quad Cities Heavy and Highway Agreement (alternately “QCHHA”), which applies to heavy and highway construction work in certain counties in Illinois and Scott County in Iowa (U. #8 at 1).<sup>2</sup>

The master agreements are complementary. Each of the master agreements contains a recognition clause or similar language that describes the bargaining unit that the Employer agreed to recognize in connection with each agreement. The Quad Cities Building Agreement recognition clause states at Section 1.1 (emphasis added) (U. #7 at 1):

[E]mployees of the Contractor engaged in the operation and maintenance of all hoisting and portable machines and engines used **on building work and excavating work** pertaining to or that may be done in preparation, such as grading and improvement of the property or site, by the Contractor, whether operated by steam, electricity, gasoline, diesel, compressed air or hydraulic power and including all equipment listed in the wage classification contained herein, or

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<sup>2</sup> The three units other than the QCBA and QCHHA units are subject to various rules that prevent the processing of any petition at this time, including the contract bar rule. Those remaining units are not discussed herein because, as the Regional Director recognized, the Employer and Petitioner agreed not to pursue elections with respect to those units (DDE at 3 fn. 4; *e.g.*, T. 23, 32, 35, 44-45).

any other power machine that may be used by the Contractor for the construction, alteration, repair or wrecking of a building or buildings, **in the Counties of Rock Island and Mercer, 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, and **the Counties of Cedar, Clinton, Des Moines, Lee, Louisa, Muscatine, and Scott in the State of Iowa**, except in mortar mixers or concrete mixers 3 1/2 S or smaller with no skip attached, pumps other than described in Article XXII. The Contractor will not be held responsible for heating plants over which he has no control when used in the temporary heating of a building under construction. Employees in the bargaining unit herein described are hereinafter referred to as "Employees" or "Engineers" or "Operators".

In contrast, the Quad Cities Heavy and Highway Agreement recognition clause at Section 1.1 states (emphasis added) (U. #8 at 1):

[E]mployees 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 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.

According to the Employer, there are eight employees in the QCBA unit and five employees in the QCHHA unit (T. 407-409).

On March 31, 2017, the Petitioner, Jake Madden, allegedly filed a petition for decertification (B. #1A). That day was the last business day before the expiration of the Quad Cities Building Agreement window period and the last day of the Quad Cities Heavy and Highway Agreement window period (*cf.* DDE at 3; U. #2; U. #3; U. #7; U. #8). The petition

identified the unit as “machine operators for **building and excavation**,” mimicking the “**building work and excavating work**” language in the Quad Cities Building Agreement (emphasis added) (*cf.* B. #1A; U. #7 at 1). During the hearing, Petitioner’s counsel remarked that the original petition was “confusing” (T. 49).

On March 31, 2017, the Officer-in-Charge of SubRegion 33 issued a Notice of Representation Hearing, and that Notice indicated that a hearing would be conducted relative to the Petition on April 10, 2017 (B. #1B). On April 7, 2017, the Employer and the Union submitted Statements of Position (B. #3; B. #4). On April 10, 2017, Petitioner filed a Motion to Amend the Petition (P. #1). The proposed Amended Petition now described the unit as “all...machine operators” and made explicit reference to persons in the Quad Cities Building Agreement unit and the Quad Cities Heavy and Highway Agreement unit (*see* exhibit attached to P. #1). On the same day, the Union filed a Response to the Motion to Amend (U. #23; U. #24).

On April 10, 2017, and April 11, 2017, the Regional Director conducted a representation hearing in connection with the decertification petition (T. 1 - 491, *generally*). At the hearing, the Employer and Petitioner ultimately agreed not to pursue elections relative to the three agreements other than the Quad Cities Building Agreement and the Quad Cities Heavy and Highway Agreement (DDE at 3 fn. 4; *e.g.*, T. 23, 32, 35, 44-45). On April 10, 2017, during the hearing, the Regional Director granted the Motion to Amend the Petition (DDE at 3, 5; T. 55). On April 25, 2017, the Regional Director issued her Decision and Direction of Elections (DDE at 9). In her Decision, the Regional Director concluded that the Quad Cities Building Agreement unit and the Quad Cities Heavy and Highway Agreement unit constituted two separate and distinct recognized units, each requiring a separate election (DDE at 3-4, 5-6).

However, in her Decision, the Regional Director also determined that the amendment to the petition was timely relative to contract bar law (DDE at 4-5). The Regional Director reasoned that the addition did not change the character and size of the unit, because the original and amended petitions both “contemplate” the same employees, employer, and union, and employees move back and forth between the two units (DDE at 5). The Regional Director further stated that Petitioner had merely clarified the unit, and had always contemplated a single unit of all machine operators (DDE at 5). She also concluded that no party sustained prejudice as a result of the amendment, and further stated it would be prejudicial to employees were the NLRB not to permit an election in both units (DDE at 5). For the reasons stated below, the Regional Director erred in her decision to permit Petitioner to include the QCHHA unit in the petition under the guise of an “amendment.”

## **II. ARGUMENT**

Under the contract bar doctrine, a party may only file an election petition between 90 and 60 days (the “window period”) prior to the expiration of a lawful collective bargaining agreement with a duration of no greater than three years, or after the agreement has expired but before a new agreement is executed. *Leonard Wholesale Meats, Inc.*, 136 NLRB 1000, 1001 (1962); *General Cable Corp.*, 139 NLRB 1123, 1125-1126 (1962); *Deluxe Metal Furniture*, 121 NLRB 995, 1000 (1958). Application of this bar “further[s] industrial peace and stability by assuring that the labor relations environment will not be disrupted during the term of a collective-bargaining agreement and by providing the parties with a period just before the expiration of the contract during which they can negotiate a new agreement free from such disruption.” *Crompton Co., Inc.*, 260 NLRB 417, 418 (1982). Like the successor bar rule, the contract bar rule “does not wreak injustice on employees who may wish to substitute for the particular union some other ... arrangement [because t]he rule extends for a ‘reasonable period,’

not in perpetuity.” *St. Elizabeth Manor, Inc.*, 329 NLRB 341, 346 (1999), relying on *Franks Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944).<sup>3</sup>

As the Regional Director correctly determined, the only appropriate unit in a decertification petition case must conform to either the recognized unit or a certified unit. *Campbell Soup Co.*, 111 NLRB 234 (1955); *W.T. Grant Co.*, 179 NLRB 670 (1969); *Bell & Howell Airline service Co.*, 185 NLRB 67 (1970); *WAPI-TV-AM-FM*, 198 NLRB 342 (1972); *Mo’s West*, 283 NLRB 130 (1989). That is, a decertification petition is not a petition for representation, where the law anticipates an inquiry into whether the petitioner has identified “an appropriate unit.” In an RD case, there is only one appropriate unit: the recognized unit. Thus, in *Calorator Mfg. Corp.*, 129 NLRB 704 (1960), the Board excluded the persons not in the contract unit and allowed an election to proceed solely on the recognized contract unit. *See also Minneapolis Star & Tribune Co.*, 115 NLRB 1300, 1302 (1956) (essentially striking decertification petition unit description that made reference to persons other than contractual unit and allowing election to proceed only in contractual unit). Additionally, the Board has determined that where an employer and a union have negotiated separate contracts for separate units, “coextensive with the recognized unit” necessarily means only one of those units. *See Clohecy Collision, Inc.*, 176 NLRB 616, 617 (1969).

In keeping with this understanding, the NLRB presumes a separate contract bar for each collective bargaining agreement that identifies a distinct, recognized unit. *See Maramount Corp.*, 310 NLRB 508, 512 (1993) (separate petitions relating to separate contract units may be processed only if the window period for each contract opens during petition process). In order to protect the contract bar rule, the Board will not allow a party to amend a petition and rely on the

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<sup>3</sup> *See also Lamons Gasket Co.*, 357 NLRB 739, 744 (2011) (reinstating successor bar doctrine).

original filing date for bar purposes if “the employers and the operations or employees involved were [not] contemplated by or identified with reasonable accuracy in the original petition,” the amendment enlarges the character or size of the unit, or it substantially increases the number of employees in the unit. *Deluxe Metal Furniture*, 121 NLRB 995, 1000 fn. 12 (1958); *accord Brown Transport*, 77 NLRB 1213, 1215 (1989) (purpose of restrictions on amendments is to “prevent a petitioner from being able to circumvent the insulated period by an amendment of its petition”); *see also Allied Beverage Distributing Co.*, 143 NLRB 149, 151 (1963) (dismissing amended petition identifying different employer than original petition because of notice implications); *Hyster Company*, 72 NLRB 937, 938-939 (1947) (dismissing petition amended at hearing to include additional employees as untimely). Whenever an amended petition “broadens the original petitioned-for unit,” the petitioner must make his amendment during an open period or it will be barred. *Centennial Development Co.*, 218 NLRB 1284, 1285 (1975) (dismissing petition that broadened unit without timely showing of interest, pursuant to contract bar).

“It is well-established that the Board judges the bar quality of collective-bargaining agreements based on the face of the agreement.” *Ace Car & Limousine Service, Inc.*, 357 NLRB 359, 360 (2011), citing *Jet-Pak Corp.*, 231 NLRB 552, 552-553 (1977) *see also Staunton Fuel*, 335 NLRB 717, 719-720 (2001) and NLRB Gen. Couns. Mem. OM 14-23 (February 4, 2014) (where agreement contains language sufficient to establish 9(a) status, NLRB will generally presume 9(a) status [and of course, corresponding contract bar]).<sup>4</sup> Likewise, where a stipulated unit description is clear and unambiguous, the Board will not examine extrinsic evidence to determine the parties’ intent. *Northwest Community Hosp.*, 331 NLRB 307 (2000); *Laidlaw Transit*, 322 NLRB 166 (1997); *Gala Food Processing*, 310 NLRB 1193 (1993). Similarly, the

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<sup>4</sup> *See Dugan v. RJ Corman Railroad Co.*, 344 F.3d 662, 665 (7th Cir. 2003) (de novo review warranted when decision-maker considers extrinsic evidence despite plain contract language).

Board judges the bar susceptibility of a petition based on the face of the petition. *See Deluxe Metal Furniture*, 121 NLRB 995, 1000 fn. 12 (1958) (original petition must identify unit with reasonable accuracy or relation back to amendment date is foreclosed).

Because the law forbids a petitioner from using the amendment process to enlarge or “broaden” the petitioned-for unit, an amendment that provides for the inclusion of an *additional* unit must also be impermissible. Put another way, the law regarding amendments does not permit the amendment process to be used to file a second, untimely petition. In this case, the face of the petition shows that Petitioner timely petitioned for only one recognized unit: the Quad Cities Building Agreement unit. The petition identified the unit as “machine operators for **building and excavation**,” a clear and unambiguous reference to the “**building work and excavating work**” language in the recognition clause of the Quad Cities Building Agreement (emphasis added) (*cf.* B. #1A; U. #7 at 1).<sup>5</sup> The original petition identified the number of people in the unit as eight, the same number of persons allegedly in the QCBA unit (T. 407-409).<sup>6</sup> The original petition did not say, as the amendment later did, that Petitioner sought “all machine operators,” nor did the original petition explicitly mention the QCHHA unit, as the amendment later did (*cf.* B. #1A; P. #1). Perhaps most importantly, the Regional Director determined that the QCBA unit and the QCHHA unit were separate and distinct units, each requiring a separate election (DDE at 3-4, 5-6). The decision to permit an amendment that includes both units is totally inconsistent with that determination, and thereby inconsistent with the law that requires the Board to respect the contract bar for each unit.

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<sup>5</sup> Even if the petition could be interpreted as anticipating a broader unit than the QCBA, it fails to meet the *Deluxe Metal Furniture* requirement of identifying the unit sought with “reasonable accuracy.” In that regard, the Petitioner’s counsel conceded that the original petition was “confusing” (T. 49), despite the fact that the existence of the QCBA and QCHHA contracts are “well-known” (T. 20).

<sup>6</sup> The Regional Director incorrectly stated that the inclusion of the QCHHA unit also represents a substantial change in the numbers associated with the unit, as the QCBA unit is 40% larger than the QCHHA unit, by the Employer’s measure (T. 407-409).

Where the Board permits the Regional Director's decision to stand, a petitioner who submits a petition that his counsel concedes is "confusing" could theoretically amend his petition indefinitely prior to an election, wander far afield from the recognized unit, and sweep into his petition an unlimited number of units well after the expiration of the window periods (or, if we are no longer respecting contract bars, even before the contract window periods open). That is, the ability to perpetually amend means that a petitioner could circumvent the contract bars for hundreds of individual contracts all at once, precisely the situation that *Deluxe Metal Furniture* was designed to prevent.<sup>7</sup> It also permits the petitioner to potentially manipulate the showing of interest (furnishing "interest" for a unit that does not exist, or for only one unit, and then amending to include others),<sup>8</sup> or skirt an inquiry into whether there are actually eligible voters such that a petition can be processed. Therefore, the Board should reverse the decision of the Regional Director because it fails to give effect to the QCHHA contract bar, and is otherwise inconsistent with the law regarding petition amendments.

Perhaps anticipating the difficulty with her position, the Regional Director attempted to justify her determination through reliance on *Brown Transport*, 77 NLRB 1213, 1214 (1989), wherein it was considered significant that the petitioner had sought a single unit from the beginning.<sup>9</sup> However, *Brown* is distinguishable on material points. In *Brown*, the Board distinguished that case from *Centennial Development* on the grounds that the petitioner in *Brown* had never asked to amend the petition, and had instead effectively relied on the original petition

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<sup>7</sup> *Brown Transport*, 77 NLRB at 1215 (1989).

<sup>8</sup> The record does not indicate whether the Regional Director ascertained that there was a sufficient showing of interest in each unit.

<sup>9</sup> Although the Regional Director compares this case to *Brown* on the grounds that both petitioners allegedly sought a single unit throughout the petition process, she also concluded that the "Petitioner's intention in amending the petition for one overall unit [was] immaterial" to the unit determination question (DDE at 3 fn. 4). The comparison of these two positions illustrates how awkward it is to try to reconcile the notion that there are two units, but that an untimely amendment which for the first time includes that second unit is proper.

from the outset, evidently supporting the claim that the original petition had identified the Board-determined unit with “reasonable accuracy.” *Brown Transport*, 77 NLRB at 1215 (“[i]n the instant case, however, there was no amendment”). That did not happen in this case, where Petitioner admits that he amended his petition because it was “confusing” (T. 49). Additionally, the NLRB’s guidance publications cite *Brown* for the proposition that “[w]hen the Board itself finds a larger unit appropriate, an intervening contract will not be found a bar.” *An Outline of Representation Law and Procedure* § 9-520. That did not happen in this case, either. Accordingly, *Brown Transport* has no application to this case.

Additionally, the Regional Director incorrectly determined that the only prejudice that would result from the amendment would be two employees denied the ability to vote for decertification (DDE at 5). The contract bar rule already takes into account the implications of application of the rule for employee free choice; it represents a careful balance between employee free choice and industrial peace. *General Cable Corp.*, 139 NLRB at 1127-1128 (1962). Moreover, application of the contract bar rule “does not wreak injustice on [employee free choice because t]he rule extends for a ‘reasonable period,’ not in perpetuity.” *St. Elizabeth Manor, Inc.*, 329 NLRB 341, 346 (1999) (identifying policy considerations surrounding the successor bar rule). That is, the application of the rule is *per se* non-prejudicial as it relates to employee free choice. The contract bar rule reconciles free choice with the countervailing policy of labor stability—interests held by the Union and its supporters that have been compromised by the Decision. Consequently, the Regional Director erred when she took into account only an assumed prejudice to the majority.

Finally, the Regional Director's stated concern about prejudice and willingness to overlook the defects in the original petition incorrectly assume that the only interest deserving of Board protection is the presumed desire of the majority to decertify. The contract bar rule applies even where only a minority of workers support the union. *NLRB v. Marcus Trucking Co., Inc.*, 286 F.2d 583, 593 (2nd Cir. 1961), *enf'g. as modified* 126 NLRB 108; *see also Energy Coal Partnership*, 269 NLRB 770 (1984) (Act protects dissident minority action when minority is motivated by desire to support union). The failure to enforce the contract bar does not just undermine the interest of workplace stability; decertification means that the alleged minority of employees<sup>10</sup> who continue to support representation and the application of a union contract may lose that right prematurely.<sup>11</sup> In addition, the failure to identify with reasonable accuracy the unit sought in the original petition means that employees were not timely or properly apprised of what interests are implicated by the petition, and thus, these individuals sustained prejudice as well. The Regional Director's Decision fails to appreciate the full measure of prejudice involved in permitting the untimely amendment to the petition.

### **III. CONCLUSION**

For all of the above-stated reasons, the Union respectfully requests that the Board grant the Union's Request for Review of the Regional Director's Decision and Direction of Elections in regard to the above-captioned Decertification Petition. The Union further requests that the Board reverse the portion of the Decision of the Regional Director that permits the amendment of the Petition to include the Quad Cities Heavy and Highway Agreement unit, reverse the Direction of Election in that unit, and set aside the results of any such Election.

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<sup>10</sup> 25% or more of the employees voted to retain union representation.

<sup>11</sup> Indeed, Petitioner admitted that other employees may not be as unconcerned as he is with matters such as pay and benefits, and therefore, he "can't speak for them" (T. 190).

Date: May 8, 2017

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has caused the service of this document upon Regional Director Patricia K. Nachand (Patricia.Nachand@nlrb.gov); Officer-in-Charge Nathaniel Strickler (Nathaniel.Strickler@nlrb.gov); Richard Davidson, Counsel for Petitioner (RDavidson@L-WLAW.com); and Stanley Niew, Counsel for Employer (sniew@senlaw.net) by email.

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# **EXHIBIT 1**

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 25  
SUBREGION 33

NEEDHAM EXCAVATING, INC.

Employer

and

Case 25-RD-195949

JAKE MADDEN

Petitioner

and

INTERNATIONAL UNION OF OPERATING  
ENGINEERS, LOCAL 150, AFL-CIO

Union

DECISION AND DIRECTION OF ELECTIONS

Petitioner seeks an election among certain employees of the Employer in order for the employees to determine whether they wish to continue to be represented for the purposes of collective bargaining by the Union. The Petitioner asserts that the appropriate unit is a single unit consisting of all machine operators of the Employer that perform work under at least two different collective-bargaining agreements within the Quad Cities area. The Employer agrees with the Petitioner's unit description. The Union argues that machine operators working under the two different collective-bargaining agreements within the Quad Cities area constitute two separate and distinct bargaining units and that the Petitioner's single petition is, therefore, untimely with regard to one of those units.

Under Section 3(b) of the Act, I have the authority to hear and decide this matter on behalf of the National Labor Relations Board. Upon the entire record in this proceeding, I find:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.<sup>1</sup>

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<sup>1</sup> The Employer is an Iowa corporation with its principal offices and place of business in Walcott, Iowa, and is engaged in the construction industry as an excavating contractor. During the last calendar year, a representative period, the Employer purchased and received at its Iowa facility goods valued in excess of \$50,000 directly from suppliers located outside the State of Iowa. During that same representative period, the Employer derived gross revenues in excess of \$1,000,000 from all sales and the performance of services.

3. The labor organization involved has claimed to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

Based upon the record and relevant Board cases, and as discussed in more detail below, I find that the petitioned-for employees constitute separate bargaining units, and I am directing elections in the units defined in the current Quad Cities Building and Quad Cities Heavy Highway collective-bargaining agreements between the Employer and the Union.

### THE EMPLOYER'S OPERATIONS

The Employer performs site grading and site utility work, primarily at commercial building sites, but also other excavating work such as on farm projects; the Employer also operates a crusher that converts broken concrete into usable aggregate product that it uses in its own operations and sells to other entities. As relevant here, the Employer employs approximately eight machine operators in running the various aspects of its business. Joe Needham is the Employer's President and Nick Needham is the General Manager.

The Employer started in business in 1987. In 1992 the Employer signed a Memorandum of Agreement to recognize the Union as the exclusive bargaining representative for employees performing work that is defined in what is now the Industrial, Commercial, Residential and Building Construction Agreement between the Union and the Quad City Builders Association (herein the "Quad Cities Building Agreement"). The Employer has continued to operate under successive Quad Cities Building Agreements since 1992. As a result of some litigation between the parties in 2015, effective January 1, 2016, the Employer executed two more Memoranda of Agreement, one again recognizing the Union under the Quad Cities Building Agreement and a second one recognizing the Union as the exclusive representative for employees performing work that is defined in the Heavy and Highway Agreement between the Union and the Associated Contractors of the Quad Cities (herein the "Quad Cities Heavy Highway Agreement").<sup>2</sup> The descriptions of the two bargaining units contained in the Quad Cities agreements cover the same geographic area and are substantially similar but reference building-related work or highway-related work. Although not fully developed in the record, the evidence indicates that the Employer and Union have been party to three additional collective-bargaining agreements (again, through the execution of Memoranda of Agreement in 2010, 2011, and 2016) covering different operator work and geographic areas other than the Quad Cities agreements.

While it appears that much of the Employer's work since January 1, 2016, has been related to commercial building construction and therefore would fall within the scope of the

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<sup>2</sup> The record does not provide any further detail to explain why the Employer executed a second Memorandum of Agreement under the Quad Cities Building Agreement.

Quad Cities Building Agreement, the Employer has also performed some crushing and farm work that would fall within the scope of the Quad Cities Heavy Highway Agreement. However, the Employer has apparently only been making wage payments and reporting benefits payments to the Union under the terms of the Quad Cities Building Agreement.<sup>3</sup> Because the current Quad Cities Building Agreement and Quad Cities Heavy Highway Agreement provide for substantially the same wages and benefits for employees, the record does not reflect any harm to employees from the Employer's benefits allocation to only the Quad Cities Building Agreement.

### PROCEDURAL HISTORY

Petitioner filed the present petition on March 31, 2017, which was the final day of the window period during which a decertification petition could be filed for both the Quad Cities Building Agreement and the Quad Cities Heavy Highway Agreement (both collective-bargaining agreements expire on May 31). The petition sought a single unit of "machine operators for building and excavation" with no exclusions listed. On April 10, the first day of the hearing, based on representations made by the Union both before the opening of the hearing and on the record, Petitioner introduced a written Motion to Amend RD Petition and orally explained that motion on the record. The amendment sought to clarify, but not alter, the scope of the bargaining unit Petitioner claimed appropriate. I granted Petitioner's motion to amend and allowed the hearing to proceed as scheduled.<sup>4</sup>

### APPLICATION OF BOARD LAW TO THIS CASE

It is well established Board policy that the bargaining unit in which a decertification election is held must be coextensive with the certified or recognized unit. See, e.g., Campbell Soup Co., 111 NLRB 234 (1955); W.T. Grant Co., 179 NLRB 670 (1969); Bell & Howell Airline Service Co., 185 NLRB 67 (1970); WAPI-TV-AM-FM, 198 NLRB 342 (1972); Mo's West, 283 NLRB 130 (1989). When it signed the Quad Cities Building Agreement and the Quad

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<sup>3</sup> The record does not reflect the extent to which wages and benefit payments have been made under the other three collective-bargaining agreements. However, while some work has apparently been performed under the Eastern Iowa Six County Agreement, little or no work has been performed in recent years under the Will & Grundy Counties Agreement or the Great Lakes Floating Agreement.

<sup>4</sup> The written amendment includes a single unit of all machine operators, including those performing work under the Quad Cities Building Agreement and the Quad Cities Heavy Highway Agreement; on its face, the amendment does not exclude employees who perform work under any of the other three collective-bargaining agreements that the Employer and Union have been party to. Based on the language in the proposed amendment which lists no exclusions and, in particular, Petitioner's representation in its written Motion to Amend that "Petitioner understands that there is only one bargaining unit consisting of the machine operators of the Employer," the amendment was permitted. The amendment was consistent with the original petition (a single unit was being sought) and only served to clarify the language used to describe the unit. However, the Petitioner's and Employer's positions verbally expressed on the record focus on a unit consisting of machine operators only performing work under the two Quad Cities agreements, which is different than the written Motion to Amend. Based on the finding herein that each collective-bargaining agreement created separate and distinct bargaining units, Petitioner's intention in amending the petition for one overall unit or a unit of only the Quad Cities agreements is immaterial.

Cities Heavy Highway Agreement Memoranda of Agreement in 1992 and 2016, the Employer recognized the Union as the exclusive collective-bargaining representative of its machine operators within the territorial and occupational jurisdiction of the Union. The Employer also agreed to be bound by those two collective-bargaining agreements, both of which contained clauses specifically and differently describing the territorial and occupational jurisdiction of the Union. Those clauses describe the two recognized units in this case.<sup>5</sup>

The Petitioner contends that the Employer's machine operators constitute a single bargaining unit, regardless of which Quad Cities collective-bargaining agreement applies to a given project. The Petitioner points to, among other things, the fact that there was a single bargaining unit under the Quad Cities Building Agreement from 1992 until 2016, the employees were likely unaware of the existence of the two different agreements since January 1, 2016, and that the Employer only paid benefits to the Union under the Quad Cities Building Agreement. The Petitioner cites to West Lawrence Care Center, 305 NLRB 212 (1991), wherein the Board found a single-employer bargaining unit was appropriate since there was no evidence that the parties had actually bargained on a multiemployer basis and there was only a brief period when the parties purported to be in a multiemployer bargaining relationship. In the present case, however, the Employer specifically signed separate Memoranda of Agreement effective January 1, 2016, binding the Employer to both the Quad Cities Building Agreement and the Quad Cities Heavy Highway Agreement, and therefore it is clear that the parties intended to create multiple bargaining relationships based on the nature of work being performed. In that regard, the evidence demonstrates that while all of the employees' benefit fund payments may have been designated by the Employer to the Quad Cities Building Agreement, the Employer has pursued at least one grievance under the Quad Cities Heavy Highway Agreement. Further, well over a year has passed since the separate Memoranda of Agreement were executed by the Employer binding it to the two separate Quad Cities agreements with different bargaining units, unlike the brief period that had passed in the case cited by the Petitioner. I therefore reject Petitioner's argument and find that the bargaining units created by the Quad Cities Building Agreement and Quad Cities Heavy Highway Agreement constitute separate appropriate bargaining units for the employees of the Employer.<sup>6</sup>

Finally, as a procedural matter, the Union asserts that the amendment to the petition is improper, at least as it relates to the Quad Cities Heavy Highway Agreement. The Union argues that the original petition only applied to the Quad Cities Building Agreement and that the amendment expanded the petitioned-for unit to include a whole new unit covered under the Quad

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<sup>5</sup> The parties' arguments and evidence on the record were focused almost exclusively on the two Quad Cities agreements. Arguably, the three other collective-bargaining agreements that the Employer and Union have been party to would also constitute separate appropriate bargaining units; however, it appears likely that any petition involving the Eastern Iowa Six County Agreement would be premature at this time since that collective-bargaining agreement is effective from February 1, 2016 until January 31, 2018, and no party has argued that a question concerning representation exists under the Will & Grundy Counties Agreement nor the Great Lakes Floating Agreement since employees have not worked under either agreement in the past several years.

<sup>6</sup> Petitioner's argument in favor of a single bargaining unit is undermined by the existence of three other collective-bargaining agreements encompassing other operator work in other geographic jurisdictions outside of the Quad Cities to which the Employer and Union have been parties.

Cities Heavy Highway Agreement. Since the amendment did not occur until April 10, 2016, which would be within the insulated period immediately before the expiration of the Quad Cities Heavy Highway Agreement, the Union reasons that the amendment should be deemed untimely. When a timeliness issue with an amendment has been raised, the Board has held that the filing date of the original petition is controlling when “the employers and the operations or employees involved were contemplated by or identified with reasonable accuracy in the original petition, or the amendment does not substantially enlarge the character or size of the unit or the number of employees covered.” Deluxe Metal Furniture Co., 121 NLRB 995, 1000 n.2 (1958). See also Brown Transport Corp., 296 NLRB 1213, 1214 (1989); Illinois Bell Telephone Co., 77 NLRB 1073 (1948).

In the present case, the original petition sought an election among the Employer’s machine operators and indicated eight employees were in the bargaining unit. The parties agree on eight specific employees that have worked under the Quad Cities Building Agreement, with the Union asserting at hearing that two additional individuals may be eligible under the Daniel-Steiny formula. The record indicates that five of those same eight employees have also performed work under the Quad Cities Heavy Highway Agreement, and that such employees move back and forth between work that is covered under each of the two Quad Cities agreements. It is evident that regardless of which unit is considered, the same employer, same union, and same employees are contemplated by and are within the scope of the original petition that was timely filed as to the expiration of both Quad Cities agreements.

The amendment to the petition did not substantially expand the unit (the same 8-10 employees are still contemplated as eligible employees) and the character of the unit is the same (operators who perform work for the Employer). As discussed above, the amendment to the petition sought to clarify the description of the bargaining unit rather than to add an additional unit, as the Union asserts. Much like the petitioner in Brown Transport, the Petitioner here has consistently sought a single bargaining unit consisting of all machine operators, although he has expressed a willingness to proceed to an election in any unit that the Board finds appropriate. It is my ruling herein that has clarified the existence of two separate bargaining units, not the Petitioner’s amendment. Therefore, I find that the timing of the amendment does not create a bar to proceeding to an election in either unit. Further, I see no prejudice to any party in allowing an election to proceed in both the Quad Cities Building Agreement and the Quad Cities Heavy Highway Agreement bargaining units. Rather, to deny the employees an election in either unit based on the Petitioner’s failure to prevail on its single-unit contention prejudices the employees. The original petition clearly contemplated and identified in general language that an election was being sought among all of the machine operators of the Employer who perform building or excavation work, which would include both the Quad Cities Building Agreement and the Quad Cities Heavy Highway Agreement units in which I am directing elections.

#### APPROPRIATE BARGAINING UNITS

Having found that the Quad Cities Building Agreement and Quad Cities Heavy Highway Agreement create separate bargaining units of machine operators of the Employer, I find the

following employees of the Employer constitute units appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

Quad Cities Building Agreement unit:

All employees of the Contractor, Needham Excavating, Inc., engaged in the operation and maintenance of all hoisting and portable machines and engines used on building work and excavating work pertaining to or that may be done in preparation, such as grading and improvement of the property or site, by the Contractor, whether operated by steam, electricity, gasoline, diesel, compressed air or hydraulic power and including all equipment listed in the wage classification contained in the Quad Cities Building Agreement, or any other power machine that may be used by the Contractor for the construction, alteration, repair or wrecking of a building or buildings, in the Counties of Rock Island and Mercer, 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 (5<sup>th</sup>) sectional line east of Morrison, Illinois, running directly north and south, and the Counties of Cedar, Clinton, Des Moines, Lee, Louisa, Muscatine, and Scott in the State of Iowa, except in mortar mixers or concrete mixers 3 1/2 S or smaller with no skip attached, pumps other than described in Article XXII of the Quad Cities Building Agreement; BUT EXCLUDING all professional employees and all guards and supervisors as defined in the Act.

Quad Cities Heavy Highway Agreement unit:

All employees of the Contractor, Needham Excavating, Inc., 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 in the Quad Cities Heavy Highway Agreement, 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 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 (5<sup>th</sup>) sectional line east of Morrison, Illinois, running directly north and south. BUT EXCLUDING all professional employees and all guards and supervisors as defined in the Act.

## DIRECTION OF ELECTIONS<sup>7</sup>

The National Labor Relations Board will conduct secret ballot elections among the employees in the units found appropriate above. Employees in each bargaining unit will vote whether or not they wish to be represented for purposes of collective bargaining by International Union of Operating Engineers, Local 150, AFL-CIO.

### A. Election Details

The elections in each bargaining unit will be conducted separately but simultaneously, and will be held on May 2, 2017 from 7:00 a.m. to 9:00 a.m. in the Parts Room at the Employer's facility located at 137 North Main Street, Walcott, Iowa.

### B. Voting Eligibility

Eligible to vote are those in each respective unit who were employed during the payroll period ending April 22, 2017, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible to vote are all employees in each respective unit 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. However, employees meeting either of those criteria who were terminated for cause or who quit voluntarily prior to the completion of the last job for which they were employed, are not eligible.

Employees engaged in an economic strike, who have retained their status as strikers and who have not been permanently replaced, are also eligible to vote. In addition, in an economic strike that commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

### C. Voter Lists

As required by Section 102.67(1) of the Board's Rules and Regulations, the Employer must provide the Regional Director and parties named in this decision separate lists of the full

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<sup>7</sup> Petitioner agreed at hearing to proceed to an election in any unit or units that I found appropriate, and therefore the Region will proceed with conducting elections in the two units found appropriate herein.

names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cell telephone numbers) of all eligible voters for each bargaining unit found appropriate herein.

To be timely filed and served, the lists must be *received* by the Regional Director and the parties by April 27, 2017. The lists must be accompanied by a certificate of service showing service on all parties. The region will no longer serve the voter lists.

Unless the Employer certifies that it does not possess the capacity to produce the lists in the required form, the lists must be provided in a table in a Microsoft Word file (.doc or docx) or a file that is compatible with Microsoft Word (.doc or docx). The first column of each list must begin with each employee's last name and each list must be alphabetized (overall or by department) by last name. Because the lists will be used during the election, the font size of each list must be the equivalent of Times New Roman 10 or larger. That font does not need to be used but the font must be that size or larger. A sample, optional form for the lists is provided on the NLRB website at [www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015](http://www.nlr.gov/what-we-do/conduct-elections/representation-case-rules-effective-april-14-2015).

When feasible, the lists shall be filed electronically with the Region and served electronically on the other parties named in this decision. The lists may be electronically filed with the Region by using the E-filing system on the Agency's website at [www.nlr.gov](http://www.nlr.gov). Once the website is accessed, click on E-File Documents, enter the NLRB Case Number, and follow the detailed instructions.

Failure to comply with the above requirements will be grounds for setting aside the election whenever proper and timely objections are filed. However, the Employer may not object to the failure to file or serve the lists within the specified time or in the proper format if it is responsible for the failure.

No party shall use the voter lists for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

#### D. Posting of Notices of Election

Pursuant to Section 102.67(k) of the Board's Rules, the Employer must post copies of the Notices of Election accompanying this Decision in conspicuous places, including all places where notices to employees in the units found appropriate are customarily posted. The Notices must be posted so all pages of the Notices are simultaneously visible. In addition, if the Employer customarily communicates electronically with some or all of the employees in the units found appropriate, the Employer must also distribute the Notices of Election electronically to those employees. The Employer must post copies of the Notices at least 3 full working days prior to 12:01 a.m. of the day of the election and copies must remain posted until the end of the election. For purposes of posting, working day means an entire 24-hour period excluding Saturdays, Sundays, and holidays. However, a party shall be estopped from objecting to the

nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution. Failure to follow the posting requirements set forth above will be grounds for setting aside the election if proper and timely objections are filed.

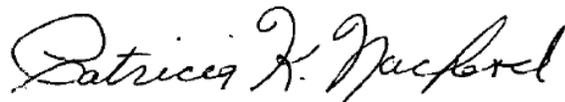
#### RIGHT TO REQUEST REVIEW

Pursuant to Section 102.67 of the Board's Rules and Regulations, a request for review may be filed with the Board at any time following the issuance of this Decision until 14 days after a final disposition of the proceeding by the Regional Director. Accordingly, a party is not precluded from filing a request for review of this decision after the election on the grounds that it did not file a request for review of this Decision prior to the election. The request for review must conform to the requirements of Section 102.67 of the Board's Rules and Regulations.

A request for review may be E-Filed through the Agency's website but may not be filed by facsimile. To E-File the request for review, go to [www.nlr.gov](http://www.nlr.gov), select E-File Documents, enter the NLRB Case Number, and follow the detailed instructions. If not E-Filed, the request for review should be addressed to the Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570-0001. A party filing a request for review must serve a copy of the request on the other parties and file a copy with the Regional Director. A certificate of service must be filed with the Board together with the request for review.

Neither the filing of a request for review nor the Board's granting a request for review will stay the election in this matter unless specifically ordered by the Board.

Dated: April 25, 2017



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PATRICIA K. NACHAND  
REGIONAL DIRECTOR  
NATIONAL LABOR RELATIONS BOARD  
REGION 25  
575 N Pennsylvania St Ste 238  
Indianapolis, IN 46204-1520