

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 32

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SOUTHWEST REGIONAL COUNCIL  
OF CARPENTERS

Charged Party Union,  
and

Case No. 32-CD-251616

BRANDSAFWAY SERVICES, LLC

Charging Party Employer  
and

LABORERS INTERNATIONAL UNION  
OF NORTH AMERICA, LOCAL 169

Involved Party Union

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**POST-HEARING BRIEF OF  
BRANDSAFWAY SERVICES, LLC**

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## **I. STATEMENT OF THE CASE**

On November 12, 2019, BrandSafway Services, LLC (the “Employer” or “BSS”) filed an Unfair Labor Practice (“ULP”) charge with Region 32 of the National Labor Relations Board (the “Board”) against the Southwest Regional Council of Carpenters (the “Carpenters”), alleging a violation of Section 8(b)(4)(D) of the National Labor Relations Act (the “Act”), 29 U.S.C. 158(b)(4)(D). The Charge alleged that the Carpenters coerced and restrained BSS with the object of forcing or requiring BSS to assign work to employees represented by the Carpenters rather than to persons represented by Laborers International Union of North America, Local 169 (the “Laborers”). BSS had assigned the work in question to employees represented by the Carpenters, but received a grievance and other demands from the Laborers demanding reassignment of some or all of the work to workers represented by the Laborers. When BSS informed the Carpenters of the Laborers’ demand for reassignment of work currently assigned to the Carpenters, the Carpenters responded with a threat to strike and picket BSS jobsites.

On December 23, 2019,<sup>1</sup> the Regional Director issued a Notice of Hearing pursuant to Section 10(k) of the Act to determine the jurisdictional dispute concerning the assignment of the following work in dispute between the Carpenters and the Laborers:

The loading/unloading, moving, erecting and dismantling scaffolding and related clean up at the Marriott Aloft Hotel project in Reno, Nevada.

On February 18, 2020, the Section 10(k) hearing was held before Hearing Officer Alex Hajduk in Reno, Nevada.

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<sup>1</sup> The original Notice of Hearing set the hearing for February 10, 2020, at a location to be determined in Reno, Nevada. An order Designating Location of Hearing was issued on December 26, 2019. The Region failed to serve the Notice of Hearing upon the Laborers. As a result, when the hearing convened on February 10, 2020, the hearing was continued to allow for notification of all Parties. An Order Continuing Hearing was issued on February 13, 2020, so that all Parties were notified and able to appear at the hearing on February 18, 2020.

This brief is submitted on behalf of BSS in support of its position that:

(1) This dispute is properly before the Board for a determination under Section 10(k);

(2) Based upon all relevant factors, the disputed work must be awarded to employees represented by the Carpenters, and not to persons represented by the Laborers; and

(3) A broad, area-wide award of such work is appropriate, based upon the evidence presented at hearing that demonstrates that the Laborers' claim of work is broader in geography and broader in time than the Marriott Aloft Hotel project, and that this dispute is likely to recur in the near future.

## **II. STATEMENT OF FACTS**

### **A. The Parties**

#### **1. Jurisdictional stipulations**

The parties stipulated that BrandSafway Services annually sells and ships goods valued in excess of \$50,000 from its facility located in Reno, Nevada area to customers located outside of the state of Nevada. (Tr. 14). The Parties further stipulated that the Carpenters and the Laborers are labor organizations within the meaning of Section 2(5) of the Act. (Tr. 14-15). Additionally, BrandSafway Services is not failing to conform to an order or certification of the Board determining the bargaining representative for the employees performing the work in dispute. (Tr. 17).

#### **2. The Employer's business and operations**

In Nevada, BSS is engaged primarily in the business of scaffolding services, but also performs some insulation services. (Tr. 23). Scaffolding is a temporary platform that is constructed on a jobsite, and is used by other construction craft workers to perform their work in elevated, off-the ground locations, such as EIFS work on the outside of a multi-story building. (Tr. 25). BSS provides and leases scaffolding equipment, delivers the equipment to the

construction jobsite, unloads and moves the equipment to the specific location to where it is to be erected, and erects the scaffolding. (Tr. 24). The scaffolding is then used on the jobsite by construction craft workers as needed, and when the work is complete, BSS returns to the jobsite, dismantles the scaffolding, loads up the equipment and takes it away, and also performs related clean-up services. (Tr. 24). Employees represented by the Carpenters have exclusively performed this work for BSS for at least ten years. (Tr. 32-33).

**B. The Work in Dispute**

The specific work that initiated the dispute was scaffolding work performed on the Marriott Aloft jobsite. (Tr. 28). The work included the loading, unloading, moving, erecting, and dismantling the scaffolding, and related clean-up at the jobsite. (Tr. 15, 24). The scaffolding that BSS erected and dismantled on that jobsite was approximately 40 to 50 feet in height. (Tr. 25-26).

**C. The Employer Assigned the Disputed Work to the Carpenters**

BSS assigned all of the disputed work on the Marriott Aloft job to BSS employees who are represented by the Carpenters. (Tr. 25). BSS staffed the job with between three and six such employees at any given time, depending upon the phase of the work being performed at the time. (Tr. 25).

**D. The Laborers Asserted a Claim to the Disputed Work**

Mr. Headrick, BSS's Branch Manager, testified that his construction manager notified him that the Laborers wanted to discuss the Company's assignment of work. (Tr. 28). Mr. Headrick had the construction manager provide Mr. Headrick's contact information to Richard "Skip" Daly, Business Manager for the Laborers. (Tr. 28). Mr. Headrick received a voicemail message from Mr. Daly, in which Mr. Daly demanded that BSS reassign to the Laborers work currently assigned to Carpenters on the Marriott Aloft jobsite. (Tr. 28). Mr. Headrick also had a

conversation with Mr. Daly, in which Mr. Daly stated that BSS should have assigned the work to members of the Laborers, that the Company had an agreement with the Laborers and that the Company should honor that agreement. (Tr. 29). Mr. Daly stated to Mr. Headrick that BSS was in violation of its contract with the Laborers by not assigning the scaffold work on the job to members of the Laborers. (Tr. 29).

The Laborers followed up Mr. Daly's verbal demands with a written grievance. (Tr. 29-30, Employer Ex. 1). That grievance claimed that the Company was bound by the Laborers Master Agreement ("LMA"). (Employer Ex. 1). The grievance expressly referenced the "Aloft Hotel Project in Reno," and also stated that "the Union recently became aware that Brand has been performing other work in the Union's Jurisdiction." (Employer Ex. 1). The geographic jurisdiction of the LMA asserted by the Laborers covers work in the State of Nevada, except Clark and Lincoln Counties, the Town of Tonopah, and a portion of Nye and Esmeralda Counties. (Laborers Exh. 3, Sec. 1, p. 2). The grievance demanded that BSS comply with the LMA in full, which expressly included a requirement for "employees to be cleared through the hiring hall of the Union." (Employer Ex. 1). This demand to "comply with the LMA in full," including obtaining workers through the Laborers' hiring hall, clearly is an area-wide demand for assignment of such work, much broader than the Marriott Aloft job alone.

Additionally, when Mr. Headrick of BSS attended a meeting with the Laborers on September 10, 2019, the Laborers reiterated its demand of assignment of scaffolding work performed by BSS. (Tr. 49-50). In addition, an attorney named Nathan Jenkins attended that meeting on behalf of the Laborers' benefit trust funds, threatening to audit BSS if it did not comply, which Mr. Headrick understood to be a threat associated with the Laborers' demand for assignment of work. (Tr. 49-50).

**E. The Carpenters Responded With a Threat to Strike and Picket**

Following the Laborers' demand for reassignment of the work, Mr. Headrick of BSS received a letter from the Carpenters stating that the Carpenters were aware that the Laborers had made a demand for assignment of scaffolding work that was currently assigned to Carpenters. (Tr. 31, Carpenters Ex. 1). The letter stated that if BSS were to reassign any of the work to Laborers, "this would not only violate your agreement with the Carpenters, it would also result in the Carpenters striking and picketing all your jobs." (Carpenters Ex. 1).

Frank Hawk, the Chief Operating Officer and Regional Vice President for the Carpenters, confirmed that he sent the strike threat letter to BSS on behalf of the Carpenters. (Tr. 71-72, Carpenters Ex. 1). Mr. Hawk was clear that the letter, as written and as intended, threatened to strike and picket if any of BSS's scaffolding work were assigned to Laborers rather than Carpenters, and was not limited to work performed on the Marriott Aloft job alone. (Tr. 71-72). Mr. Hawk testified that, to his knowledge, the Laborers were still demanding reassignment of scaffolding work currently performed by the Carpenters, beyond just the completed Marriott Aloft job. (Tr. 72).

In response to the Carpenters' strike threat, BSS filed the ULP charge in this matter. (Tr. 31).

**F. The Laborers Have Not Disclaimed the Demand for Reassignment of the Work**

At hearing, the Laborers made a half-hearted, non-committal effort to pretend that they had not and were not making any claim for assignment of work. However, when asked expressly whether the Laborers were disclaiming and waiving any right to assignment of scaffold-related work performed by BSS, Mr. Daly would not state any such disclaimer or waiver of the Laborers' demands for assignment of such work. (Tr. 113). Mr. Daly stated that the Laborers

had made “no such claim or demand for the work, and we haven’t waived any of the work because we don’t know if we have a contract.” (Tr. 113). As such, the facts are that the Laborers have made repeated demands for assignment of scaffold-related work from BSS, and have not disclaimed those demands. Further, the Laborers’ ongoing and broad demand for assignment of work is further confirmed by the fact that, during the Section 10(k) hearing in this matter, the Laborers had an operative on a BSS jobsite photographing scaffolding work being performed by the Company. (Tr. 138-139, Employer Ex. 4).

**G. The Laborers’ Demand for Reassignment of Work is Broader Than a Single Jobsite**

The evidence presented at hearing established that the Laborers’ demand for assignment of work is much broader than just the Marriott Aloft job. Mr. Daly of the Laborers stated to Mr. Headrick of BSS that the Company had an agreement with the Laborers and that the Laborers demanded compliance with that agreement. (Tr. 29). Likewise, the Laborers’ grievance expressly stated that “the Union recently became aware that Brand has been performing other work in the Union’s Jurisdiction” – other work in addition to the Marriott Aloft job. (Employer Ex. 1). The grievance demanded that BSS comply with the LMA in full, which expressly included a requirement for “employees to be cleared through the hiring hall of the Union.” (Employer Ex. 1). In order to “comply with the LMA in full,” as demanded by Mr. Daly and by the Laborers’ grievance, BSS necessarily would have to assign such work to members of the Laborers’ on all scaffolding jobs throughout the geographic coverage of the LMA.

Mr. Headrick testified that all of the Laborers’ communications to him, including those from Mr. Daly, included demands that BSS assign scaffold work to the Laborers on a broader basis going forward, beyond the Marriott Aloft job. (Tr. 63). In fact, the Laborers repeatedly asserted the existence of an agreement that required BSS to use Laborers on all scaffolding jobs.

(Tr. 63). This clearly is an area-wide demand for assignment of such work, much broader than the Marriott Aloft job alone.

Additionally, the Laborers' ongoing conduct – long after the Marriott Aloft job has concluded – demonstrates that the Laborers' claims are broader than one jobsite alone. At the exact moment the Laborers were attempting to downplay their demands at the Section 10(k) hearing, a Laborers' operative was observed photographing on a BSS jobsite known as the "Double-R" office building in Reno. (Tr. 138, Employer Ex. 4). The Laborers' trespassing and photographing on a BSS jobsite came just four days after BSS sent an email to Mr. Daly of the Laborers notifying him of BSS's performance of scaffolding work on various jobsites in the Reno area, including the Double-R jobsite, and inquiring as to whether the Laborers claim or demand the right to be assigned any such work. (Tr. 139-140, Employer Ex. 3). This behavior is fully consistent with the Laborers' ongoing behavior demonstrating a demand for assignment of work throughout the geographic area claimed by the LMA.

### **III. ARGUMENT**

#### **A. This Dispute is Properly Before the Board for a Determination Under Section 10(k) of the Act**

The Board must act to resolve work jurisdiction disputes between labor organizations when "there is reasonable cause to believe that: (1) there are competing claims to the disputed work; (2) a party has used proscribed means to enforce its claim to the work in dispute; and (3) the parties have not agreed on a method for the voluntary adjustment of the dispute." *Laborers' International Union of North America, Local 265 (Henkels McCoy, Inc.)*, 360 NLRB 819, 822 (2014).

## **1. There are competing claims to the work**

The evidence demonstrates that BSS is faced with competing demands for the assignment of the same scaffolding work. As discussed above, employees represented by the Carpenters have been performing all scaffolding work for BSS for at least 10 years. The Carpenters very clearly have demanded continued assignment of that work, including a threat to strike and picket in furtherance of the demand. (Carpenters Ex. 1).

The Laborers have made verbal and written demands for reassignment of BSS's scaffolding work on the Marriott Aloft job and beyond. (Tr. 28-30, Employer Ex. 1). Mr. Daly testified on behalf of the Laborers that he told Mr. Headrick that BSS was in violation of its agreement, and that it had an obligation to assign scaffolding-related work to Laborers. (Tr. 88). Even after the Marriott Aloft job was completed, the Laborers had an operative on another BSS jobsite photographing BSS's scaffolding work on that site, while this Section 10(k) hearing was in progress. (Tr. 138, Employer Ex. 4). Despite the Laborers' attempts at hedging at the hearing, the Laborers' lone witness, Mr. Daly, ultimately would not disclaim or waive the Laborers' prior demands for assignment of such work. (Tr. 113).

## **2. The Carpenters violated Section 8(b)(4)(D) of the Act**

There is no doubt that the Carpenters used proscribed means to enforce its competing claim, by making the threat to strike and picket in the event BSS reassigned scaffold work to members of the Laborers in response to the Laborers' demands. (Carpenters Ex. 1). At hearing, the Carpenters confirmed the unlawful threat. (Tr. 71-72).

At hearing, the Laborers' made a misguided argument that the Laborers' demands for reassignment of the work and filing of the grievance demanding same were lawful, and that it was asserting a "work preservation" defense in this matter. (Tr. 117). This argument is irrelevant and misplaced. The Laborers are not charged with any unfair labor practice or illegal

action against which to assert a defense. In the context of this dispute, the Laborers' grievance and demands for reassignment of the work serve only to establish that competing demands for assignment of the work exist. It is the Carpenters' strike threat that violated the Act.

Board authority is clear that if *either* union claiming jurisdiction over disputed work threatens to picket or strike the location of the work, such coercive threats satisfy Section 8(b)(4)(D). In particular, the Board has held that where one union seeks to displace a second union through a grievance arbitration process – as the Laborers did here – the second union's threat to picket or strike to protect the work constitutes coercion under Section 8(b)(4)(D). *See Laborers Mass. Dist. Council (J.E. White Contracting Co.)*, 290 NLRB 300, 301 (1988); *Local 1575, International Longshoremen's Association, AFL-CIO (Puerto Rico Marine Mgmt.)*, 289 NLRB 1215, 1216-17 (1988).<sup>2</sup>

Further, there was no evidence presented at hearing to challenge the authenticity of the Carpenters' strike threat, or that it was the result of collusion. *See Laborers' International Union of North America, Local 265 (Henkels McCoy, Inc.)*, supra (“The Board has consistently rejected this argument where, like here, there is no affirmative evidence that [the union's] threat was not genuine or that it was a product of collusion with the employer.”); *Local 1575, International Longshoremen's Association, AFL-CIO (Puerto Rico Marine Mgmt.)*, 289 NLRB 1215, 1216-17 (1988). (“there is no evidence that the threat was not made seriously or that [the other union] had in any way colluded with the Employer ...”).

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<sup>2</sup> Nor does the presence of a no-strike clause in the Carpenters' CBA with BSS alter this analysis in any way, as the threat to strike in violation of a no-strike clause is an actual threat to strike. *See Aldridge Electric, Inc.*, 358 NLRB No. 87, 3 (2012); *Laborers Local 265 (AMS Construction)*, 256 NLRB No. 57, 4 (2010); *Lancaster Typographical Union No. 70 (C.J.S. Lancaster)*, 325 NLRB 449, 450-51 (1998).

**3. The Parties have not agreed upon any voluntary resolution mechanism**

The Parties stipulated that there exists no agreement between these three Parties for voluntary adjustment of the dispute. (Tr. 21-22).

**B. Based Upon the Relevant Factors, the Board Should Award the Disputed Work to Employees Represented by the Carpenters**

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). These factors are (1) collective bargaining agreements (“CBAs”); (2) employer preference and past practice; (3) area and industry practice; (4) relative skills and training; and (5) economy and efficiency. *Laborers Internatl. Local 510 (Surianello General Concrete)*, 351 NLRB No. 25, 182 LRRM (BNA) 1453 (2007). These factors, as applied to the evidence presented at hearing, demonstrate that the Board should award the disputed work to employees represented by the Carpenters.

**1. Collective bargaining agreements**

There is a contract between BSS and the Carpenters covering Northern Nevada, which expressly includes in the Carpenters’ scope of work all “scaffold” work. (Tr. 31-33; Employer Ex. 2, Section II.B(3), p. 4). The contractual relationship with the Carpenters dates back for many years, prior to when Mr. Headrick joined BSS approximately 10 years ago. (Tr. 32-33).

Mr. Headrick testified on behalf of BSS that he does not believe that BSS is bound by any contract with the Laborers. (Tr. 33). The Laborers take the position that BSS is bound to the Laborers Master Agreement (“LMA”). (Tr. 110). However, the Laborers produced no contract document executed by an agent of BSS or any other evidence that BSS is bound by any contract with the Laborers. Mr. Daly testified at great length to his confusion about the identity of the

Employer, various contractual relationships with several different employers, and his personal confusion about which Employer was the proper target of the Laborers' grievance demanding assignment of work. (Tr. 93-108). Nonetheless, Mr. Daly confirmed that the Laborers continued to assert that BSS is bound by the Laborers' Master Agreement covering the Reno area. (Tr. 109). The Laborers submitted a copy of an LMA following the end of the live hearing, and that LMA contains no reference of any kind to scaffolding. (Laborers Ex. 3).

## **2. Employer preference and past practice**

Employer preference and past practice clearly favor awarding the disputed work to the Carpenters. Mr. Headrick testified that it is BSS's preference to assign scaffolding work to the Carpenters and not to the Laborers. (Tr. 61). The reasons he provided were the Carpenters skills, training and efficiency, as fully discussed below.

BSS's past practice has long been consistent with its preference that employees represented by the Carpenters perform BSS's scaffolding work. Mr. Headrick testified that, in his approximately 10 years with BSS, the Company has performed approximately 75 to 100 scaffolding jobs per year in the Reno area. (Tr. 34-35). Over that ten-year period, that amounts to approximately 750 to 1000 jobs. Mr. Headrick testified that BSS had assigned all scaffolding related work on all of those jobs to employees represented by the Carpenters. (Tr. 35). Aside from using a limited number of Laborers in industrial maintenance projects – not construction sites of the type in dispute here – covered by a National Maintenance Agreement in 2006-2008, the Company had not assigned any scaffolding-related work to Laborers at all. (Tr. 35-36).

## **3. Industry and area practice**

Industry and area practice also favor awarding the work to the Carpenters. Beyond the Carpenters' relationship with BSS, the Carpenters have contractual relationships with approximately 10 to 12 employers who perform scaffolding services exclusively in Northern

Nevada, and with roughly another 100 employers who perform at least some scaffolding services. (Tr. 69-70). Mr. Hawk stated that he was not aware of any of those contractors having any contractual relationship with, or employing members of, the Laborers. (Tr. 69-70). Mr. Hawk testified that he has worked in the field on 100-plus jobsites, and never observed any Laborers erecting or dismantling or moving scaffold. (Tr. 75-76).

Mr. Headrick testified on behalf of BSS that, to his knowledge and experience, Laborers do not erect or build scaffolding, and that he was not aware of any BSS competitors in the Reno area using Laborers to perform scaffolding work. (Tr. 36-37, 59).

The Laborers failed to present any evidence that there is an area or industry practice of assigning scaffolding work to members of the Laborers. Mr. Daly purported to testify that the Laborers have relationships with contractors who perform scaffolding work in Northern Nevada. (Tr. 142). These included Brand Scaffold Rental and Erection as well as Aluma Systems. (Tr. 142-144). However, on cross-examination, Mr. Daly acknowledged that Brand Scaffold Rental and Erection no longer performs any scaffolding work in the Reno area, and that he does not even know if Aluma Systems continues to exist. (Tr. 143-144).

This factor clearly and strongly favors an award of the work to employees represented by the Carpenters.

#### **4. Relative skills and training**

This factor also favors an award of the disputed work to employees represented by the Carpenters. The Carpenters have a state recognized four-year apprenticeship program that is exclusive to scaffolding, leading to designation in a special classification of Carpenter known as a “Carpenter Scaffolder.” (Tr. 71, 73). Mr. Headrick testified to his opinion that the Carpenters training and skills for scaffolding work are “phenomenal.” (Tr. 37). Mr. Headrick has visited

the Carpenters' training center in Las Vegas, where he observed members of the Carpenters training on all types of scaffolding. (Tr. 37). Mr. Headrick stated that the Carpenters' training center provides training for the specific types of scaffolding work he assigns in the Reno area. (Tr. 37). Mr. Headrick testified that the employees represented by the Carpenters who have performed this work for BSS perform it well, and that BSS continues to win work and get repeat business from contractors, which indicates a high quality of work. (Tr. 38). The Carpenters are uniquely equipped with excellent training and all necessary skills to successfully perform the disputed scaffolding work.

In contrast, Mr. Daly testified that the Laborers teach scaffolding work only "peripherally" in their apprenticeship program. (Tr. 86). He confirmed repeatedly that the Laborers simply do not erect or build scaffolding. (Tr. 86, 120). Mr. Daly testified that Laborers work on scaffolding is limited to "tending to Carpenters," which is generally moving and handing material to members of the Carpenters as they erect scaffolding. (Tr. 119).

A comparison of the relative skills and training of the Carpenters and the Laborers strongly favors an award of the work to employees represented by the Carpenters.

##### **5. Economy and efficiency**

Economy and efficiency also favor awarding the work to the Carpenters. Mr. Headrick testified that it is most economical and efficient for BSS to assign scaffolding work to employees represented by the Carpenters because they have the skills to perform all aspects of the scaffolding work performed by BSS, and have the necessary skills and ability to advance in the Company. (Tr. 38-39). Additionally, members of the Carpenters assigned to perform scaffolding work can perform all aspects of the job, from loading and unloading, to staging, to erecting multiple levels of scaffold as needed for the job, to dismantling and removing scaffolding from the jobsite, as well as related clean-up. (Tr. 39). In short, the Carpenters'

members can perform every aspect of the work required on BSS's jobsites. (Tr. 39). Mr. Headrick testified that, to his knowledge and experience, Laborers simply do not erect or build scaffolding, so members of the Laborers would not be able to perform the functions BSS needs. (Tr. 59). As noted above, the Laborers' admitted that their scope of work on scaffolding is limited to "tending to Carpenters" by handing them materials as Carpenters build the scaffold. (Tr. 119). This means that adding members of the Laborers to the jobsite would not negate the need to employ members of the Carpenters to erect the scaffolding; it would just add additional people to perform functions that the Carpenters already perform. It would be far less efficient to use workers who perform only a small portion of the required functions, particularly on smaller jobs involving as few as three employees at times, such as the Marriott Aloft job and similar jobs.

### **C. A Broad Award Is Appropriate**

Under similar circumstances, the Board has held that is appropriate to issue a broad, area-wide award of work covering the geographic area in which the employer performs the work and the competing unions' jurisdictions coincide. *See Laborers Int'l Union of N. Am., Local 860 (Ballast Constr., Inc.)*, 364 NLRB No. 126, 8-9 (2016). The Board will issue a broad award in a 10(k) proceeding where there is evidence that similar disputes may recur, and it is likely that there will be more proscribed conduct in the future. *Id.* Both of these requirements are satisfied here and a broad award is appropriate.

It is clear that BSS intends to continue assigning the scaffolding work to employees represented by the Carpenters, and it continues to assign this work to such employees on other jobsites that are ongoing and active. (Employer Ex. 3).

The Laborers clearly claim that at least some of the disputed work is covered by a CBA with BSS, which would require assignment of that work to members of the Laborers. The

Laborers, snaking through evasive and equivocal testimony, flatly refused to disclaim or waive its demands for work on the disputed Marriott Aloft hotel jobsite, or on several other current and ongoing jobs. Further, while this Section 10(k) hearing was taking place in Reno, a representative of the Laborers was observed and photographed taking pictures of scaffolding work performed by BSS employees represented by the Carpenters on a current and active jobsite – not the Marriott Aloft hotel jobsite. Mr. Daly incredibly denied having any knowledge of this activity, including no knowledge of why there would be a Laborers’ operative on the Employer’s jobsite during the Section 10(k) hearing. (Tr. 122). Mr. Daly maintained his assertion that he had no knowledge of this activity, despite his acknowledgement that he had just received notice from BSS just four days earlier that it was performing scaffolding work on that jobsite. (Tr. 122-123). It is clear that the Laborers’ demand for reassignment of this work does not stop with the Marriott Aloft job but, rather, the Laborers’ demand is ongoing and the Laborers continue to prepare for future battles over this work. The Laborers’ evasiveness and refusal to answer questions about their intentions further indicate a need for a broad order.

Finally, the Carpenters’ threat of proscribed strike and picket activity is not limited to the Marriott Aloft job. The Carpenters’ threat letter refers to “the scaffolding work in Northern Nevada,” and pledges that any reassignment of that work would “result in the Carpenters striking and picketing all your jobs.” (Carpenters Ex. 1).

This is a dispute that is broader in time and geography than the Marriott Aloft job, and is very likely to recur in the near future. Under these circumstances, a broad, area-wide order resolving these disputes is appropriate and should be issued.

**D. The Laborers' Argument Regarding Subcontracting Grievances is Irrelevant and Misplaced**

At hearing, the Laborers repeatedly argued that there was no competing demand for assignment of the work in dispute because the Laborers merely were maintaining a subcontracting grievance against a general contractor, which it claims is a separate dispute from the assignment of work itself. In that argument, the Laborers cited the Board's decision in *Capitol Drilling Supplies*, 318 NLRB 809 (1995). This argument is misplaced, and *Capitol Drilling* is irrelevant and inapplicable, because BSS is not a general contractor, nor does it subcontract any of the scaffolding work to another employer. (Tr. 40). BSS self-performed this work by assigning it to its employees represented by the Carpenters. (Tr. 25). Further, the Laborers' own grievance does not reference or assert that any subcontracting has taken place – because it has not. (Employer Ex. 1). Clearly, this is a dispute over BSS's assignment of scaffolding work to individuals employed directly by BSS, and not about any subcontracting dispute.

**E. Evidentiary Issues Remaining from the Hearing**

At hearing, the Laborers sought to introduce "Laborers Ex. 2," received by the Hearing Examiner, which is a packet of documents including numerous, separately numbered exhibits within it. The Hearing Examiner agreed that the parties would address objections to each of the individual components of Laborers Ex. 2 in the post-hearing briefs. (Tr. 92). BSS's objections to these documents are as set forth below:

- The first eight pages of Laborers Ex. 2 is the Laborers' position statement as submitted to the Region during the investigation. This is an "out of court" statement by the Laborers, it is not sworn testimony, and it is not an admission by a party opponent and, as such, it is

inadmissible and irrelevant. The Board's determination should be based upon competent evidence presented at the hearing.

- Exhibits 1 through 8, within Laborers Ex. 2, are all documents that pertain to employers and entities that indisputably are not the Employer involved in this case. As such, they are irrelevant to this matter, and should not be admitted or considered for any purpose.
- Exhibits 13 and 14 purport to demonstrate an obligation on the part of BSS to arbitrate the Laborers' jurisdictional demand for assignment of work. These are irrelevant, as the Parties to this matter – including the Laborers – have stipulated that there is no agreement for the voluntary resolution of this dispute. (Tr. 21-22).
- BSS asserts no objection to the receipt of Exhibits 15 through 25 (within Laborers Ex. 2), which are correspondence between the Laborers and BSS.
- BSS objects to the receipt of Exhibits 26 through 28, as they are correspondence to which BSS is not a party, and which are not relevant to the dispute before the Board.
- BSS has no objection to the receipt of Exhibit 29, but notes that it has already been admitted as part of the formal papers as the ULP charge in this matter.
- BSS objects to the receipt of Exhibits 30 and 31 as they appear to be hearsay in the form of a ULP charge and correspondence relating to a dispute involving different employers, involving the assignment of small equipment operation and not scaffolding, and bears no relevance to this dispute.

#### **IV. CONCLUSION**

The weight of the evidence demonstrates that the Carpenters violated Section 8(b)(4)(D) of the Act as charged. The Carpenters and the Laborers have asserted competing demands for BSS's scaffolding work, not only for the Marriott Aloft job but for the entire area in which the

Unions' geographic jurisdictions coincide. The Parties stipulated that there is no agreed-upon alternative mechanism to resolve this dispute. Based on the factors the Board traditionally uses, the Board should issue a Section 10(k) award as to the disputed work to employees represented by the Carpenters, on a broad area-wide basis.

Respectfully submitted March 10, 2020.

A handwritten signature in black ink, appearing to read 'Timothy C. Kamin', written over a horizontal line.

Timothy C. Kamin  
Attorney For  
BrandSafway Services, LLC  
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**CERTIFICATE OF SERVICE**

The undersigned attorney hereby certifies that he has served a copy of the foregoing  
POST-HEARING BRIEF OF BRANDSAFWAY SERVICES, LLC, by electronic mail upon:

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Dated this 10<sup>th</sup> day of March, 2020.



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