

ELLEN GREENSTONE
RICHA AMAR
ROTHNER, SEGALL, GREENSTONE & LEHENY
510 South Marengo Avenue
Pasadena, California 91101-3115
Telephone: (626) 796-7555
Facsimile: (626) 577-0124
E-mail: egreenstone@rsgllabor.com

Attorneys for PAINTERS AND ALLIED TRADES
DISTRICT COUNCIL 36, INTERNATIONAL
BROTHERHOOD OF PAINTERS AND ALLIED
TRADES, AFL-CIO, CLC

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Region 21

SOUTHWEST REGIONAL COUNCIL OF
CARPENTERS, SOUTHERN CALIFORNIA
CONFERENCE OF CARPENTERS, UNITED
BROTHERHOOD OF CARPENTERS &
JOINERS OF AMERICA,

CASE No. 21-CD-675

and

TANGRAM FLOORING, INC.

and

PAINTERS AND ALLIED TRADES DISTRICT
COUNCIL 36, INTERNATIONAL UNION OF
PAINTERS AND ALLIED TRADES, AFL-CIO, CLC

Party in Interest.

**POST-HEARING BRIEF TO THE NATIONAL LABOR RELATIONS BOARD
BY PARTY IN INTEREST
PAINTERS AND ALLIED TRADES DISTRICT COUNCIL 36**

TABLE OF CONTENTS

	<u>Page</u>
I. STATEMENT OF RELEVANT FACTS	1
III. ARGUMENT	3
A. § 10(k) PREREQUISITES	3
1. The Existence of Competing Claims to the Work	4
2. Reasonable Cause to Believe that § 8(b)(4)(D) Was Violated	7
3. The Existence of an Agreed Method for Voluntary Resolution of the Dispute	14
B. § 10(k) FACTORS	15
1. Employer Preference	15
2. Certifications and Collective Bargaining Agreements	18
3. Relative Skills	19
4. Area and Industry Practice	26
5. Employer Past Practice	28
6. Efficiency and Economy of Operations	29
C. IF THE BOARD ISSUES AN AWARD OF THE WORK IN THIS CASE, THE AWARD SHOULD BE NO BROADER THAN THE LEGACY APARTMENTS JOB WHICH IS THE SUBJECT OF THE CHARGE	29

TABLE OF AUTHORITIES

<u>Case</u>	<u>Page</u>
<i>Dillingham Construction N.A., Inc. v. City of Sonoma (Dillingham II)</i> , 190 F.3d 1034 (9 th Cir. 1999)	25
 <u>Administrative Cases</u>	
<i>Carpenters Local 623 (E.P. Donnelly, Inc.)</i> , 351 NLRB 97 (2007)	19
<i>Cleveland Typographical Union 53 (Sherwin-Williams Co.)</i> , 224 NLRB 583 (1976)	20
<i>Graphic Communications Int'l. Union (Jos. Berning Printing Co.)</i> , 331 NLRB 846 (2000)	16
<i>IBEW Local 357 (Western Diversified Electric)</i> , 344 NLRB 1239 (2005)	30
<i>Iron Workers Local 46 (A.F.C. Enterprises, Inc.)</i> , 316 NLRB 271 (1995)	6
<i>Ironworkers Local 380 (Stobbeck Masonry, Inc.)</i> , 267 NLRB 284 (1983)	16, 17, 20, 26
<i>Iron Workers Local No. 1 (Goebel Forming, Inc.)</i> , 340 NLRB 1158 (2003)	18
<i>Laborers (Capitol Drilling Supplies)</i> , 318 NLRB 809 (1995)	14
<i>Laborers Local 1086 (Miron Construction Co., Inc.)</i> , 320 NLRB 99 (1995)	14
<i>Pipefitters Local 562 (Systemaire, Inc.)</i> , 321 NLRB 428 (1996)	29

TABLE OF AUTHORITIES
(Continued)

<u>Statutes and Regulations</u>	<u>Page</u>
National Labor Relations Act, as amended	
§ 8(b)(4)(D)	<i>passim</i>
§ 10(k)	<i>passim</i>
California Labor Code	
§ 1777.5(c)	20
§ 1777.5(d)	20
§ 1777.5 (e)	22
§ 1777.5(g)	20
§3077	20
§ 3093(k)	21
California Code of Regulations,	
Title 8, Sec. 230.1(c)	20

Party in Interest in the above-captioned proceeding under § 10(k) of the National Labor Relations Act, PAINTERS AND ALLIED TRADES DISTRICT COUNCIL 36, INTERNATIONAL UNION OF PAINTERS AND ALLIED TRADES, AFL-CIO, CLC ("Painters" or "District Council 36") files its Post-Hearing Brief to the Board.

I. STATEMENT OF RELEVANT FACTS

The parties stipulated that Charged Party/Respondent SOUTHWEST REGIONAL COUNCIL OF CARPENTERS ("Carpenters") and Union Party in Interest Painters are both labor organizations within the meaning of § 2(5) of the Act and that Charging Party Employer, TANGRAM FLOORING, INC. ("Tangram"), is an employer within the meaning of § 2(6) and (7) of the Act. BdX 2, ¶¶ 3, 4.¹

The parties stipulated that the work that is the subject of this proceeding is "[t]he flooring installation being perform[ed] at the Legacy Apartments jobsite in Hollywood, California." BdX 2, ¶5. Specifically, Painters Business Representative Vince Ramos testified that he observed Tangram employees prepping floors, gluing down cork floor sound barrier, and installing vinyl strips in restrooms and kitchen areas. VR 277:24-278:6.² Tangram performs commercial floor covering installation of carpet, resilient flooring, and wood. DT 22:13-16. Tangram performs no work other than the installation of resilient flooring, carpet and wood. DT 88:11-13.

The parties stipulated that Tangram is not failing to conform to an order or certification of

¹ Exhibits are noted as "BdX" for Board Exhibits; "ERX" for Employer Tangram's Exhibits; "RUX" for Respondent Carpenters Union Exhibits; and "PIX" for Party in Interest Painters Exhibits.

² Citations to the transcript of the hearing are noted with the initials of the witness whose testimony is cited, followed by the page(s) and line(s) of testimony cited separated by a colon.

the Board in determining the bargaining representative for the employees performing the work. BdX 2, ¶ 6.

Tangram was formed July 18, 2008. DT 22:17-18. One month later, on August 21, 2008, Tangram signed a Floor Covering Memorandum Agreement with the Carpenters. DT 23:9-21; ERX 1. At the time, Tangram had no actual work or projects. DT 23:22-24. The "Work Covered" by the Memorandum Agreement is described as all work in connection with the installation of floor coverings (with the exception of wood floors covered by the Carpenters master agreement), including carpet, linoleum, vinyl, cord, laminate, and glue down wood floor. ERX 1, ¶ 4. The Memorandum Agreement binds Tangram to the Southern California Master Labor Agreement between United General Contractors, Inc. 2006-2010 and the Carpenters ("Carpenters master agreement"). ERX 2, ¶ 1. The Carpenters master agreement covers the gamut of work performed on construction projects. *See* ERX 1, pp. 4-9. The only flooring work specifically described is nailed wood flooring. GH 154:14-19; ERX 1, ¶ 112. This nailed wood flooring work is apparently the exception stated in the scope of work described in Tangram's Memorandum Agreement. GH 181:14-21. The extent to which the reference to the Carpenters master agreement as an "exception" in the Memorandum Agreement creates coverage or creates an exception to coverage is unclear.

In November 2008, Tangram first requested dispatch of workers from the Carpenters. DT 25:19-26:1. Tangram Vice President and principal employer witness David Teper did not know what projects Tangram had when it first employed employees. DT 88:7-9. At the time of the hearing, Tangram had approximately 25 employees. DT 22:22-25.

David Burtle, business representative for Local 1247, International Union of Painters and Allied Trades ("Painters Local 1247"), testified that Painters Local 1247 represents employees in the floor covering trade. DB 194:15-25. Painters Local 1247 members install carpet, VCT, vinyl, cork, laminate, wood, rubber tile, and other flooring materials. DB 195:3-6. Painters Local 1247, through Party in Interest District Council 36, has a Master Labor Agreement with the Floor Covering Association of Southern California ("Painters Floor Covering MLA"), an industry association of employers. DB 196:5-197:2; PIX 2. The Painters Floor Covering MLA is effective in Orange, Los Angeles, Riverside, San Bernardino, Venture, Santa Barbara, San Luis Obispo, Kern, Inyo, and Mono Counties. DB 197:12-15; PIX 2, Art. II, Sec 1. The agreement describes the work covered broadly as including all steps in the installation of sheet rubber, sheet linoleum, sheet vinyl, laminate floors and laminate floor systems, cork, carpet, rubber tile, linoleum tile, asphalt tile, cork tile, interlocking tile, vinyl tile, vinyl composition tile, composition in sheet or tile form, top set base, and all derivatives of these materials; artificial turf and derivatives; all resilient seamless materials such as epoxy, polyurethane, plastics and their derivatives whether poured, sprayed, or troweled on components and systems, solid wood and solid glue down wood; fittings; removal; cleaning; and application of moisture barriers. DB 197:16-22; PIX 2, Art. II, Sec. 2.

II. ARGUMENT

A. § 10(k) PREREQUISITES

In a proceeding under § 10(k), the prerequisites which must be established in order for the Board to consider an award of work are: 1) competing claims to the work, 2) reasonable cause to

believe § 8(b)(4)(D) has been violated, and 3) no agreed-upon method for voluntary resolution of the dispute.

Painters submit that this case concerns the issue of whether an effort to enforce State apprenticeship law constitutes a claim for assignment of work and/or can give rise to a violation of § 8(b)(4)(D). *See* 29:12-17. Painters submit that such an effort itself is *not* a claim for work and is not a violation of § 8(b)(4)(D) by the enforcing union. However, if the Board finds either that Painters' effort to enforce State apprenticeship law constitutes a claim for work or that Painters otherwise made a claim for the work which is the subject of this case or that enforcement of or threats to strike over enforcement of State apprenticeship standards violates § 8(b)(4)(D), then Painters submit that State law apprenticeship and public works obligations compel assignment of the work to Painters under the Board's traditional § 10(k) factors.

1. The Existence of Competing Claims to the Work

On April 3, 2009, the Compliance Supervisor of the Community Redevelopment Agency of the City of Los Angeles ("CRA") e-mailed the general contractor on the Legacy project, advising that it had come to the attention of the CRA that the carpet subcontractor on the project, Tangram, was a Carpenter signatory. The Compliance Supervisor advised that Tangram had to use the correct work classification and was required to submit a DAS-140 form to the appropriate apprenticeship program, the Southern California Resilient Floor and Decorative Covering Joint Apprenticeship Training Committee ("Resilient Floor JATC"). ERX 5.³

³ The DAS-140 form is a State of California form which contractors and subcontractors awarded public works jobs must send to apprenticeship committees approved by the State to train apprentices in the trade and area of the jobsite of the public work. The form directs the contractor to the DAS website for apprenticeship programs and requires contractors to state that they will employ and train apprentices in accordance with the California regulations.

On April 6, 2009, counsel for both Painters and Carpenters separately wrote the CRA Compliance Supervisor. Painters counsel recounted the Painters' communication to the CRA advising that apprentices from the appropriate JATC were not being used on the project, that the only California State-approved apprenticeship program for resilient flooring and carpet was the Resilient Floor JATC, and that Carpenters did not have a State-approved apprenticeship program. RUX 1. Carpenters counsel threatened to sue the CRA for assertedly taking sides in a labor dispute and to strike and picket Tangram. ERX 4.

The parties stipulated that Carpenters counsel's letter was copied to and received by Tangram and that a Painters attorney received this letter from the CRA through a public record request. BdX 2, ¶ 7. Although Teper asserted that he took the Painters' April 6 letter to the CRA, which he received from Carpenters counsel, to be a claim by Painters for Tangram's work on the project [DT 67:2-68:1, 69:12-25], Teper acknowledged that the project executive for the Legacy project reported to him on April 6 that the CRA "wanted Tangram Flooring off the jobsite until we signed a DAS-140 form and used the apprentices from the Painters Union." DT 57:24-20; ERX 6.

Moreover, Carpenters Contract Administrator Gordon Hubel testified that he caused the threat to strike and picket to be issued by Carpenters counsel and that, when he did so, he did not know that the issue before the CRA was the use of apprentices; he instead thought it was a claim for the work. GH 150:25-151:4.

See PIX 1.

The parties stipulated that, since April 6, Tangram has continued to assign the work to members of the Carpenters who are its employees. BdX 2, ¶ 7. Tangram never assigned the work to the Painters. DT 101:14-16.

Painters have taken the position in this proceeding that an effort to enforce state apprenticeship law is *not* a claim for the work or a violation of the Act. See 29:12-17. Tangram and Carpenters were ultimately uncertain of the effect of the apprenticeship issue. Teper testified that Carpenters counsel told him "absolutely" that it would be a violation of Tangram's contract with the Carpenters if Tangram accepted apprentices from the Painters Apprenticeship Program and that the Carpenters would picket. DT 58:25-59:11. During the hearing, though, Tangram's counsel asked whether the Painters would be satisfied if Tangram agreed to take apprentices from the Painters apprenticeship program who, once dispatched, would be represented by the Carpenters under its agreement. 29:23-30:5. Painters counsel, in turn, asked whether, hypothetically, if Tangram did this, the Carpenters would discontinue their threat to strike the job; and Carpenters counsel stated they would not. 32:9-16. However, when questioned under oath by Painters counsel whether it is the Carpenters position that it will strike or picket Tangram if all that occurs is dispatch of apprentices from the Painters Apprenticeship Program to Tangram [GH 151:14-17], Hubel did not know what the Carpenters policy would be [GH 153:1-8] or whether such dispatch would violate the Carpenters' contract with Tangram [GH 180:11-181:5].

There is no jurisdictional dispute where a union's conduct relates to the terms and conditions under which work is to be performed, rather than to which employees will perform the work. *Iron Workers Local 46 (A.F.C. Enterprises, Inc.)*, 316 NLRB 271, 273 (1995) (picketing following employer's reassignment of work to Carpenters after dispute arose between employer

and Iron Workers over employer's application of "prevailing wage" instead of rate in collective bargaining agreement held not to be jurisdictional dispute). Enforcement of State law apprenticeship requirements on public works jobs relates to the terms and conditions under which work is to be performed, separate from which employees will perform the work. Carpenters and Tangram's hesitance to take the position that Carpenters could, by virtue of their contractual arrangement, avoid Painters' enforcement of State law apprenticeship requirements, affirms that the issue is apprenticeship conditions, not work assignment.

2. Reasonable Cause to Believe that § 8(b)(4)(D) Was Violated

Teper testified that a customer informed him that the Painters first showed up to a two-day job at Pacific Life in Newport Beach with a rat and a banner that said, "Shame on Tangram." DT 35:5-25, 37:25-38:6. Teper testified he tried to contact Painters representative Vince Ramos [DT 38:14-17] but did not reach anyone from the Painters Union to talk about Pacific Life [DT 40:17-19]. ERX 7. This testimony does not constitute a claim for work or a violation of § 8(b)(4)(D) on the Legacy project, or on any project.

Teper stated he knew of Ramos because Ramos had come into Tangram's office in either November 2008 or January 2009 after Tangram signed with the Carpenters to ask why Tangram had signed. DT 39:1-40:2. Teper claimed Ramos told him to understand that, by doing so, he had started a war. DT 39:16-19. Teper later stated he talked with Ramos about a prior conversation with Painters representative Matt Weir. DT 43:21-44:2.

Ramos testified that he visited Tangram in early November 2008 because a worker came into Local 1247 and said he needed to join the Union to work for Tangram.⁴ Ramos told him he could not sign him up but took his contact information in order to get back to him. Ramos testified that he told Teper the man had come in and that he asked Teper what job Tangram was doing. Teper told him the man had gone to the wrong union, that Tangram had signed with the Carpenters several months before. This was new information to Ramos. Teper asked Ramos if this would cause a problem, and Ramos said he was not sure. Ramos denied saying that this would start a war. VR 275:21-277:16. Ramos testified he did not believe either he or Teper used the term "war" and that he might have stated that there could be conflicts between the Painters and Carpenters as a result of Tangram's having signed with Carpenters. VR 283:14-284:21. Ramos testified that Teper told him he had a bad experience with Weir, that Weir had been rude to him and used an obscenity. VR 280:18-281:8. Under either Teper's or Ramos' account of the conversation, Ramos made no claim for work nor issued any threat to Tangram.

Although it was unclear what of his conversation with Weir Teper relayed to Ramos, Teper claimed that in early 2007 he had a conversation with Weir in which Teper claimed Tangram was looking at signing with a Painters signatory contractor for the Miller Children's Hospital project and asked Weir what Tangram would need to do to accomplish the project and in which Weir responded, "Fuck you, you fucking rat," and hung up. DT 44:2-9, 20-22.

Weir testified that he had a single conversation with Teper, who called him on the phone in late 2006 or early 2007 and asked why he had to use apprentices. Weir told Teper that "[i]t

⁴ Asked if Ramos had come into his office to tell him that one of his apprentices had come to the Painters Apprenticeship Program to try to register, Teper said he did not recall. DT 92:15-19.

was a state-approved program for resilient flooring and on public works, he should be using our apprentices." In response, Teper told Weir, "I don't have to use any of your fucking apprentices." MW 368:9-369:8, 396:2-7. Weir stated that Teper was yelling at him about something he had received. MW 380:18-24. Teper told Weir that the Carpenters would pay for his legal fees if the matter went further. MW 369:9-12, 383:2-15. Weir testified this conversation was in reference to a job in 2006 at UCLA, the Broad Art Center job.⁵ MW 370:17-22, 373:2-14, 376:6-12.⁶ Again, under either account of the 2006 or 2007 telephone conversation, no claim for any work was made, nor were any threats made.

Teper testified that the Painters had "Shame on Tangram" signs at the Legacy project in March 2009. DT 41:19-23, 41:25-42:2. Teper claimed that the Painters "harassed" his client. DT 41:13-14, 42:18-19.

⁵ The transcript incorrectly identifies the facility as the Brode Art Center. MW 370:18.

⁶ Of Teper's and Ramos' accounts of Ramos' visit to Tangram's offices, Ramos' account is the more credible. Other than the claim he obviously wished to emphasize, that Ramos said there would be a "war," Teper's recollection of and testimony about the encounter was vague. Ramos, on the other hand, recalled the reason for the visit and more specifics about the conversation, including that Tangram's signing with the Carpenters was news to him.

Of Teper's and Weir's accounts of their single encounter, Weir's account is clearly the more credible. Again, Teper sought to make a point, that Weir swore at him and called him a "rat." Yet Teper's account makes no sense for several reasons: In early 2007, when both Teper and Weir recount the conversation as having taken place, there is no evidence that Tangram had had any negative experience with Painters. It does not make sense for Weir to have responded to an offer by Teper to perform work through a Painters' signatory contractor by swearing and hanging up on him, particularly in light of Weir's uncontradicted testimony about friendly contacts with Tangram official Jack Hooven in 2005. *See* MW 386:10-387:22. Weir's account that Teper called him angry that a public works job required Teper to use union apprentices is the more plausible account.

Ramos testified he visited with Tangram employees on the Legacy job four times between the end of March and mid-May. VR 284:25-285:3. He spoke with the employees about apprenticeship. VR 292:16-295:13, 297:24-298:24. Ramos testified that he visited with Tangram apprentices at the Legacy jobsite in the course of visiting tapers and glaziers apprentices represented by Painters, did not threaten them or interrupt them, and asked them their names and about apprenticeship training. VR 278:9-279: 9, 299:11-18, 302:2-303:7. Ramos testified he did not communicate to any Tangram supervisor or foreman that Painters was claiming the work they were performing. VR 279:10-13.

Teper, however, called Ramos about the banner; Ramos told Teper he would call him back. Teper claimed Ramos did so, said they were not picketing but demonstrating, and did not answer Teper's questions why. Teper asked for a meeting in order to "put this thing to rest so you guys don't bother me or my installers anymore," and Ramos set one up. DT 42:20-43:20. Ramos testified that Teper asked for a meeting to do something about bannering by Painters at the Legacy jobsite. VR 304:12-18. Ramos testified he had no discussion with Teper about signing an agreement. VR 305:2-19.

Teper testified that the Painters cancelled the meeting. DT 45:8-11. Teper claimed that Painters representative Grant Mitchell cancelled through an e-mail through his secretary; that Teper was confused; and that he responded by asking if the meeting were still on. DT 45:12-23. Teper claimed that he received a response in the form of a telephone call from Painters counsel Ellen Greenstone, which he later documented in an e-mail to *Carpenters* counsel at 5:45 p.m. DT 45:25-46:18; ERX 3. Teper claimed that he asked why the Painters were picketing, that Greenstone said they were not picketing but were just demonstrating and would not say why.

Teper claimed Greenstone kept telling him to read between the lines and that he finally asked her if the Painters guys would go away if he signed a contract with the Painters. DT 47:22-48:25.

Teper claimed he asked if the meeting was still on for Monday, and Greenstone told him to keep the meeting on. DT 48:25-49:2. Teper testified that the conversation was so comical he had staff members come and listen over the speakerphone. DT 48:3-6. Teper acknowledged he did not tell Greenstone that his end of the conversation was on a speakerphone. DT 96:12-15.

Greenstone testified she called Teper mid to late afternoon and stated she understood he wanted a meeting with the Painters Union. He asked why the Painters were demonstrating. She told him the Painters were not demonstrating and had a right to have a banner. Teper asked what the Painters wanted and, since he had requested the meeting, Greenstone asked whether he was offering anything. Greenstone told Teper she was not going to propose anything and asked if he was offering anything. Greenstone's notes made during the call recount that she and Teper went round and round making those statements. EG 319:25-322:14, 332:12-337:6, 348:1-2, 353:12-16, 354:12-14; PIX 5. Greenstone testified she told Teper that there were apprentices on the job that were not in a State-approved apprenticeship program, that Teper asked if putting Painters Union apprentices on the job would get rid of the banner, and that Greenstone told him Tangram was required to have apprentices enrolled in a State-approved program. EG 322:18-323:1, 342:23-343:24, 344:10-20. Greenstone testified that Teper asked if the Painters was asking Tangram to sign a contract and that she told him she was not asking anything and asked whether he was offering anything. She did not get an answer. The conversation ended with Teper asking if the meeting was still on and Greenstone stating that her client would get back to him. EG 323:2-13, 353:17-354:10.

Greenstone disputed Teper's account of the conversation that he said the meeting had been cancelled, testifying that she understood a meeting and been tentatively scheduled and had no understanding of any cancellation. EG 326:4-9. She testified she did not state that the Painters were bannering because Tangram was not signed with the Painters nor anything that would lead to such a conclusion, that he should read between the lines, or that anyone would go away if he signed anything, including a contract. EG 326:14-327:1, 353:4-11.⁷

In connection with Painters' complaints to the CRA about Tangram's failure to use apprentices from a State-approved program which followed the telephone conversation, Teper stated that Carpenters counsel threatened to strike if Teper signed any type of agreement with the Painters [DT 49:23-50:3] and that a "flurry" of Carpenter representatives followed suit and threatened to strike the jobsite. DT 51:1-9. One such threat was apparently directed to Tangram's Miller Children's Hospital job and occurred in May 2009. GH 161:19-22; RUX 5.

Burtle testified that he observed Tangram employees installing cove vinyl flooring and associated cap metal at Miller Children's Hospital which he believed to be within Painters

⁷ For reasons like those discussed in connection with Teper's conversations with Ramos and Weir, Greenstone's account of the conversation is the more credible. If Painters were, in fact, making a claim on the work, it makes no sense that Painters would cancel a meeting Teper requested, that Painters' counsel would call after her client had cancelled the meeting, that Teper would ask if Painters wanted a contract, and that the Painters would then decline to meet. It is far more credible that Teper asked for a meeting, that Painters tentatively set up a meeting but questioned Teper's aim, that Painters' counsel called Teper to find out his aim without making a claim for work or asking for anything from Tangram, that Teper sought to draw Painters' counsel into making a claim for work, and that based on Teper's solicitations the Painters cancelled the meeting. Greenstone took her notes *during* the call. Consistent with Greenstone's testimony that the conversation took place mid to late afternoon and with cancellation of the meeting by the Painters thereafter, Tangram e-mailed his account of the conversation generated later to Carpenters' counsel. The meeting remained cancelled, lending credence to Greenstone's account that Painters made no claims nor demands on Tangram.

jurisdiction. DB 231:16-22, 232:14-233:11. Burtle testified he asked representatives of the general contractor whether a letter of assent was required of the flooring subcontractor binding it to the project labor agreement for the project, as required [DB 233:15-234:22, 235:J15-18], and in what program the apprentices on the job were enrolled [DB 235:19-25]. Burtle testified that he visited the Miller Children's Hospital job twice, once with Weir and once with Romero, and that he did not threaten any workers nor hear Weir threaten any workers; that he asked the flooring workers what apprenticeship program they were in; and that, told they were in the Carpenters program, said nothing further. DB 244:12-246:11.⁸

Tangram sought to introduce a Painters demand for arbitration on the general contractor on the Miller Children's Hospital job apparently as evidence of a claim for the work on Tangram. ERX 9. The arbitration demand and the underlying grievance documents, however, establish that Painters' grievance concerning Miller Children's Hospital is directed solely at the general contractor on the project, Turner Construction Company, and not at Tangram; that the grievance against Turner is specifically for "[d]amages" and not to force assignment of work; that Painters advise Turner expressly that Painters "do not have, and do not intend to engage in a dispute with Tangram and . . . have a dispute with TCC [Turner] only." *Id.*

⁸ Asked if the Painters Apprenticeship Program would dispatch apprentices to Tangram on a public works job, Burtle testified that the program would dispatch on a request by Tangram. DB 253:21-25. Burtle testified that Tangram would need to sign a participation agreement agreeing to adhere to all of the conditions of the Painters Local 1247 MLA and would have to fill out a DAS-7 form. Burtle testified that the participation agreements require employees to belong to the Painters and that the employees would be working under the jurisdiction of the Painters. DB 254:4-21, 255:22-256:2, 258:5-13. Asked hypothetically, Burtle testified that, on such a job, as to journeymen, he would file a grievance that the Carpenter journeyman is working within the Painters scope of work. DB 263:9-266:25.

None of the above credible facts establishes a claim by Painters for Tangram's work or a violation of § 8(b)(4)(D) by Painters or Carpenters. A banner at the Legacy job saying "Shame on Tangram," without more, neither establishes nor supports an inference of a claim for work or as coercion to assign work. Ramos, Burtle, nor Weir sought assignment of work or a contract from Tangram. Ramos' conversations with employees were not coercive, despite Teper's characterizations of Ramos' lawful jobsite visits as "harassment." Greenstone did not state a claim for work nor discuss coercive activity, stating simply that Painters had a right to be present with a banner. Despite Teper's effort to claim that Greenstone sought a contract from Tangram, she did not; no meeting took place; and Painters' efforts in the wake of the call, like Greenstone's undisputed statement in the call, were directed solely to the CRA concerning apprenticeship issues. With respect to Painters' grievance against Turner Construction at Miller Children's Hospital, a claim through a grievance procedure against a general contractor for damages for breach of its own contractual obligations related to subcontracting does not constitute a claim for work from the recipient subcontractor giving rise to a jurisdictional dispute. *See Laborers Local 1086 (Miron Construction Co., Inc.)*, 320 NLRB 99 (1995); *Laborers (Capitol Drilling Supplies)*, 318 NLRB 809 (1995). Likewise, Carpenters' corresponding threats related to these actions by Painters do not meet the reasonable cause standard of a § 10(k) proceeding.

3. The Existence of an Agreed Method for Voluntary Resolution of the Dispute

Late in the hearing, Tangram introduced into evidence a CRA Project Labor Agreement ("PLA") dated December 11, 2008. ERX 8. Tangram represented that the PLA applies to the Legacy project. 187:1-6. Hubel testified on behalf of Carpenters that he believed the PLA

applied but could not say positively. GH 172:7-20. Painters declined to stipulate that there is no agreed method for voluntary resolution of any dispute in this case. The PLA, though the copy introduced was unsigned, lists both Carpenters and Painters local unions. ERX 8, Appendix "E," p. 57. The PLA requires jurisdictional disputes to be resolved by the Building and Construction Trades Department Plan. ERX 8, Art. XIV, sec. 14.2. Evidence sufficient that the PLA applies and the PLA's facial indication that both unions are bound by it having been presented (with no evidence to the contrary), Painters submits the Board must defer to voluntary resolution under the Plan. Anticipating that Carpenters will argue that they are not members of the AFL-CIO Building Trades Department, Painters submits that they have nonetheless agreed to designation as a Construction Trade Union in Appendix "E" and Article XIV, section 14.2 of the PLA and have thereby agreed to be bound by the voluntary jurisdictional dispute resolution procedure of the PLA. On this basis alone, the Notice of Hearing in this case should be quashed.

B. § 10(k) FACTORS

Analysis of the § 10(k) factors fully supports and compels a conclusion that the proper assignment of the resilient flooring and carpet work at the Legacy project is to Painters.

1. Employer Preference

Tangram Vice President Teper testified that he was a signatory owner/contractor and member of the Carpenters Union in Michigan in about 1998 or 2000. DT 24:18-25:2. He stated that he agreed to sign with the Carpenters on behalf of Tangram in the Los Angeles area because:

[T]he Carpenters is a much stronger union than what the Painters Union is. They had a more secure pension program. They showed more support to the employee and the employer than what the Painters Union did.

They offer a larger pool of people that I can utilize from as well as it offers more benefits for my employees. For example, if I'm slow and my guys have to go back to the hall on the out of work list, they don't have the option to just go to a floor covering company, they can go to multiple different companies to get work and learn different trades and better themselves. It offered a laundry list of things that was just a betterment for my employees.

DT 25:6-18. Tangram offered no other nor additional reasons for its preference for Carpenters.

"Although the Board normally accords employer preference considerable weight, it has consistently maintained that an employer's assignment of work 'cannot be made the touchstone in determining a jurisdictional dispute.'" *Ironworkers Local 380 (Stobek Masonry, Inc.)*, 267 NLRB 284, 287 n.8 (1983). One reason for deferring to the employer's preference is that it is generally assumed to have already accounted for other factors the Board considers. Thus, when an employer bases its preference on non-traditional factors, its preference may be given less weight by the Board. *Graphic Communications Int'l. Union (Jos. Berning Printing Co.)*, 331 NLRB 846, 848 (2000). Specifically, an employer's conclusion that a particular union is "stronger" or "better" for its employees is *not* a basis for a preference to which the Board defers. In *Jos. Berning Printing*, the employer stated a preference for the work to be awarded to GCIU because it was a "stronger, better union." *Id.* at 846. The Board found that this reason was not entitled to the deference typically accorded to employer preference:

The Board generally gives considerable weight to an employer's uncoerced preference in making work assignment awards. However, this considerable weight is accorded because an employer's preference is typically based on

legitimate, traditional factors relevant to awarding the work in dispute. The Employer's purported concern that a new employee belong to a "stronger, better union" cannot serve as a basis for the Employer's preference. Thus, we find under these unique circumstances that the Employer's stated preference does not favor awarding the disputed work to the employees represented by GCIU.

Id. at 848. Because the Board found that past practice favored employees of the other union, CTU, it awarded the work to CTU. *Id.*

Beyond the insubstantial, subjectively-personal basis for Teper's preference on behalf of Tangram, employer preference cannot outweigh the traditional § 10(k) factors. In *Stobek Masonry*, the Board determined a jurisdictional dispute between the Laborers and Ironworkers over the erection and dismantling of patent scaffolding. The employer wished to assign the work to the Laborers because it employed Laborers for other work and did not regularly employ Ironworkers. 267 NLRB at 287. The Ironworkers, however, introduced extensive evidence that Ironworkers traditionally erected and dismantled patent scaffolding in the area, while the Laborers produced no testimony about Laborers constructing patent scaffolding. The Ironworkers also introduced evidence that the Ironworkers Apprenticeship and Training Program and their training manuals dealt with skills related to patent scaffolding. *Id.* at 286. The Laborers offered no comparable evidence. The Board determined that the training program had "some relevance to the work in dispute" and that the area practice and skills considerations outweighed the employer's preference. "The Board is reluctant to disturb a well-defined area practice in the construction industry absent some compelling reason. Employer preference is not by itself a reason." *Id.* at 287.

Because Tangram's preference for Carpenters is based on a non-factor and is, in any event as shown below, outweighed by the traditional factors, Tangram's preference does not support an award of the work to Carpenters.

2. Certifications and Collective Bargaining Agreements

There is no evidence of Board certification concerning the employees involved in this matter. Tangram has a collective bargaining agreement with Carpenters and not Painters, a factor which ordinarily would favor Carpenters. However, Tangram's agreement with Carpenters is recent; was entered into before Tangram had any jobs or employees; and covers few jobs (only three were referred to in the hearing, one of which lasted only two days) and employees (approximately 25). The agreement affords Tangram the ability to double-bread. ERX 1, ¶ 8(e). Moreover, as discussed below, under the agreement Carpenters cannot as a matter of law supply Tangram with apprentices qualified to work on public works projects, including the Legacy project at issue. Indeed, the Memorandum Agreement expressly recognizes this legal insufficiency: paragraph 6 provides for a one-to-two ratio of journeymen to trainees and states, "This ratio will be reviewed *if the Union obtains approval for an apprenticeship program for floor covering.*" ERX 1, ¶ 6, p. 4 (emphasis supplied).

Thus, this factor does not tip strongly in favor of Carpenters. *See Iron Workers Local No. 1 (Goebel Forming, Inc.)*, 340 NLRB 1158, 1161 n.11 (2003).

Moreover, if the CRA PLA applies to the project which is the subject of this case, as Tangram represented, even if its voluntary dispute resolution procedure requiring resort to the BCTD Plan were not to bind Carpenters to an alternate dispute resolution forum, the *terms* of the PLA do bind Tangram and, therefore, *require* Tangram to comply with the PLA regardless of any

obligations it may otherwise have to Carpenters. *See* ERX 8, Art. II, sec. 2.1; Art. III, secs. 3.2, 3.3. The PLA supersedes collective bargaining agreements, providing, "It is further agreed that, where there is conflict, the terms and conditions of this Agreement shall supersede and override terms of any and all other national, area, or local collective bargaining agreements," with exceptions not relevant here. ERX 8, Art. II, sec. 2.3. The PLA requires, *inter alia*, assignment of work according to the BCTD Plan [ERX 8, Art. XIV, sec. 14.1] and use of apprentices [ERX 8, Art. VII, sec. 7.11] who are indentured in an approved program [ERX 8, Art. I, sec. 1.2].

Where an employer is signatory to a project labor agreement which creates an obligation to one union (*e.g.*, a BCTD union) and a collective bargaining agreement with another union which is not signatory to the PLA (or in this case may contend it is not bound to all its provisions), in a § 10(k) proceeding the factor of collective bargaining agreements does not favor the union with the agreement. *See Carpenters Local 623 (E.P. Donnelly, Inc.)*, 351 NLRB No. 97, sl op 6 (2007). Even more clearly here, where the CRA PLA by its terms *supersedes* Carpenters agreements with Tangram to the extent they conflict with the PLA, if the CRA PLA applies to Tangram at the Legacy project, even if Carpenters maintain they are not bound to the PLA's jurisdictional dispute procedure, Carpenters' collective bargaining agreement is not sufficient to favor assignment of work to them.

3. Relative Skills

In this case, not only do Painters possess skills to perform the disputed work superior to Carpenters, but *Painters alone* possess the right to train and supply apprentices in resilient flooring and carpet for public works jobs in this and surrounding counties. The project which is the subject of this proceeding for the CRA is such a public project. Because, as will be discussed

below, Tangram is *legally required* to use apprentices from the apprenticeship program affiliated with Painters, Painters submit that this factor is dispositive and requires the Board to award the work to Painters. While the Board has considered apprenticeship training relevant and has given it weight in § 10(k) proceedings [*see Cleveland Typographical Union 53 (Sherwin-Williams Co.)*, 224 NLRB 583, 585 (1976); *Ironworkers Local 380 (Stobek Masonry, Inc.)*, *supra*, 267 NLRB at 286], to Painters' knowledge, the Board has not considered the effect of non-preempted State law apprenticeship requirements for public works on assignment of work.

California Labor Code § 1777.5(c) provides that "[o]nly apprentices, as defined in Section 3077, who are in training under apprenticeship standards that have been approved by the Chief of the Division of Apprenticeship Standards and who are parties to written apprentice agreements under Chapter 4 (commencing with Section 3070) of Division 3 are eligible to be employed at the apprentice wage rate on public works."⁹ The Labor Code further regulates the ratio of apprentices to journeymen, providing that the ratio in a particular craft or trade on a public work may be no higher than the ratio specified by the approved apprenticeship standards for the craft or trade, but in no case may be less than one hour of apprentice work for every five hours of journeyman work. Labor Code § 1777.5(g). California Code of Regulations, Title 8, Sec. 230.1(c) requires that "[a]pprentices employed on public works can only be assigned to perform work of the craft or trade to which the apprentice is registered."

⁹ Labor Code § 3077 defines "Apprentice" as including participation in an approved program in an apprenticeable occupation approved by the Chief of the DAS. "Apprenticeable craft or trade" is one determined to be an apprenticeable occupation in accordance with the rules and regulations of the California Apprenticeship Council. Labor Code § 1777.5(d).

David Romero, Coordinator of the Southern California Resilient Floor and Decorative Covering Joint Apprenticeship Training Committee ("Resilient Floor JATC"),¹⁰ testified that the Resilient Floor JATC is funded by contributions made under collective bargaining agreements between employers and Painters. DR 401:11-402:12. The Resilient Floor JATC trains apprentices in "[c]arpet, vinyl, soft tile, which is VCT, rubber, wood laminate, engineered wood, glue-down, floor prep - - any types of floor prep used to cover the floor or used to prep the floor for installation of resilient flooring." DR 402:13-20. The apprenticeship program takes four years of class time, at 160 class hours per year, and on-the-job training totaling an additional 6,400 hours. DR 402:13-403:8. Apprentices pass through eight levels in the program. DR 402:13-403:13. Romero testified that there were then about 220 apprentices in the program, with more being added. DR 403:14-404:10. The program has apprentices at all eight levels. DR 412:2-5. The Resilient Floor JATC graduated 80 journeymen in the past two years. DR 404:11-20. Graduates receive a completion certificate and card from the State of California. DR 404:21-23; PIX 6, 7. The Resilient Floor JATC also gives individuals with three or four years' documented experience a "walk-in journeyman test" at their request and, if they show skills greater than a first period apprentice but less than a journeyman, will allow them to enter the program at their level of skills. DR 404:24-405:13.¹¹

¹⁰ Incorrectly transcribed as "JACT." *See e.g.*, 401:18.

¹¹ "Journeyman," as defined in the apprenticeship provisions of the California Labor Code "means a person who has either (1) completed an accredited apprenticeship in his craft, or (2) who has completed the equivalent of an apprenticeship in length and content of work experience and all other requirements in the apprenticeship standards for the craft which has workers classified as journeymen in an apprenticeable occupation." Labor Code § 3093(k). Thus, observance of the statutory ratio of apprentices to journeymen and proper on-the-job supervision of apprentices may require an employer to employ a specifically and particularly

The Resilient Floor JATC has been approved by the State of California to train apprentices in the resilient floor trade continuously since at least March 10, 1986. DR 407:20-410:18; PIX 8. It is the *only* apprenticeship program in resilient flooring and carpet approved by the State to provide apprentices on public works jobs in Los Angeles County. The State of California maintains a website list of State-approved apprenticeship programs. A search for programs listed under carpet and linoleum in Los Angeles County shows that the Southern California Resilient Floor and Decorative Covering JATC is approved to train in the trades or occupations of Carpet & Resilient Installer, Carpet Installer, and Resilient Installer Custom and that no other programs are listed as approved. Romero additionally testified that he knew of no resilient flooring apprenticeship programs, other than his own, approved by the State for Los Angeles County and that he would be notified if any were approved. DR 417:9-420:20; PIX 11.

When a contractor is awarded a public works job, the contractor sends a State of California-generated DAS-140 form to the Resilient Floor JATC. DR 412:10-24, 413:25-414:17; PIX 1. California Labor Code § 1777.5(e) requires this information from "every contractor," including subcontractors under a contractor who performs any public work (with very limited exception). The instructions on the DAS-140 form state that the form with contract award information must be sent to the awardee's Apprenticeship Committee if the awardee is a member of a committee approved to train or, if the awardee is not approved to train, to "ALL" Apprenticeship Committees in the trade and area of the jobsite of the public work. The form directs the contractor to the DAS website for apprenticeship programs. PIX 1. The form requires contractors to state that:

qualified journeyman, not just any employee of the employer.

We will employ and train apprentices in accordance with the California Apprenticeship Council regulations, including § 230.1(c) which requires that apprentices employed on public projects can only be assigned to perform work of the craft or trade to which the apprentice is registered and that the apprentices must at all times work with or under the direct supervision of journeyman/men.

PIX 1. The contractor follows the DAS-140 form with a DAS-142 form to request apprentices. DR 412:24-25, 414:13-415:19; PIX 9. The contractor pays apprenticeship contributions directly to the Resilient Floor JATC or to the State governing body for apprenticeship programs, the California Apprenticeship Council, on a State-generated CAC-2 form. DR 415:22-417:8; PIX 10.

Although Carpenters introduced into evidence Standards of Apprenticeship which Hubel claimed were the Carpenters apprenticeship standards for different classifications of floor covering worker [GH 134:2-8; RUX 2], they admitted that they have *no State-approved apprenticeship program to train in resilient flooring and carpet installation*. Hubel claimed that the standards have been sent for approval by the state apprenticeship agency. GH 134:21-24. Asked when the standards were submitted to the State, Hubel answered, "Sometime last week." GH 156:18-19. Hubel testified that the Carpenters have attempted to conform their program to the Painters Apprenticeship Program. GH 158:8-19. Hubel further admitted that there are *no apprentices* in the Carpenters floor layer or carpet layer programs now because the Carpenters programs have not been approved by the State. GH 159:4-18.¹²

¹² Hubel did not know how many apprentices are training in the Carpenters floor layer apprenticeship program. GH 159:22-160:1. He did not know how many Tangram employees were training. GH 160:10-12. He did not know what period any of the apprentices

Teper admitted that, as of the date of his testimony, Tangram had not submitted a DAS-140 form to the State or to the CRA. DT 105:11-13; PIX 1. The form only came up after the Painters attorney raised the issue of Tangram's apprenticeship compliance with the CRA. DT 116:13-20. Teper claimed that the Carpenters told him Tangram did not have to submit a DAS-140 form if it was signatory to a union. DT 118:6-7, 118:17-119:9.

Teper testified he was familiar with the Carpenters apprenticeship programs from being a signatory back in Michigan and talking with someone from the Carpenters program in Southern California about what they had available. DT 26:11-22. Of the 25 employees at the time of the hearing, Teper could not state or even estimate the number of journeymen or apprentices. DT 89:11-17. He did not know the ratio of journeymen to apprentices. DT 90:6-13. Although he signed the forms for apprentices' enrollment in the Carpenters apprenticeship program, he did not know how many Tangram employees have been enrolled. DT 90:19-91:7. He testified his apprentices tell him they are learning about safety and hand tools. As he put it, because Tangram is a new company, his apprentices have just recently enrolled in the Carpenters program in the last few months and are still learning basics before they can move on to a program specific to their work. DT 72:72:9-13, 73:2-9.

Hubel testified that he understands Tangram employees are being trained at the Carpenters training program. GH 140:1-4. Hubel testified that the initial first and second

training at the Carpenters facility for floor or carpet laying had attained. GH 160:18-23. Hubel acknowledged that early stage training is the same for all apprentices, including drywall/lather apprentices. GH 161:10-17. GH 161:11. (The transcript incorrectly denotes "lacquer" for "lather.") The Carpenters' unapproved standards, modeled after Painters Apprenticeship Program standards, show what appear to be add-ons to the tail-end of existing Carpenters nail-down hardwood floor and terrazo training. RUX 2, A-1-A-10.

periods of training concern safety and introduction to materials and tools and that such training is the same for all apprentices. GH 140:5-17, 141:15-20. Carpenter apprentices do not start to move into more substantive skill training until probably the third or fourth period. GH 141:9-14.

Ramos testified that the first or second times he visited the Legacy jobsite, Tangram's apprentices had not started apprenticeship school. VR 299:3-4. Incidentally, Romero, who was indentured as an apprentice in and graduated from the Painters program [DR 408:23-25], testified that he installed the floors in the Carpenters' training center in Whittier [DR 436:22-25, 439:11-24] and that a Painters signatory contractor laid the floors in the new Carpenters' Apprenticeship Training Center that opened in Ontario [DR 440:4-6].

The evidence and California law establishes that *only* the Resilient Floor JATC is qualified to supply apprentices on the Legacy project. Painters submit that the Board cannot award work in derogation of the State law requirements. In *Dillingham Construction N.A., Inc. v. City of Sonoma (Dillingham II)*, 190 F.3d 1034, 1037-38 (9th Cir. 1999), on remand from U.S. Supreme Court, the Ninth Circuit held that California's apprenticeship standards are not preempted by the NLRA. The Court held that the standards are not preempted under *Machinists* preemption because: 1) Congress did not intend to leave the subject of apprenticeship standards unregulated since it specifically directs the Secretary of Labor to establish federal apprenticeship standards and to cooperate with the states in their doing so; and 2) the State apprenticeship prevailing wage laws and standards only establish minimum standards for the purpose of ensuring that public works contractors will hire ordained apprentices. *Id.* at 1039. The Court expressly rejected a claim that California's apprenticeship standards for public works result from the State functioning as a mere proprietor or market participant, rather than as a regulator. *Id.* at

1037-38. Painters submit that the Board must follow such non-preempted State law requirements in any award of the work in this case. State law in this case *legal requires* assignment to Painters.

4. Area and Industry Practice

The critical factor of area and industry practice overwhelmingly favors Painters. *Ironworkers Local 380 (Stobek Masonry, Inc.), supra*, 267 NLRB at 287 ("The Board is reluctant to disturb a well-defined area practice in the construction industry absent some compelling reason.").

Painters Local 1247 has a Master Labor Agreement with the Floor Covering Association of Southern California ("Painters Floor Covering MLA"), an industry association of employers. DB 196:5-197:2; PIX 2. This agreement is effective from 2007 to 2010. Since at least 1958, Painters and the Floor Covering Association of Southern California or its predecessors have continuously been party to collective bargaining agreements, cover pages and coverage language of 16 of which, including the current agreement, were entered into evidence. DB 204:12-205:15; PIX 3, collectively. Burtle testified that there are 37 employers signatory to Painters Local 1247 or District Council 36 collective bargaining agreements covering resilient flooring, including 13 members of the Floor Covering Association of Southern California. DB 215:7-216:8. All adhere to the association Painters Floor Covering MLA. DB 216:9-12.

Burtle testified that signatory employers contributed to trust funds for benefits under these agreements for approximately 917,00 hours worked in 2008 and 822,000 hours in 2007. DB 216:15-217:13.

Painters also introduced a Decision rendered under the Building and Constructions Trades jurisdictional dispute resolution plan in 1942 from the plan's "Green Book," dividing resilient flooring of asphalt and rubber tile, roll and sheet linoleum between the Painters and the Carpenters, giving Painters jurisdiction of Kansas City and all territory west of Kansas City and giving Carpenters jurisdiction of all territory east of Kansas City. DB 208:17-209:17, 214:4; PIX 4.

By contrast, Hubel testified that there are "approximately five or six" other contractors signed with the Carpenters under its master labor agreement [ERX 2] to perform the type of work at issue. GH 130:4-12. Hubel claimed, without substantiation, that Carpenters have done such work throughout the U.S. for at least 20 years as part of the accepted jurisdiction of the Carpenters Union. GH 131:12-21. Asked what "accepted" meant, Hubel testified, "[b]y the Carpenters Union and people in the construction industry. Probably not by your client." GH 154:20-23. Of these few contractors, Hubel testified that one does mostly sports floors, two others are carpet companies, and one, Hur, does different types of flooring. Hubel could not think of any other contractors. GH 155:1-12. Hubel asserted, again without detail, that, except for Hur, the other companies had only performed work under a Carpenters contract in this area for a couple of years. GH 155:13-156:3.

Burtle clarified Hubel's testimony as to Hur Flooring, stating that Hur Flooring has collective bargaining agreements with both the Painters and Carpenters; that Hur is signatory to an agreement with Painters Local 1247 or District Council 36 on its behalf covering the scope of work in the Painters Floor Covering MLA and binding Hur to the master agreement; and that work is divided between the two unions such that Painters install carpet and resilient flooring,

including tile, cork, rubber, etc., and Carpenters perform sanding and refinishing of wood flooring and install nail-down wood flooring. DB 217:14-24, 218:10-15. None of Painters' other 36 contractors also has a contract with Carpenters. DB 267:6-14.

The evidence establishes that area and industry practice solidly favors Painters.

5. Employer Past Practice

Tangram is related to Tangram Interiors, Inc.,¹³ which appears to have subcontracted to Painters' signatory contractors. As discussed above, Teper asserted that he communicated with Painters Business Representative Weir about signing with a Painters signatory contractor for the Miller Children's Hospital project in early 2007, while Weir testified that Teper called angry about having to use apprentices from the Resilient Floor Apprenticeship Program. Either way, Tangram apparently performed or solicited performance of work through Painters. Weir testified, without contradiction, that he talked to Tangram official Jack Hooven in 2005, when Hooven came to his office, said something about a company named BMI and Tangram and being bought out, and asked for a master labor agreement signature page so that company officials

¹³ Tangram's Memorandum Agreement with Carpenters specifies:
"The Union acknowledges that Tangram Flooring, Inc. is related through common ownership and some common management personnel to a company doing business as Tangram Interiors, Inc. (aka Tangram Fabricators, Inc and New Tangram, LLC). Each company does work that is, in part, the same or similar to that of the other. The Union agrees, however that Tangram Interiors, Inc is not a signatory to this agreement and that this agreement does not apply to any employees of or work done by Tangram Interiors, Inc."

Tangram's counsel represented that Tangram Interiors is and always has been a non-union company. 79:20-23. Teper testified that Tangram Interiors is a Steelcase office furniture dealership [DT 84:17-23] in which Teper held the position of General Manager [DT 86:15-19]. Before Tangram Flooring was formed, Tangram Interiors installed resilient flooring through subcontractors. DT 85:5-16. The Memorandum Agreement, however, appears to authorize continuation of a Tangram double breast.

could review it. Weir testified that he contacted Hooven once or twice thereafter to ask where the matter stood and that nothing came of the contact. MW 386:10-387:22.¹⁴

The Employer's past practice does not consistently favor Carpenters and should not weigh in their favor.

6. Efficiency and Economy of Operations

Tangram performs no work other than the installation of resilient flooring, carpet and wood. DT 88:11-13. Since it is undisputed in the record that Painters can supply a large pool of journeymen and apprentices skilled and trained in precisely Tangram's work and that the Carpenters have barely got training in the trade off the ground, the factor of efficiency and economy weighs in Painters' favor.

C. IF THE BOARD ISSUES AN AWARD OF THE WORK IN THIS CASE, THE AWARD SHOULD BE NO BROADER THAN THE LEGACY APARTMENTS JOB WHICH IS THE SUBJECT OF THE CHARGE.

Carpenters have requested a broad order in this case. Painters submit that, regardless of the union to which an award is made, a specific order limited to the Legacy project is appropriate. The Board customarily declines to grant a broad, area-wide award in cases where the charged party represents the employees to whom the work is awarded and to whom the employer contemplates continuing to assign the work. *Pipefitters Local 562 (Systemaire, Inc.)*, 321 NLRB 428, 431 (1996). Section 10(k) awards are normally limited to the jobsite where the unlawful 8(b)(4)(D) conduct occurred or was threatened. A broader award requires a showing of the following pre-requisites: 1) there must be evidence that the work in dispute has been a

¹⁴ Teper testified that Jack Hooven is currently Tangram's secretary [DT 75:22-25].

continuous source of controversy in the relevant geographic area and that similar disputes may recur; and 2) there must be evidence demonstrating the charged union's proclivity to engage in further unlawful conduct in order to obtain work similar to that in dispute. *IBEW Local 357 (Western Diversified Electric)*, 344 NLRB 1239, 1241 (2005). Carpenters' request for broad relief is audacious wishful thinking. Carpenters seek the Board's assistance in acquiring work Carpenters have not performed, do not perform, and do not have the lawful ability to provide apprentices on public works to perform. The Board should deny their request. If a broad order is called for at all, it is an award in Painters' favor halting Carpenters' attempt to use the Board to violate State apprenticeship laws.

Dated: July 2, 2009

ELLEN GREENSTONE
RICHAMAR
ROTHNER, SEGALL, GREENSTONE & LEHENY

By  _____
RICHAMAR

Attorneys for PAINTERS AND ALLIED TRADES
DISTRICT COUNCIL 36, INTERNATIONAL UNION OF
PAINTERS AND ALLIED TRADES, AFL-CIO, CLC

Re: Tangram Flooring, Inc.
Case 21-CD-675

CERTIFICATE OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is 510 South Marengo Avenue, Pasadena, California 91101.

On July 2, 2009, I served the foregoing document described as **POST-HEARING BRIEF TO THE NATIONAL LABOR RELATIONS BOARD BY PARTY IN INTEREST PAINTERS AND ALLIED TRADES DISTRICT COUNCIL 36** on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Cecelia Valentine
National Labor Relations Board, Region 21
888 South Figueroa Street, 9th Floor
Los Angeles, California 90017

Desmond C. Lee
DeCarlo, Connor & Shanley
533 South Fremont Avenue
Los Angeles, California 90071

Frank Cronin
Snell & Wilmer
600 Anton Boulevard, Suite 1400
Costa Mesa, California 92626

(By UPS Next Day Air)



I caused such envelope to be placed in the UPS collection box, located at 200 East Del Mar Boulevard, Pasadena, California, the scheduled pickup time for which is 4:45 p.m. United Parcel Service guarantees delivery of packages deposited into this collection box, as addressed above, by 10:30 a.m. the following business day.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 2, 2009, at Pasadena, California.



DOROTHY A. MARTINEZ