

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
WASHINGTON, D.C.

International Union of Elevator Constructors, Local 8,  
Respondent,  
-and-  
National Elevator Bargaining Association  
Charging Party,  
-and-  
Otis Elevator Company,  
Employer

Case No. 20-CD-745

**CHARGING PARTY’S AND EMPLOYER’S POST-HEARING BRIEF TO THE  
NATIONAL LABOR RELATIONS BOARD**

Now comes the Charging Party, National Elevator Bargaining Association (“NEBA”), and the Employer, Otis Elevator Company (“Otis”), by and through their counsel Downs Rachlin Martin PLLC, and respectfully file their brief with the National Labor Relations Board (the “Board” or “NLRB”).<sup>1</sup>

**I. Introduction**

Through these proceedings, brought pursuant to Sections 8(b)(4)(D) and 10(k) of the National Labor Relations Act (the “Act”), NEBA and Otis request Board resolution of a jurisdictional claim by the Respondent, International Union of Elevator Constructors, Local 8

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<sup>1</sup> References to the transcript will be referred to as Tr. \_\_\_\_\_. References to Board exhibits will be referred to as Bd. Exh. \_\_\_\_\_. References to exhibits of the Charging Party and Employer will be referred to as Emp. Exh. \_\_\_\_\_. References to exhibits of the Respondent, International Union of Elevator Constructors, Local 8 will be referred to as U. Exh. \_\_\_\_\_. Unless indicated otherwise, all dates are in 2009.

(“Local 8” or the “Union”), to the work of installing specialty flooring in elevator cars at the Lodi Memorial Hospital located in Lodi, California and at the Mercy San Juan Medical Center located in Carmichael, California. Based on the pertinent agreements, contractor preference, area and industry practice, relative skills of the employees, and concerns of efficiency and economy, the Board should issue an award concluding that the disputed work is not Local 8’s work. See International Union of Elevator Constructors, Local 91 (Otis Elevator Company), 281 NLRB 1241 (1986)(awarding disputed work to the unrepresented employees of a subcontractor and not the Elevator Constructors under Section 10(k) of the Act). Further, the Board should deny Local 8’s Motion to Quash Notice of 10(k) Hearing as it is completely without merit.

## **II. Statement of the Case**

### **A. Procedural History**

NEBA filed a charge against Local 8 alleging a violation of Section 8(b)(4)(D) of the Act on August 18, 2009. Bd. Exh. 1. On August 31, 2009, the Regional Director issued a Notice of 10(k) Hearing. Bd. Exh. 1(E). The hearing was held on September 9 and 10, 2009. Tr. 1, 204.

On September 9, at the start of the hearing, Local 8 made a verbal motion to quash the Notice of 10(k) Hearing. Tr. 10-13. The bases of Local 8’s motion were: (1) Local 8’s position that it did not claim the flooring installation work on the two jobs at issue (a position that was defeated by the evidence), (2) Local 8’s qualified, untimely, and suspect “disclaimer” regarding the work at the two jobs at issue, and (3) Local 8’s unfounded position that no party other than Local 8 claimed the disputed work. Id. The Hearing Officer denied the motion. Tr. 13. At the end of the hearing, Local 8 renewed its motion, and the Hearing Officer deferred the motion to the Board. Tr. 320-21. NEBA’s and Otis’ written opposition to this motion is found at Part V of this Brief, infra.

B. Facts

**1. Business of the Employer**

Otis is in the business of manufacturing, installing, repairing, modernizing and maintaining elevators, escalators, and related equipment throughout the United States, including California. Tr. 108. Otis has a Branch Office in North Highlands, California. Tr. 221. Otis is an employer within the meaning of the Act. Tr. 8; Bd. Exh. 2.

**2. The Collective Bargaining Relationship**

Otis employs Elevator Constructor Mechanics, Apprentices and Helpers (sometimes collectively referred to as “Elevator Constructors”) represented by the International Union of Elevator Constructors (“IUEC”). Tr. 27. The IUEC has many locals, including Local 8, which covers the Northern California and Northern Nevada areas. Id. 27, 280.

Otis has a longstanding collective-bargaining relationship with the IUEC, which negotiates for and on behalf of its local unions, including Local 8. Tr. 30-32. For many decades, Otis and most of the major elevator companies belonged to the National Elevator Industry, Inc. (“NEII”), a multi-employer bargaining association that negotiated a series of collective-bargaining agreements (the “Standard Agreements”) with the IUEC for and on behalf of its local unions. Otis withdrew from NEII for collective-bargaining purposes in 1987 and entered its own five-year agreements, known as the Otis Agreements, with the IUEC until 2007. Tr. 31. The Otis Agreements and the Standard Agreements were substantially similar in most respects. Tr. 32. NEII ceased to exist for collective-bargaining purposes in 2002, and its members negotiated their own agreements with the IUEC.

In 2006, Otis joined a new multi-employer association, NEBA. NEBA negotiated a collective-bargaining agreement between NEBA, for and on behalf of its employer-members

(including Otis), and the IUEC, for and on behalf of its locals (including Local 8) (the “NEBA Agreement”), which covers all of the United States, except New York City and vicinity, and has a term from July 9, 2007 to July 8, 2012. Emp. Exh. 1; Tr. 28-30.

IUEC Local 8 is a labor union within the meaning of the Act. Tr. 8.

### **3. Disputed Work**

As stated in the Notice of 10(k) Hearing, the following work is in dispute:

The installation of elevator flooring at Lodi Memorial Hospital located at 975 South Fairmont Street, Lodi, California, 95240; and at Mercy San Juan Medical Center located at 6501 Coyle Avenue, Carmichael, California, 95608.

Bd. Exh. 1(E). In the elevator industry, the disputed work is commonly referred to as specialty flooring or finish flooring. See, e.g., Tr. 77, 96, 99, 118.

Specialty flooring is part of the interior of the elevator cab. Once the cab shell, walls and sub-flooring is complete, specialty flooring is installed in some cases. The specific type of specialty flooring is typically determined by the building owner or an architect. Common types of specialty flooring include tile, marble, stone, wood, rubber, or carpeting (but it can be virtually any durable material). See, e.g., Tr. 77.

Historically (in Northern California and throughout the Country) General Contractors have not awarded the work of installing specialty flooring to elevator companies like Otis. Tr. 109. Rather, General Contractors award this work to licensed flooring contractors. Tr. 77-78, 96, 109. When the floors are ready to be installed, an IUEC-represented elevator Mechanic parks the elevator at the most convenient level (often the ground level), locks the elevator, and “safes out” the elevator to ensure that it has no power and cannot be operated. Tr. 79, 97, 111, 284-85. Then, the Elevator Constructors leave the site or perform unrelated work on other elevators. Tr. 111-12, 284-85. At this time, the flooring contractor employees install the floors.

Tr. 97, 111-12. When the floors are complete, the Elevator Constructors return, inspect the elevator for damage, and then complete the remaining elevator installation work (such as balancing and final adjustments). Tr. 97, 111-12. This has been true for as long as the various witnesses could remember, a period of at least three decades. Tr. 78, 83 (“I have never seen an elevator mechanic install a specialty floor in the 30 years I have been in the industry”), 96 (“we [Turner Construction] have never had elevator mechanics install specialty flooring on any project”), 113.

Until the recent dispute (discussed in detail below), the overwhelming majority of flooring installation work was performed by employees of flooring contractors, not IUEC-represented Mechanics and Apprentices employed by Otis and other elevator companies.<sup>2</sup>

#### **4. The Lodi Memorial Hospital Project**

Otis has a contract for the installation and construction of six elevators at the Lodi Memorial Hospital at 975 South Fairmont Street, Lodi California (the “Lodi Job”). Tr. 156. The general contractor for the Lodi Job is HMH Builders (“HMH”). *Id.* Under Otis’ contract with HMH, Otis is responsible for the installation of the elevators, but the contract specifically excludes certain work. Among the work excluded from Otis’ contract by HMH is the work of installing the specialty flooring of the elevator cabs. Specifically, under the “Exclusions” section of the Scope of Work, the contract identifies “Floor finish (by Flooring Subcontractor)” as excluded work. Tr. 118; Emp. Exh. 8. As discussed above, this is common for elevator construction projects in California (and throughout the Country). The work of installing

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<sup>2</sup> On rare occasion, when a General Contractor awarded flooring work to an elevator company, the flooring was simple (such as bolting sheet metal to the floor of a freight elevator or applying self-adhering carpet squares). Tr. 129. In these rare cases, an IUEC-represented Mechanic has installed the flooring. *Id.* As explained below, however, there is no evidence that IUEC-represented Mechanics have installed specialty flooring material such as marble, tile, or wood.

specialty flooring in elevator cabs is commonly excluded from Otis' contracts, and that work is generally assigned by the general contractors to flooring sub-contractors.

Of the six elevators at the Lodi Job, four require flooring known as "Nora Rubber Flooring," and two require Ceramic Tile flooring. HMH's specifications for the flooring provide that an installer of the Ceramic Tile must have a "minimum of 5 years successful documented experience." Tr. 158-59; Emp. Exh. 12. In addition, installation of Nora Rubber Flooring requires specialized training. *Id.* HMH awarded the work of installing the specialty flooring to Capitol Commercial Flooring (for the rubber flooring), and Capitol City Tile and Marble (for the tile flooring).

Otis does not have Mechanics, Apprentices, or Helpers in the Sacramento area that have training or experience in the installation of Ceramic Tile flooring or Nora Rubber Flooring. Tr. 159, 110. In addition, Otis is unaware of any member of IUEC Local 8 who has such experience and training. Tr. 110-11. The Flooring Installers<sup>3</sup> employed by Capitol Commercial Flooring and Capitol City Tile and Marble, on the other hand, have demonstrated, documented, and proven experience installing the respective types of flooring their employers were awarded. Tr. 78, 80-82. Moreover, Capitol Commercial Flooring and Capitol City Tile and Marble have long-standing relationships with HMH and HMH is confident that these contractors employ well trained and highly experienced installers. *Id.* HMH has never awarded specialty flooring work to Otis or any other elevator company. Tr. 83, 86. HMH prefers to award this work to licensed

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<sup>3</sup> This brief uses the term "Flooring Installers" to refer to those employees hired by the flooring contractors awarded the disputed work; specifically, the employees of Capitol Commercial Flooring, Capitol City Tile and Marble, and B.T. Mancini. The Flooring Installers do not appear to be represented by a labor union. Indeed, evidence suggests that one concern of Local 8 was that the disputed work was being performed by "non-union" workers. Tr. 46.

flooring contractors with experienced employees, and not elevator companies. Tr. 83-84, 86.

### **5. The Mercy San Juan Medical Center Project**

Otis also has a contract for the installation elevators at Mercy San Juan Medical Center located at 6501 Coyle Avenue, Carmichael, California, 95608 (the “Mercy Job”). Tr. 159. The General Contractor for the Mercy Job is Turner Construction. Tr. 92, 159. Like the Lodi Job, and consistent with past practice, the work of installing specialty flooring at the Mercy Job is excluded from Otis’ contract with Turner Construction. Tr. 92, 118-19; Emp. Exh. 9. Turner Construction awarded the specialty flooring installation work to B.T. Mancini. Tr. 92. Turner Construction has hired B.T. Mancini on a regular basis for nearly 20 years and is confident that the Flooring Installers hired by B.T. Mancini possess the experience, skills, and training needed to install the specialty flooring on Turner Construction’s projects, including the Mercy Job. Tr. 92-93, 95. Turner has never awarded specialty flooring work to Otis or any other elevator company. Tr. 96 (“to my knowledge we have never had elevator mechanics install specialty flooring on any project”). Turner prefers to award this work to licensed flooring contractors with experienced employees, and not elevator companies. Tr. 97-98; 84.

### **6. Local 8 Claims Flooring Installation Work, Threatens Work Stoppages and Then Directs Work Stoppages To Enforce Its Claim To The Disputed Work**

#### **(a) Local 8 Demands That An IUEC-Represented Mechanic work “Stand-By” While Floors Are Installed**

Despite a decades-old history of specialty flooring work being awarded to flooring contractors who hired Flooring Installers (and not IUEC-represented Elevator Constructors) to install the floors, Local 8 recently began a campaign to claim the work of installing floors. This campaign began in approximately December, 2008. At this time, Otis had a contract to install

elevators at the CalSTRS Headquarters in Sacramento, California (the “CalSTRS Job”).<sup>4</sup> Tr. 147. The Otis Mechanic-in-Charge at the CalSTRS Job, Dave Davison, called Otis Construction Superintendent Ken Greenling to state that Local 8 had instructed him to work “stand-by” while the floors were installed by the flooring contractor. Tr. 147. After receiving this call from Mechanic-in-Charge Davison, Otis Construction Superintendent Greenling called Local 8 Business Manager Patrick McGarvey to ask why he was telling Mechanic-in-Charge Davison to work stand-by. Tr. 147. Local 8 Business Manager McGarvey responded that it was “state law.” Tr. 148. Otis Construction Superintendent Greenling said that he had never heard that state law required an elevator Mechanic to work stand-by during flooring installation. Id. Local 8 Business Manager simply repeated that it was a requirement of state law. Id.

About a day later, a California State Elevator Inspector responsible for the Sacramento area, Willie Price, contacted Otis and stated that Otis was required to have a licensed elevator Mechanic present during the installation of specialty flooring. Tr. 148-49. Elevator Inspector Price also threatened to shut down the temporary elevators (effectively shutting down the job) on a job where Otis failed to follow this directive. Tr. 149. Elevator Inspector Price confirmed his directive and interpretation of state law (as requiring an elevator Mechanic’s presence while floors are installed) in telephone conversations with Otis Regional Field Operations Manager David Holliman, Tr. 114-15, 135, and Otis Branch Manager Marcus Burton, Tr. 214-15. Elevator Inspector Price also confirmed that his agency became involved because it had received a call from Local 8. Tr. 215.

The Sacramento area is the only area in California where a state inspector has notified Otis that it needs to have a Mechanic present while specialty flooring is installed. Tr. 115.

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<sup>4</sup> CalSTRS is the California State Teachers’ Retirement System.

Despite repeated requests, Elevator Inspector Price (and his successor Mike Boyle) refused to explain orally or in writing how state law compelled the presence of an elevator Mechanic when floors were installed. Tr. 115, 134-35, 215. When asked for an explanation, he merely referred Otis managers to the state labor code. Id.<sup>5</sup>

Based on the position taken by Elevator Inspector Price and his threat to shut down jobs, Otis began to assign Mechanics to work stand-by while specialty floors were installed in the Sacramento area, including the CalSTRS Job. Tr. 149, 153-54, 125-26, 129-30; Emp. Exh. 10, 11.

(b) Local 8 Claims The Flooring Installation Work

Having first demanded that Mechanics work stand-by during the installation of specialty floors, and having enlisted the State elevator inspection agency to support its position, Local 8 then demanded that its members actually perform the flooring installation work. In April 2009, at an Otis project at 500 Capitol Mall in Sacramento, California (the “500 Capitol Mall Job”), Local 8 Business Manager McGarvey told Otis Construction Superintendent Ken Greenling that the work of installing specialty flooring was Local 8’s work. Tr. 152-53. Otis Superintendent Greenling responded that IUEC members were not qualified and had not performed specialty flooring work. Tr. 152. The floors at the 500 Capitol Mall Job were high-end Italian marble, the installation of which required substantial specialized skill. Tr. 116, 152. Nevertheless, Local 8 Business Manager McGarvey persisted and claimed that the work was IUEC work. Tr. 153.

After Local 8 claimed the flooring work in his conversation with Construction Superintendent Greenling, Otis Regional Field Operations Manager David Holliman and Otis

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<sup>5</sup> California Labor Code Section 7311.2(a) provides that “any person who, without supervision, ...installs ... any conveyance covered by this chapter, shall be certified as a certified competent conveyance mechanic.” U. Exh 1 at p. 10 (emphasis added).

Branch Manager Marcus Burton spoke with Local 8 Business Manager McGarvey. In these conversations, Local 8 Business Manager McGarvey was clear in his claim that the flooring installation work was IUEC work. Tr. 115-16; 216-17. Local 8 Business Manager McGarvey also asserted that Local 8's members were not going to work stand-by while someone else did their work. Id. He did, however, propose a "composite crew" (with an IUEC Mechanic and a flooring installer working together). Tr. 218; 292. The General Contractor, however, was adamant that elevator Mechanics lacked the experience needed to install high-end marble, and that Otis employees were not to touch the marble. Tr. 116, 218.

Eventually, Otis Mechanic Norm Franklin worked stand-by while the flooring contractor installed the floors in the passenger cars at 500 Capitol Mall. Tr. 153, 155; Emp. Exh. 11. Indeed, when Otis Construction Superintendent Greenling and Otis Branch Manager Marcus Burton asked the General Contractor about the flooring installation, the General Contractor reported that Mechanic Franklin sat on a bucket while the floors were installed. Tr. 195-96; 218-19.

(c) Local 8 Refuses To Allow Its Members To Work Stand-By And Directs Otis Employees To Refuse Stand-By Assignments Under Threat Of Union Penalties

In early August 2009, Otis Construction Superintendent Greenling had a conversation with Local 8 Business Manager McGarvey about specialty flooring work and stand-by assignments. Tr. 160. Local 8 Business Manager McGarvey again declared that the flooring installation work was IUEC work and that Local 8's members had to install the floors. Id. He added that Local 8's members would not work stand-by. Id. Otis Construction Superintendent Greenling explained that Otis was assigning stand-by because Elevator Inspector Price required it. Tr. 160-62.

Soon after this conversation, an Otis Mechanic at the Lodi Job, Paul Weiseugegel, called Otis Project Manager Karen Stribble to request a Change Order so that he could install the specialty flooring. Tr. 163. When Otis Construction Superintendent Greenling learned about this call, he called Mechanic Weiseugegel to ask why he was requesting a Change Order. Tr. 164,209. Mechanic Weiseugegel explained that Local 8 told him he had to install the floors and that he could not work stand-by while someone else installed the floors. Tr. 164. Specifically, Mechanic Weiseugegel explained that Local 8 had given “a direction that we’re not to stand by and watch someone else perform our work. So we’re going to do the work.” Id.

On August 5, 2009, the General Contractor’s representative on the Lodi Job, HMM Superintendent Steve Harless, sent an email to Otis Construction Superintendent Ken Greenling informing him that Mechanic Weiseugegel had declared that Mechanic Weiseugegel’s Union was claiming the flooring installation work. Tr. 165-66; Emp. Exh. 13 (“Paul is now telling me that the elevator union is requiring that elevator installers must install the flooring.”). HMM Superintendent Harless stated that he was concerned because the contract with Otis did not include the floors, and he questioned whether Otis employees had the proper qualifications to perform the flooring installation work. Emp. Exh. 13.

Also on August 5, 2009 Otis Regional Field Operations Manager Dave Holliman called Otis Labor Relations Manager Chris Grenier to explain the situation. He reported that Local 8 had instructed its members to refuse stand-by assignments. Tr. 32-33. He also explained that the Sacramento area Elevator Inspector insisted that an elevator Mechanic be present while floors are installed, but that Otis had not been awarded the work of installing the floors. Tr. 33-34. Therefore, to comply with the State Elevator Inspector’s requirements, Otis had to assign a

Mechanic to work stand-by. But the Mechanic at the Lodi Job was now refusing stand-by work and claiming flooring installation work under Local 8's direction. Tr. 34.

On August 6, 2009, Otis Labor Relations Manager Grenier called Local 8 Business Manager McGarvey and left a voice mail message. Tr. 35-36. After not hearing from Business Manager McGarvey for about three hours, Labor Relations Manager Grenier faxed a letter to Local 8 Business Manager McGarvey and IUEC General President Dana Brigham demanding that the IUEC and Local 8 cease and desist from the unlawful directives to Otis' employees that they refuse to work stand-by while the flooring was installed by another sub-contractor. Tr. 36-37; Emp. Exh. 2. This letter explained that Otis was not awarded the flooring installation work, and that Otis considered the Union's directions to its members to refuse stand-by work to be a threat to use an illegal means to claim the flooring installation work and to coerce the General Contractor to assign the disputed work to the IUEC. Tr. 37; Emp. Exh. 2.

Otis Labor Relations Manager Grenier then spoke by phone with Local 8 Business Manager McGarvey about the dispute. In this conversation, Local 8 Business Manager McGarvey claimed that the flooring installation work was "IUEC work." Tr. 44-45; see also Tr. 309 (Local 8 Business Manager McGarvey admitting it is "possible" he told Grenier the flooring was IUEC work). Local 8 Business Manager McGarvey surmised that Otis was only providing an IUEC Mechanic to work stand-by in order to help a "non-union" contractor take away the IUEC's work. Tr. 46. He said that Local 8 would not do the stand-by work, because to do so would only help Otis "give away IUEC work." Tr. 46.

On or about August 7, 2009, Local 8 Business Manager McGarvey sent a letter to Otis Labor Relations Manager Grenier. In this letter, Local 8 Business Manager McGarvey stated that Local 8 would not be a party to a practice under which Union members "loan" their licenses

under stand-by assignments while another sub-contractor installed the flooring. Tr. 47-48.; Emp. Exh. 5.<sup>6</sup>

(1) *The Lodi Job Work Stoppage*

HMH scheduled the specialty flooring installation work at the Lodi Job for Monday August 24, 2009. Tr. 167. Accordingly, on Friday August 21, 2009, Otis Construction Superintendent Ken Greenling met with Mechanic Lee Moore to inform him that his assignment on August 24, 2009 would be to work stand-by while the floors were installed. Tr. 167-68. Mechanic Moore refused the assignment, explaining that Local 8 had directed him not to work stand-by and that he would be brought up on charges if he did. Tr. 168 (“I can get fined by the union if I do it”). Construction Superintendent Greenling spoke with Mechanic Moore by phone on Monday, August 24, 2009 to discuss the assignment again. Mechanic Moore again refused to work stand-by. Tr. 168-69. As a result of Mechanic Moore’s refusal to work stand-by, the flooring sub-contractor was unable to proceed and elevator work at the site came to a halt. Tr. 169-70.<sup>7</sup> Tr. 171.

On August 26, 2009, Construction Superintendent Greenling issued a written warning letter to Mechanic Moore for his refusal to work as directed. Tr. 170; Emp. Exh. 14.

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<sup>6</sup> During the August 6 conversation between Labor Relations Manager Grenier and Business Manager McGarvey, Business Manager McGarvey did not say anything about licensing issues or Local 8 members “loaning” their licenses. Tr. 46-48. Despite Business Manager McGarvey’s new wording, the true meaning of his letter was clear – Local 8 would not tolerate stand-by work. Otis Labor Relations Manager Grenier understood this letter as a clear statement that Local 8 would not permit its members to work stand-by, particularly in the context of the August 6, 2009 conversation when Local 8 Business Manager McGarvey made his position explicit. Tr. 48; 71.

<sup>7</sup> The flooring for the Lodi Job was re-scheduled to begin September 10, the second day of the 10(k) hearing. Tr. 171. Local 8 negotiated a stipulation with Region 20 not to interfere with this assignment in order to avoid the hearing on Region 20’s petition for an injunction, which had been scheduled for September 11. Tr. 171, 16.

(2) *The Mercy Job Work Stoppage*

Similarly, Turner Construction (the General Contractor at the Mercy Job) wanted the floors installed during the week of August 17, 2009. However, Otis Mechanic Matt Andries told Turner Superintendent Tony Walters that he had to install the floors and that he could not work stand-by. Tr. 172. Mechanic Andries then called Construction Superintendent Greenling to explain that the General Contractor was ready to install floors, and he “wanted to get information before [he] called the union.” Tr. 266. Then, Mechanic Andries called Local 8 Business Manager McGarvey. Tr. 267. In this conversation, Local 8 Business Manager McGarvey informed Mechanic Andries that “at one time” “the State of California says, absolutely, yes, we got to do the work.” Tr. 267-68. After this conversation, Mechanic Andries spoke again with Otis Construction Superintendent Greenling, at which time Superintendent Greenling asked Mechanic Andries whether or not he would work stand-by. Mechanic Andries said “no,” and “I’m not going to.” Tr. 269; see also Tr. 175. Mechanic Andries explained that there was a “directive from the International . . . , that we weren’t going to stand-by and watch somebody do our work.” Tr. 176.

Construction Superintendent Greenling then received a call from Turner Construction Superintendent Walters, who was upset. Tr. 174. Turner Superintendent Walters asked when an elevator union claim to floors started; he said that he has never heard such a claim before. Tr. 174.

Later that day, Turner Superintendent Walters sent Construction Superintendent Greenling an email stating that he wanted the floors installed that week and that he would hold Otis responsible for any delays. Tr. 173; Emp. Exh. 15. He also questioned whether Otis’ employees were qualified to install the floors, but he had no problem with a Mechanic working

stand-by. Id. This email also confirmed that Mechanic Andries had claimed the flooring work. Emp. Exh. 15 (“your installer has indicated that they need to install the flooring”).

Responding to the General Contractor’s demands, Otis Construction Superintendent Greenling called Mechanic Andries on August 18 and August 19 to direct him to work stand-by for the installation of the specialty flooring; on each day, Mechanic Andries refused. Tr. 179; 181. As a result of Mechanic Andries’ refusal to work stand-by, the elevator work at the Mercy Job came to a stand-still.<sup>8</sup>

On August 20, 2009, Superintendent Greenling issued a written warning letter to Mechanic Andries for his refusal to work as directed. Tr. 181; Emp. Exh. 16.

*(3) The August 31 Meeting With Otis Employees*

On August 31, 2009, Otis held a safety meeting for its field employees at the North Highlands Branch Office. Tr. 210. At the end of the meeting, Branch Manager Marcus Burton asked to speak with the Mechanics, Apprentices and Helpers about the flooring dispute. Tr. 211. He had hoped for a constructive conversation about the issue, but the meeting became contentious. Id. Several employees were upset that Otis had disciplined two Mechanics for refusing stand-by work, and that they felt they were “between a rock and a hard place.” Tr. 212. They explained “that they didn’t know what to do in this situation, because they felt like on the one hand the union was telling them not to perform the work or they could be fined, and on the other hand ...they were upset that [Otis was] disciplining them for not performing the work.” Tr. 212. One of the more vocal employees, Eric Hooper, is a Local 8 official and serves on Local 8’s Executive Board. Tr. 224, 230, 310.

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<sup>8</sup> The floors at the Mercy Job were eventually installed when one Otis Mechanic was willing to work stand-by despite Local 8’s directives. Tr. 179, 98.

When the employees asked why they could not install the floors, Branch Manager Burton explained that the General Contractors and owners often require a minimum level of actual experience installing the type of floor being installed at the job. Tr. 212-13. He used the Lodi Job as an example, and explained that the General Contractor on that job required five years' of experience with the particular type of floor tile. Tr. 213. Branch Manager Burton then asked the group whether any one in the room had the experience to satisfy that requirement, and no one answered. Tr. 213.

**7. Region 20 Finds Merit To The Charges, Issues A Complaint, Issues A Notice of 10(k) Hearing, And Initiates Injunction Proceedings Under Section 10(l)**

On August 18, 2009, NEBA filed two charges against Local 8 alleging unfair labor practices. The first charge alleged a violation of Section 8(b)(4)(D)(case number 20-CD-745); the second alleged a violation of Section 8(b)(4)(B)(case number 20-CC-3476). After investigating the charges, the Regional Director for Region 20 concluded that both charges were meritorious. Accordingly, the Regional Director issued a Notice of 10(k) Hearing in case number 20-CD-745, and he issued a Complaint and Notice of Hearing in case number 20-CC-3476.

Pursuant to Section 10(l), Region 20 also filed a lawsuit in the United States District Court for the Eastern District of California against Local 8 seeking an injunction ceasing Local 8's unlawful conduct. Tr. 15-16. A hearing on Region 20's petition for an injunction was scheduled for September 11 (immediately after the 10(k) hearing). Tr. 16. The hearing was continued based on a stipulation negotiated by Local 8 and Region 20 during the 10(k) hearing. See, Tr. 171, 16.

### III. Legal Analysis

The Board is required to examine work jurisdiction disputes and to make an affirmative award to one of the contending parties. NLRB v. Broadcast Eng'rs Local 1212 (Columbia Broadcasting System), 363 U.S. 802 (1960). The Board's obligation stems from Section 8(b)(4) and 10(k) of the Act. Section 8(b)(4) provides in pertinent part:

Sec. 8(b)(4) It shall be an unfair labor practice for a labor organization or its agents –

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or an industry affecting commerce, where in either case an object thereof is—

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work.

Section 10(k) provides:

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(D) of section 8(b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

When a charge alleging a violation of Section 8(b)(4)(D) has been filed, the Board determines the dispute as long as there is reasonable cause to believe the charge has merit and no agreed upon method of adjustment exists. See NLRB v. Broadcast Eng'rs, supra.

A. Section 10(k) Prerequisites

The Board will resolve a jurisdictional dispute under Section 10(k) of the Act when it finds that “there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed on a method for the voluntary adjustment of the dispute.” Operating Eng'rs Local 318 (Foeste Masonry), 322 NLRB 709 (1996). Both of these prerequisites are satisfied in the present case.

1. **Section 8(b)(4)(D) Violation**

The first prerequisite requires a finding that “there is reasonable cause to believe that there are competing claims to the disputed work among rival groups of employees and that a party has used proscribed means to enforce its claim to the work in dispute.” Chicago Regional Council of Carpenters, 354 NLRB No. 73 (Aug. 31, 2009); Int'l Union of Operating Eng'rs, Local 150, 348 NLRB No. 33, (Sept. 29, 2006). Both of these elements exist here.

(a) Local 8 Claims The Disputed Work

The evidence clearly shows reasonable cause to believe that Local 8 claims the disputed work.<sup>9</sup> Local 8 Business Manager McGarvey has repeatedly asserted that the flooring installation work is “IUEC work” or “our work” in several conversations with Otis managers.<sup>10</sup>

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<sup>9</sup> The fact that the disputed work was awarded to and performed by the Flooring Installers establishes that the Flooring Installers have a claim to the work. Electrical Workers IBEW Local 98 (Swartley Bros. Engineers), 337 NLRB 1270, 1271 n.4 (2002) (“[P]erformance of the . . . work by the Employer’s unrepresented employees ‘is evidence of a claim to that work by those employees, even absent an explicit claim.’ . . . Thus, there are competing claims to the work, and this jurisdictional prerequisite is met.” (quoting Carpenters Local 13, 336 NLRB at 1003)). Thus, Local 8’s claim to the work is a competing claim.

<sup>10</sup> At the hearing, Business Manager McGarvey clarified “when I say ‘our work,’ I mean the IUEC.” Tr. 285.

For example, in the first week of August, 2009 he told Construction Superintendent Greenling that the installation of flooring was IUEC work and that the IUEC did not want others to do their work. Tr. 160. Similarly, in conversations with Branch Manager Marcus Burton, RFOM David Holliman, and Construction Superintendent Greenling regarding the 500 Capitol Mall Job Business Manager McGarvey clearly asserted that the flooring was “our work.” Tr. 115-16, 152-53, 216-17. He repeated this claim in his August 6, 2009 phone conversation with Otis Labor Relations Manager Grenier when he claimed the flooring work as “IUEC work.” Tr. 45-46.<sup>11</sup>

Moreover, the Mechanics on both the Lodi Job and the Mercy Job told the General Contractors on those jobs that Local 8 was claiming the flooring installation work. Tr. 166, 274; Emp. Exh. 13 (“Paul is now telling me that the Elevator Union is requiring that elevator installers must install the flooring”); Emp. Exh. 15 (“your installer has indicated that they need to install the flooring”). These same employees told Otis Construction Superintendent Greenling that Local 8 instructed them to install the floors at these jobs. Tr. 164, 168, 175-76. Indeed, the Mechanic at the Lodi Job went so far as to request a formal Changer Order so that he could install the floors, and he explained his actions as based on Local 8’s claim to the work. Tr. 163.

In addition to this clear evidence of Local 8’s claim to the flooring installation work, Local 8 prepared a written grievance that demonstrates Local 8’s claim. In the statement of grievance that Local 8 Business Manager McGarvey personally drafted, Tr. 306, Local 8 states, “Otis Elevator continues to violate [the NEBA Agreement] by assisting general contractors to use tradesmen other than Elevator Constructors to perform work specified in [the NEBA

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<sup>11</sup> The testimony concerning Business Manager McGarvey’s statements is uncontested. During his testimony, Business Manager McGarvey did not deny making these statements. Although his version of the conversations omitted these statements, he made no effort to specifically deny that he made these statements to Otis’ managers. Tr. 287. Indeed, McGarvey admitted on cross examination that it was “possible” he told Chris Grenier the flooring work was IUEC work. Tr. 309.

Agreement]; specifically car floor covering at Lodi Memorial Hospital and Mercy San Juan Hospital.” Emp. Exh. 7 (emphasis added). By asserting this grievance (which Local 8 has not withdrawn or rescinded), Local 8 unequivocally claims the disputed work. See Tr. 318 (the status of the grievance is “pending”).

After Local 8 threatened work stoppages and Otis demanded that Local 8 cease and desist (with a statement that Otis would go to the NLRB for relief unless the unlawful conduct ceased), Local 8 re-characterized its position as merely a concern about the requirements of California licensing law. See, e.g., Emp. Exh. 5. This was a position Local 8 continued to advance at the 10(k) hearing. However, Local 8’s reliance on California licensing law is actually further evidence of Local 8’s claim to the disputed work. Despite a lack of written guidance from the California regulators, and despite the fact that no Elevator Inspector has required licensed Mechanics to install the floors, Local 8 interprets California law as requiring that an IUEC-represented Mechanic actually install the specialty flooring. See Tr. 308 (Local 8 Business Manager McGarvey claiming that state law requires flooring installation work to be performed by elevator mechanics); see also Tr. 23 (Local 8’s counsel stating in opening statement Local 8’s view that state regulators require that “flooring installation has to be done by somebody with a license”). The statute, however, says only that elevator installation work must be performed under the “supervision” of a licensed elevator Mechanic. See, U. Exh. 1 at p. 10. Even assuming that this statute applies to flooring (a conclusion that is not clear from the statute) Local 8’s interpretation of the word “supervision” as requiring that a licensed elevator Mechanic actually install the flooring (as opposed to stand-by work) shows that Local 8 is merely using state law as a pawn in its campaign to claim the flooring installation work. Although Local 8 cites state law to support of its claim, Local 8’s interpretation of state law is neither a defense to

its violation of the Act nor a disclaimer of the disputed work; to the contrary, Local 8's insistence that state law supports its position is direct evidence of Local 8's claim.

Finally, it is no defense that the Flooring Installers – who currently have been assigned the disputed work – are not known to be represented by a union. For example, in International Union Elevator Constructors, IUEC Local No. 91 (Otis Elevator Co.), 281 NLRB 1242 (1986), the IUEC challenged Otis' assignment of work to non-represented employees by (a) striking, (b) threatening another strike and (b) threatening to “pull” the union cards of any member who cooperated with the non-represented employees. Otis filed an unfair labor practice charge alleging a violation of Section 8(b)(4)(D). The Board considered the evidence, weighed the relevant factors, and awarded the work to the non-represented employees. Similarly, in Millwright and Mach. Erectors Local 1906 (Chicago Steel Ltd.), 310 NLRB 646 (1993), the Millwrights local and Carpenters Council challenged the assignment of work to non-represented employees by picketing (and severely limiting access to the job site), and exerted sufficient pressure on the employer to send the non-represented employees home and agree to a composite crew in order to continue its work. Again, after considering the evidence, the Board found a violation of Section 8(b)(4)(D) and awarded the work to the non-represented employees. See also International Union, United Mine Workers of Am. (Con-Serv, Inc.), 299 NLRB 865 (1990) (“the applicability of Section 8(b)(4)(D) is not limited to competing groups of employees working for the same employer, but also extends to an attempt to force the indirect assignment of work from employees of one employer to employees of another. It also extends to conduct which is directed at ending the contracting out of work to a firm using members of another union or unrepresented employees”).

Local 8 clearly claims the disputed work. Consequently, “there is reasonable cause to believe that there are competing claims to the disputed work among rival groups of employees.” Int’l Union of Operating Eng’rs, Local 150, 348 NLRB No. 33 (Sept. 29, 2006).<sup>12</sup>

(b) Local 8 Used Proscribed Means (Strike Threats and Strikes) To Enforce Its Claim

The evidence equally shows reasonable cause to believe that Local 8 used proscribed means to enforce its claim. It first threatened work stoppages and then directed work stoppages at both the Lodi Job and the Mercy Job to enforce its claim to the flooring work.

Section 8(b)(4)(D) of the Act prohibits strikes, picketing, boycotts, threats, and coercion where an object is “forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class...” Local 8’s directives to its members to refuse stand-by work assigned by Otis, and Local 8 Business Manager McGarvey’s threats that Local 8 members will not work stand-by, clearly constitute prohibited means to enforce Local 8’s claim to the disputed work of installing the cab flooring.

Local 8 first threatened work stoppages when Local 8 Business Manager told Otis managers that Local 8’s members would not work stand-by assignments. Even though Local 8 Business Manager McGarvey first demanded that Otis assign stand-by work at the CalSTRS Job, and then arranged for the Elevator Inspector to make the same demand, Local 8 Business Manager McGarvey told Otis Construction Superintendent Greenling in early August 2009 that

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<sup>12</sup> At the start of the hearing, Local 8 attempted to disclaim the disputed work. However, the representations of Local 8’s counsel were cautious, qualified, and limited. Specifically, he proposed a disclaimer of the work at the Mercy Job after that work had already been completed, and he proposed to disclaim the work at the Lodi Job because it had been scheduled to start the next day and Local 8 would not interfere with the stand-by assignment (particularly when the injunction hearing was pending). Even though counsel said he would submit a written disclaimer, Local 8 never offered a written disclaimer. As discussed below in response to Local 8’s motion to quash, Local 8’s disingenuous and untimely attempt to offer a qualified disclaimer is ineffective and does not preempt a 10(k) ruling. It was little more than a transparent effort to avoid resolution of the dispute.

Local 8 members would no longer work stand-by while other workers installed the specialty flooring. Tr. 152-53. Local 8 Business Manager McGarvey repeated this threat to Otis Labor Relations Manager Grenier in his phone conversation on August 6, 2009. Tr. 44-46. His letter to Labor Relations Manager Grenier was equally clear – Local 8 would “not be a party” to stand-by work. Tr. 47-48; Emp. Exh. 5. Local 8’s threat of refusing stand-by work was repeated by Otis’ Mechanics, who explained to Construction Superintendent Greenling that they could not work stand-by while floors were installed. Tr. 164, 168, 175-76. They explained that their inability to work stand-by was based on directives from Local 8. Id.

Local 8 then followed through on its threat and directed work stoppages at both the Lodi Job and the Mercy Job. The Otis Mechanics at both jobs refused to work stand-by as assigned, and they cited Local 8’s directive as the reason. Indeed, Otis’ employees confirmed at the August 31, 2009 meeting that Local 8 had actually threatened to fine its members or bring them up on charges if they accepted stand-by work. Tr. 212. One of these employees was Eric Hooper, who is a member of Local 8’s Executive Board. The evidence thus clearly shows that Local 8 directed the work stoppage through unlawful directives to refuse work and illegal threats of union discipline.<sup>13</sup>

Although Business Manager McGarvey testified that he did not give a directive to members to refuse stand-by work, Tr. 301, the evidence is clear that Local 8 in fact gave such directives. Nevertheless, Business Manager McGarvey’s denial does not prevent the Board from

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<sup>13</sup> At this time, the Flooring Installers have completed the disputed work at the Mercy Job and started the work at the Lodi Job while Otis Mechanics worked stand-by. The fact that the disputed work has been performed with Otis Mechanics working stand-by, however, has no bearing on the fact that Local 8 struck Otis to enforce its claim to the disputed work. The Mechanic at the Lodi Job simply disregarded Local 8’s directive and worked stand-by. At the Lodi Job, a Mechanic was assigned stand-by on the second day of the 10(k) hearing and one day before the hearing on Region 20’s petition for an injunction; in this context it is not surprising that Local 8 did not interfere with the assignment.

making an award under Section 10(k). The prerequisite for a 10(k) award is that there is “reasonable cause to believe” that Local 8 used proscribed means. See, e.g., International Union of Elevator Constructors, Local 91 (Otis Elevator Company), 281 NLRB 1241, 1243 (1986)(disputed testimony does not prevent a Section 10(k) determination, because “the Board is not required to find that a violation did in fact occur, but only that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated”). The evidence overwhelming supports such a finding in this case.

The Unions’ unlawful conduct here was clearly an attempt to force reassignment of the flooring installation work from the Flooring Installers to Local 8’s members, and is a clear violation of Section 8(b)(4)(D). Thus, there is reasonable cause to believe that Local 8 used proscribed means to enforce its claim to the disputed work.

## **2. There is No Agreed Upon, Voluntary Method of Adjustment**

The second prerequisite for Board resolution of a Section 10(k) jurisdictional dispute requires a finding that the parties have not agreed to an alternate process for resolving such disputes. In this case, there is no voluntary method to resolve the dispute that is binding on all of the parties. No collective-bargaining agreement or other agreement with a dispute resolution mechanism for jurisdictional claims binds Otis, the general contractors, the flooring sub-contractors, Local 8, and the Flooring Installers.

Thus, the pre-requisites for Board resolution clearly exist in this case.

### **B. 10(k) Factors**

In resolving jurisdictional disputes, the Board reviews a number of factors and uses its common sense and experience to determine how to award the disputed work. Int’l Brotherhood of Electrical Workers (U.S. Info. Sys.), 326 NLRB 1382, 1384 (1998). These factors include: (1)

certifications and collective bargaining agreements; (2) the employer's preference, current assignment and past practice; (3) area and industry practice; (4) relative skills; and (5) economy and efficiency of operations. Chicago Reg'l Council of Carpenters, Local 1, 347 NLRB No. 49, slip op. at 3 (2006) (citing Machinists Lodge 1743 (J.A. Jones Constr. Co.), 135 NLRB 1402, 1410-11 (1962)). The uncontested evidence introduced at the 10(k) hearing in the present dispute shows that Local 8's claim to the disputed work lacks merit.

### **1. Certifications and Collective Bargaining Agreements**

As mentioned above, NEBA (for and on behalf of its members, including Otis) currently has a collective-bargaining agreement with the IUEC (for and on behalf of its locals, including Local 8). Although the NEBA Agreement contains work jurisdiction provisions, these provisions do not apply when Otis does not control the work and was not awarded the work. Indeed, the IUEC agreed in 1999 that it could not claim cab-interior work when the signatory employer was not awarded the work. Tr. 39-41; Emp. Exh. 3. Thus, the NEBA Agreement does not support an award of the work to either party to the claim.

Moreover, Otis is not a party to any collective bargaining agreement with a flooring union or the Flooring Installers. Tr. 32.

Therefore, this factor does not weigh in either party's favor.

### **2. Employer Preference and Practice**

The evidence is undisputed that general contractors historically assign the disputed work to the Flooring Installers and other employees of licensed flooring contractors (not elevator companies or contractors employing Local 8 members). Tr. 86. Even Local 8 Business Manager Pat McGarvey testified that this was the case when he worked as a Mechanic in the field. Tr. 284-85.

In this case, the disputed work was assigned to the Flooring Installers. At the Lodi Job, the work was assigned to Capitol City Marble and Tile and Capitol Commercial Flooring; at the Mercy Job, the work was awarded to B.T. Mancini.

In addition, the employers that controlled the award on each job, the General Contractors, prefer to award the work to licensed flooring contractors who employ Flooring Installers. Tr. 83-84, 86, 97-98. The General Contractors explained that their preference is based on their normal practice, their prior experience with the Flooring Installers, and their knowledge of the Flooring Installers skills and experience. Id.; see also Tr. 84 (Union counsel offering to stipulate that the General Contractors prefer to award the work to flooring installation contractors).

Notably, HMM (the General Contractor on the Lodi Job) has never hired an elevator company to install specialty floors in elevator cars. Tr. 83, 86. Similarly, Turner Construction (the General Contractor on the Mercy Job) has never awarded the specialty flooring installation work to an elevator company. Tr. 96.

Therefore, this factor strongly supports an award to the Flooring Installers. See Chicago Regional Council of Carpenters 354, NLRB No. 73 (Aug. 31, 2009) (“employer preference . . . is entitled to substantial weight”) (citing Iron Workers Local 1 (Goebel forming), 340 NLRB 1158, 1163 (2003)).

### **3. Area and Industry Practice**

As stated above, the long-standing practice in the industry is that the disputed work is performed by employees of licensed flooring contractors, such as the Flooring Installers, and not IUEC-represented employees of elevator companies. This evidence is undisputed. As mentioned above, even Local 8 Business Manager Pat McGarvey confirmed that this was true when he worked in the field as a Mechanic. Tr. 284-85. Neither HMM nor Turner has ever

awarded the work to Otis or any other elevator company. Tr. 96, 83, 86. Thus, Local 8's claim to the work is completely unfounded, and this factor supports an award of the work to the Flooring Installers.

#### **4. Relative Skills**

The Flooring Installers possess the training, skills, and experience to install the specialty flooring at issue. Tr. 81-82. General Contractors, Architects, and owners frequently require that the flooring installers possess specific minimum skills and experience installing the floors for any particular project. Tr. 80, 94-95, 110; Emp. Exh. 12. The Flooring Installers are able to satisfy these requirements. Tr. 82, 84 (union counsel offers to stipulate flooring installers "are well equipped and trained to this work"), 95. This testimony was uncontested.

No evidence shows that Local 8 members possess the experience, skills, and training required to install specialty flooring. Indeed, at the meeting on August 31, 2009, Otis Branch Manager Marcus Burton asked Otis' field employees whether any of them had the experience needed to satisfy the requirements of the Lodi Job. Tr. 213. No Mechanic answered that he did. Id. At the 10(k) hearing, Local 8 presented no evidence whatsoever to suggest that its members have any experience or skills installing specialty flooring. Therefore, this factor supports an award of the disputed work to the Flooring Installers.

#### **5. Economy and Efficiency**

General Contractors generally award elevator flooring work to the same flooring contractor that was hired to install floors in the lobby and elsewhere in the building. Tr. 77, 94. This ensures that the materials and installation methods in the elevator and elsewhere match. This practice is also more efficient since the same contractor is responsible for supplying materials and labor and results in consistency. It is therefore more efficient and effective to use a

flooring contractor to install floors generally and in the elevators, and this factor favors the Flooring Installers' claim to the disputed work.

#### **IV. Conclusion and Remedy**

After reviewing all the relevant evidence, the necessity for issuing an award is clear. Local 8 clearly claims the disputed work. Local 8 threatened to strike, and in fact struck, in violation of Section 8(b)(4)(D) to ensure that the installation of specialty flooring was assigned to Elevator Constructors (even though Otis was not awarded the work and did not control the work). There is no agreed upon method of dispute resolution which will bind all parties. Therefore, the Board is required to make an award.

Based on all the factors, it is equally clear that the Flooring Installers should be awarded the work.

Finally, the Board should issue a broad award. Local 8 has claimed this work at three job sites (500 Capitol Mall, the Lodi Job, and the Mercy Job), and Local 8 has engaged in unlawful strikes to force assignment of the disputed work to Local 8 at two job sites and against two different General Contractors (the Lodi Job and the Mercy Job). The recurrent nature of Local 8's unlawful conduct establishes a propensity for violating the Act. Therefore, there is a likelihood of this dispute recurring at other locations. Thus, the Board should issue a broad award to prevent future violations. Electrical Workers IBEW Local 211 (Sammons Communications), 287 NLRB 930, 934 (1987) (broad award is appropriate when there has been a continuing source of controversy in the area; similar disputes are likely to occur; and the charged party has a proclivity to engage in unlawful conduct to obtain the work).

## V. Local 8's Motion to Quash the 10(k) Hearing Should Be Denied

In what appears to be a last-ditch effort to avoid the inevitable result of a 10(k) merits analysis, at the beginning of the 10(k) hearing Local 8 moved to quash the Notice of 10(k) Hearing on several grounds. First, Local 8 argues that the disputed work was substantially complete, and thus a 10(k) hearing was essentially moot. Second, Local 8 asserts that there is no competing claim to the disputed work because no other party formally appeared at the 10(k) hearing to claim the work. Third, Local 8 attempted to offer a qualified and untimely “disclaimer” of completed work. As explained in detail below, Local 8's motion is meritless and should be denied.

### A. Performance of Dispute Work Does Not Moot 10(k) Jurisdiction

Local 8 advances a spurious argument that the 10(k) issue is moot because the work in dispute already has been completed. It is well-settled, however, that “completion of disputed work at the site that gave rise to the controversy is not a basis for quashing a 10(k) proceeding where there is not evidence that similar disputes are unlikely to recur.” Carpenters Ohio Reg'l Council (Competitive Interiors), 348 NLRB 266, 268 (2006) (citing Operating Engineers Local 150 (Martin Cement), 284 NLRB 858, 860 n.4 (1987)); see also Iron Workers Local 395 (Arco, Inc.), 325 NLRB 658, 659 n.3 (1998) (“It is well-established that the mere fact that disputed work has been completed does not render a jurisdictional dispute moot where nothing indicates that similar disputes are unlikely to recur.” (citations omitted)). Here, there is no evidence that Local 8 intends to permanently relinquish its claim of entitlement to the disputed work. To the contrary, Local 8's belated “disclaimer” of the work was expressly limited to the Lodi Job and the Mercy Job, where the work is now substantially complete. Tr. 12 (Local 8's “disclaimer” is limited to work “at the two sites”), Tr. 25 (Local 8 no longer claims the work “at these two job

sites”). In addition, no evidence suggests that the dispute is unlikely to recur; rather, the evidence shows that the dispute is highly likely to recur, as Local 8 has now claimed the work at three job sites (the 500 Capitol Mall Job, the Mercy Job, and the Lodi Job). Thus, the fact that the work already has been substantially completed has no bearing on the necessity for a 10(k) determination.

B. There Are Competing Claims For the Disputed Work

Next, Local 8 argues that the notice of hearing should be quashed because there are no competing claims to the work in dispute. Specifically, the Union asserts that because representatives of the Flooring Installers did not appear at the Section 10(k) hearing, they have not claimed the flooring work. This argument is similarly meritless.

It is immaterial whether the Flooring Installers appeared at the hearing because it is undisputed that they actually performed the disputed work. It is well-established that “performance of work by a group of employees is evidence of a claim to that work by those employees, even absent an explicit claim.” Carpenters Local 13 (Millenium Construction), 336 NLRB 1002, 1003 (2001) (citations omitted); see also Electrical Workers IBEW Local 98 (Swartley Bros. Engineers), 337 NLRB 1270, 1271 n.4 (2002) (“[P]erformance of the . . . work by the Employer’s unrepresented employees ‘is evidence of a claim to that work by those employees, even absent an explicit claim.’ . . . Thus, there are competing claims to the work, and this jurisdictional prerequisite is met.” (quoting Carpenters Local 13, 336 NLRB at 1003)); Operating Engineers Local 926 (Georgia World Congress Center), 254 NLRB 994, 996 (1981)) (“While these temporary employees of the Employer have never made a formal demand for the work, the Board has held that the fact that employees are performing the disputed work is evidence that they claim the work in dispute.” (citing International Longshoremen’s Union Local

8 (Collier Carbon & Chemical Corp.), 231 NLRB 179 (1977)). Thus, because the undisputed evidence shows that the Flooring Installers have performed the work at both the Mercy Job and the Lodi Job, it is clear that the Flooring Installers claim the work in dispute. Local 8's claim is therefore a competing claim.

C. Local 8's Untimely, Qualified, and Suspect "Disclaimer" Is Ineffective

Finally, the Union purports to offer a limited and untimely "disclaimer" as a means to prevent a Section 10(k) determination. The Union's sham disclaimer, however, was offered for the first time at the start of the Section 10(k) hearing – after the disputed work at the Mercy Job had already been completed and when the disputed work for the Lodi Job was scheduled to begin on the second day of the 10(k) hearing (a day before a court hearing on Region 20's petition for an injunction against Local 8). Moreover, Local 8's "disclaimer" was qualified and expressly limited to the Mercy Job and the Lodi Job, where the work was either completed or imminent. See, Tr. 12 (the disclaimer is limited to work "at the two sites"), 25 (the disclaimer is limited to work "at these two job sites"). This "disclaimer" is clearly inadequate and reflects little more than a transparent attempt to evade a 10(k) award.

As the Board has observed, "the Board will refuse to give effect to 'hollow disclaimers' interposed for the purpose of avoiding an authoritative decision on the merits." Laborers Local 81 (Kenny Construction Co.), 338 NLRB 977 (2003). Here, the Union's "disclaimer" should not be given effect because it is nothing more than a blatant effort to avoid a decision on the merits.

First, it is clear that Local 8 did not intend its "disclaimer" to have any actual effect other than to thwart resolution of the 10(k) issue. The Union made no effort to disclaim its entitlement to the disputed work in general or at any time before the hearing began. Indeed, while purporting in this proceedings to "disclaim" any entitlement to that work, Local 8 simultaneously

is pursuing a grievance against Otis that expresses a clear claim to the flooring work. Local 8's attempts to make it appear that it has disclaimed the disputed work should be disregarded as equivocal and inconsistent with its actions in a parallel proceeding. See Iron Workers Local 112 (Freesen, Inc.), 346 NLRB 953, 955 (2006) (rejecting union's disclaimer as inconsistent with union's claim of entitlement to disputed work in parallel proceeding (citing Laborers Local 79 (DNA Contracting), 338 NLRB 997, 998-99 (2003); Operating Engineers Local 150 (Interior Development), 308 NLRB 1005, 1006 (1992)).

Moreover, the Board has repeatedly held that disclaimers, such as Local 8's, made at the start of the 10(k) hearing after the disputed work has been substantially completed, are not valid:

Laborers did not disclaim the work until the hearing was about to begin. Furthermore, the actual rebuild work on the furnace was virtually completed, and the disputed work . . . had been finished. In reality, there was nothing left for the Laborers to disclaim. Thus, it appears that Laborers was attempting to avoid any definitive resolution of the issues and was seeking to escape the consequences of its unlawful actions. Under these circumstances, such an empty disclaimer cannot be given effect.

Laborers Local 910 (Brockway Glass Co.), 226 NLRB 142, 143 (1976); see also Laborers Local 1184 (Golden State Boring & Pipejacking), 337 NLRB 157, 158 (2001) ("Operating Engineers' disclaimer of interest in the work in dispute, made only after the work had been completed, is ineffective." (citing Laborers Local 910, 226 NLRB at 143)); Electrical Workers IBEW Local 103 (Comm-Tract Corp.), 307 NLRB 384, 386 (1992) ("Because Local 103 did not disclaim this work before the hearing, and there was little work to disclaim at the time of the hearing, it is clear that Local 103 'did not seek to effectively disclaim the disputed work but sought instead to escape the consequences of its improper actions.'" (quoting Electrical Workers IBEW Local 3 (Mike G. Electric), 279 NLRB 327, 328 (1984)).

Thus, since the Union’s partial, qualified, and untimely “disclaimer” – made only at the start of the hearing after the disputed work had been substantially completed and Region 20 had instituted a 10(l) injunction proceeding against it – is clearly nothing more than a sham attempt to avoid an authoritative decision on the merits and should be disregarded.

Therefore, Local 8’s motion to quash should be denied.

**VI. Conclusion**

For the foregoing reasons, NEBA and Otis respectfully request that the Board DENY Local 8’s Motion to Quash Notice of 10(k) Hearing; address the Section 10(k) factors; and BROADLY AWARD the installation of elevator flooring to employees of flooring contractors.

Dated at Burlington, Vermont

Respectfully submitted,

September 29, 2009

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CERTIFICATE OF SERVICE

I, Eric D. Jones, hereby certify that I caused a copy of the foregoing Post-Hearing Brief to be served upon the following parties by electronic mail and U.S. Mail on September 29, 2009:

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In addition, although other parties in interest did not formally intervene, I caused a copy of the foregoing Post-Hearing Brief to be served upon the following parties by U.S. Mail on September 29, 2009:

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