UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D.C.

International Union of Elevator Constructors, Local 8,	)	
and	)	**Case No. 20-CD-745**
National Elevator Bargaining Association	)	

POST HEARING BRIEF AND MOTION TO QUASH NOTICE OF HEARING UNDER SECTION 10(k)

INTRODUCTION

This case presents the question of whether Otis Elevator may require its licensed elevator constructor mechanics to "standby" and do *no work* at a construction site solely in order to enable a *different* employer, whose employees are not suitably licensed, to comply with state law. Odd though it is, this question cannot by *any* stretch be molded into the form of a jurisdictional dispute appropriate for resolution under Section 10(k). It is, in essence, a contractual dispute that Otis aims to avoid by conjuring sham competing work claims.

Section 7311.2 of the California Labor Code, enacted in 2003, provides that "any person who, without supervision, erects, constructs, installs, alters, tests, maintains, services or repairs, removes, or dismantles any conveyance covered by this chapter, shall be certified as a certified competent conveyance mechanic". The weight and balance of cab flooring directly affects the safety and operation of an elevator conveyance. It is not surprising, therefore, that the Principal Engineer of the Elevator Ride & Tramway Unit (ERT), the agency responsible for enforcement of the new law, determined that flooring installation must be performed by, or under the supervision of, a licensed elevator mechanic.

It is this simple fact, however, that has caused Otis the institutional pain it seeks to alleviate through recourse to the Board. For Otis only rarely contracts to install cab flooring itself, and the general contractors with whom it does business, and who are apparently ignorant of the new conveyance law, expect Otis to ensure that all flooring and other subcontracted work is completed on schedule. For reasons that can only be guessed, Otis has not approached ERT or other state agencies to obtain transitional or other relief in this matter, even though, as the evidence will show, it has met with state officials in Nevada in connection with a parallel law there. Instead, Otis has attempted to force its California employees to standby and "lend" their personal licenses to companies that do not employ them, a request many members of the bargaining unit have resisted due to concerns about the effect this could have on their licenses. The statute on its face requires that the licensed mechanics "supervise" the flooring work, but in the instances when Otis has had its employees standby in this manner, they have not been permitted to do anything other than to sit idle and collect a paycheck.

Fortunately, Section 10(k) is not as supple an instrument as Otis supposes. The evidence presented at the hearing plainly shows that the Union has never made any claim for flooring

installation work not awarded to its signatory employers, and for that reason alone, the notice of hearing in this matter should be quashed. The employers allegedly subject to the competing work claims – the general contractors with whom Otis contracted and who were allegedly subject to competing work claims – did not intervene at the hearing, providing nothing but pat testimony about their "preferences" for the flooring subcontractors at the two job sites. In short, this is a "jurisdictional dispute" *entirely* of Otis' making, and as such it is antithetical to the purposes Section 10(k) was intended to serve.

STATEMENT OF JURISDICTION

This case is before the National Labor Relations Board ("Board") upon Otis Elevator's charge that the International Union of Elevator Constructors, Local 8 ("Local 8" or the "Union"), violated Section 8(b)(4)(B) and 8(b)(4)(D) of the National Labor Relations Act ("Act") and request that the Board hold a 10(k) hearing.

Otis is a Connecticut corporation with a principal place of business located in North Highlands, California. Otis is engaged in the business of manufacturing, installing and servicing elevators and other conveyances throughout the United States, and is an employer within the meaning of Section 2(6) and (7) of the Act.

Local 8 represents elevator constructor mechanics employed by elevator contractors throughout Northern California and Northern Nevada, and is a labor organizations within the meaning of Section 2(5) of the Act.

STATEMENT OF THE ISSUE PRESENTED

Whether the Board should quash the notice of 10(k) hearing on the grounds that this matter does not involve competing claims to disputed work, but rather a primary *bona fide* labor dispute between Otis and Local 8 concerning the implementation of new state law.

STATEMENT OF THE CASE

The hearing in this matter was noticed pursuant to Section 10(k) of the Act, subsequent to the filing of unfair labor practice charges by Otis on August 18, 2009. The dispute arose when two Otis employees, Matt Andries and Lee Moore, declined to "standby" at the Mercy San Juan Hospital job site in Carnichael, California, and at the Lodi Memorial Hospital job site in Lodi, California, respectively, while specialty flooring contractors at those job sites installed flooring in the elevator cabs.

The Regional Director made a decision that reasonable cause existed to believe that the Union had encouraged its members not to "standby", thereby engaging in coercive conduct directed at HMH Builders (the general contractor at the Mercy San Juan Hospital job site) and Turner Construction Company (the general contractor at the Lodi Memorial Hospital job site) with the objective of forcing them to cease doing business with the flooring subcontractors, in violation of Sections 8(b)(4)(B) and 8(b)(4)(D). The Regional Director therefore authorized complaint under Section 10(l) and a Notice of Hearing for a 10(k) proceeding.

Following the filing of the Board charges, Local 8 member Norm Franklin agreed to standby at the Mercy San Juan Hospital job site, and Lee Moore agreed to standby at the Lodi Memorial Hospital job site. Accordingly, the Regional Director entered into a stipulation with Respondent to take the Section 10(l) hearing off calendar pending resolution of the underlying charges, now scheduled for November 3-4, 2009. The flooring installation at the Mercy Hospital job site was completed prior to the hearing (Tr. Tr. 9:11-18; 98:7-20), while the work at Lodi Memorial Hospital has been completed since that time.

A hearing was held before the Board on September 9-10, 2009. Neither HMH Builders, Turner Construction Company nor either of the two flooring subcontractors intervened, although

HMH and Turner each sent one representative to testify on behalf of Otis. (Tr. 5: 22-24; Tr. 7:23-25) At the hearing, Local 8 orally moved to quash the notice of 10(k) hearing on the grounds that the dispute at issue is not jurisdictional. In accordance with the Board's Rules and Regulations, Section 102.65, the Hearing Officer did not rule on the motion, leaving it for the Board's consideration. (Tr. 321:3-16)

STATEMENT OF FACTS

I. The Union Has Made No Claim to Flooring Installation Work Not Assigned to its Signatory Contractors.

At the hearing, the parties agreed that if Otis is awarded flooring installation work by a general contractor, "it would be IUEC work" under Article IV, par. 2(j) of the parties' collective bargaining agreement (CBA), which covers "the assembly of all cabs complete". (Tr. 45:16-19; Employer Exhibit 1, page 7) Otis Regional Field Operations Manager David Holliman described occasions where Otis does in fact contract to perform flooring work with its own employees. (Tr. 109:21-110:2; 129:1-7)[1]

Where, however, the Union does not represent the employees of a flooring subcontractor, the record is clear that it has made *no* claim to the work assigned to the subcontractor by a general contractor. At the hearing, McGarvey testified unequivocally that the Union had no interest in work not awarded to signatory contractors, and did not seek to represent the employees of the flooring subcontractors at the Mercy San Juan or Lodi Memorial Hospital projects. (Tr. 314:6-9; 300:3-301:16; 307:13-308:4; 270:17-22; 273:1-6)

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[1] Holliman testified that the National Elevator Industry Educational Program (NEIEP), the parties' joint labor-management apprenticeship training program, does not include installation of flooring (Tr. 121:12-25). When presented with a printed book entitled "Elevator Cab Modernization, Refinishing and Floor Covering", however, a book that includes a section on "Ceramic and Special Tile Installation" and is used for Unit 4 of Year 1 of the Apprenticeship Program (Union Exh. 2), he retracted his testimony. (Tr. 139:13-140:4; 282:22-284:9)

McGarvey's August 7 letter to Grenier also contained a very clear disclaimer of interest in the flooring installation work at issue, if one were needed. At the end of the letter, McGarvey wrote: "If you want someone other than an employee we represent to engage in such practices, that is your business; but this union does not wish to be a party to such practices which, again, could result in legal issues for our individual members." (Er. Exh. 5, p. 2) Again, in his August 21 letter to Labor Relations Manager Christian Grenier, McGarvey reiterated that "the Union is not making a claim to work that has not been awarded to Otis ... our dispute is over 'standby work' our members are being asked to do, not over flooring installation work Otis was not awarded." (Er. Exh. 6)

Even more significant, all witnesses provided identical testimony that prior to learning of the State's insistence that a licensed mechanic standby for flooring installation, in the event a non-signatory flooring subcontractor was working on a job site, the practice had always been that the elevator mechanic would 'park' and lock the cab with its doors open and leave to do other work while the subcontractor installed the flooring; at the end of a shift, the mechanic would then return to inspect for any cab damage. (Tr. 111:18-113:1; 132:1-14; 284:23-285:7) There was no suggestion by Otis that over all this time the Union had somehow ever claimed such flooring work.

Indeed, the only testimony that McGarvey had somehow claimed the flooring work at Mercy San Juan or Lodi was as self-serving as it was incredible. Grenier testified that he spoke with McGarvey about the Lodi job, and that McGarvey "maintained that it was their work and they wanted that work." (Tr. 45:24-25) McGarvey, however, testified unequivocally to the contrary, and stated that the Union did not and could not direct members either to standby or not to standby, testimony that was corroborated by Matt Andries. (Tr. 303:14-19; 270:17-22; 273:1-

6) Grenier statement that he interpreted McGarvey's August 7 letter as "reinforcing the fact that they consider the flooring to be their work and that the IUEC was not going to allow its members to do the standby" (Tr. 45:11-13) was plainly manufactured for the occasion. When pressed to identify where in the letter he could possibly have received the impression that McGarvey was directing members not to standby and to claim the work, Grenier became strangely non-responsive: McGarvey "apparently was making a determination that standby was not real work." (Tr. 71:12-18)

II. The 2003 Amendments to the Labor Code Require That Flooring Work be Performed by, or Under the Supervision of, a Licensed Elevator Constructor Mechanic.

In 2003, the California Legislature enacted a new and comprehensive conveyance law "to promote public safety awareness and to assure, to the extent feasible, the safety of the public and of workers with respect to conveyances covered by this chapter." Cal.Lab.C. §7300(a). Among other provisions, the new law requires that on and after June 30, 2003, "any person who, without supervision, erects, constructs, installs, alters, tests, maintains, services or repairs, removes, or dismantles any conveyance covered by this chapter, shall be certified as a certified competent conveyance mechanic ..." Cal.Lab.C. § 7311.2(a). (Union Exh. 1, p. 10) Moreover, the firm or corporation which employs the elevator mechanic must be a "certified qualified conveyance company" (CQCC). Cal.Lab.C. § 7311.1(a). (Union Exh. 1, p. 9)

Pursuant to this provision, members of Local 8 have obtained, at their own expense, "Certified Competent Conveyance Mechanic" (CCCM) licenses from the Elevator Ride and Tramway Unit (ERT), Division of Occupational Safety and Health of the California Department of Industrial Relations. (Tr. 246:14-16) The certificates state that "this individual is certified by the Division as competent to perform the work of a conveyance mechanic in the State of

California as specified on the face of this card and all documents submitted by the applicant." (Union Exh. 5, p.2) Individual mechanics are required to purchase their own licenses and to pay a fee to attend a continuing education class and to renew their license every two years. (Tr. 241:21-24; 263:16-22)

In Nevada, where a similar law exists, a CQCC is referred to as a "C-7 company", and workers must hold a "working card with a C-7 contractor." (Tr. 249:22-250:22) Company and Union witnesses testified that Otis has met with officials in the State of Nevada about that state's licensing requirements, and specifically about whether or not flooring installation must be performed by a C-7 contractor. (Tr. 67:11-19; 124:23-125:1; 248:13-25; 293:22-295:3) For the most part, however, the company's witnesses testified that Otis has taken little initiative to meet with their California counterparts. Thus, Grenier testified that he has not investigated the issues surrounding the new licensing law. (Tr. 75:1-5) Holliman did not ask ERT, or request that anyone else at the company do so, for clarification of its position. (Tr. 136:10-15) Otis Construction Superintendent Ken Greenling was not aware of the new licensing requirements until very recently. (Tr. 186:4-6) And neither Clifford Kunkel, Project Executive with Turner Construction Company, nor Tony Walters, Field Observation Manager for HMH Builders, were aware of the elevator company and elevator mechanic licensing requirements under the Labor Code. (Tr. 103:23-104:1;174:9-14; 178:12-14)

By contrast, both Lawrence Barulich and Patrick McGarvey, as the Organizer and Business Manager of Local 8, respectively, had to keep up to date on the status of the licensing requirements in both states in order to assist Local 8 members with the licensing process. (Tr. 236:25-237:3; 281:8-11; 289:3-8) For this reason, they kept in contact with Al Tafazoli, the Principal Engineer of ERT, and ERT Senior Safety Engineer Michael Boyle. (Tr. 289:19-290:8)

McGarvey testified that "somehow Local 8 has become the vehicle to understand the Labor Code in lieu of contacting the state itself. So we would be called, whether it be by member or by employer, to say what is the state's most current stand. And it depended which day of the week it was how the state was responding to the flooring issues. It's a valid concern for these people with the license. It's been a headache for all parties, whether it be the employer or their employees." (Tr. 291:11-19)

Barulich also serves as a continuing education instructor for licensed mechanics, who every two years must attend a state-approved class to renew their licenses under the law. (Tr. 237:7-11) He testified that the curriculum covers the labor code "pretty extensively. It was kind of new still to the license holders." (Tr. 238:12-14) "We wanted to impress to them, part of the curriculum was there's assumption of risk in California ... we were held at a higher standard." (Tr. 239:14-16) Barulich further testified that "we encourage them to document and keep track of what they have done so that in cases where something comes back, they have some kind of record to show what they've done and that they weren't negligent. So it's more a reminder of negligence, not to be negligent, that the state has the ability to revoke your license, which would remove your livelihood." (Tr. 241:14-20).

III. Beginning in December 2008, Otis Adopted a New Policy of Assigning Employees to "Standby" For the Installation of Cab Flooring.

Grenier testified that in approximately December 2008, Holliman told him that William Price, then ERT Regional Inspector for the Sacramento area, "indicated that someone would need to stand by" for flooring installation work at the new CalSTRS building in Sacramento, California, someone "who had a license for this type of work under the state licensing

requirements." (Tr. 63:6-14) Earlier, Grenier and Holliman had discussed "the same concept" with respect to the "similar licensing law" in Nevada. (Tr. 63:15-23)

Holliman stated that Price required only that the mechanic be on the "same floor" where the flooring subcontractor was working. (Tr. 114:20-22) Thus, rather than leave the cab while the flooring subcontractor worked, as the parties had long done prior to that time, Holliman was told by Price that the elevator mechanic had to stay on the same floor with the subcontractor until the work was done or the shift ended. (Tr. 133:9-16; 134:6-23)

The other company witnesses expressed a rather different understanding of the new state requirements. Thus Sacramento Branch Manager Marcus Burton recalled Price stating "that it was reported to him that [Elevator Mechanic] Chris Walsh was up in the machine room and not down on the floor overseeing the flooring going in, at which time then I asked [for] additional clarification on his interpretation of this code ... And he said ... he needs to be within the proximity. He doesn't mind if he's in the next cab over working on something, but he needs to be within that same area, he can't be off on another floor or up in the machine room as he was." "He told me we cannot be off on another side of the building or up on other floors, we need to be there to be consistently checking in on the individuals doing that installation." (Tr. 214:23-215:12;228:18-24) According to Burton, this "was the first time I heard Willie Price explain to me over the phone, or anyone in the office explain to me, that we needed to be there present the entire duration of the installation of the flooring." (Tr. 217:11-14)

Grenier testified that his understanding of the new rules was that, in contrast with Nevada -- where he believed it was enough to "have a licenses mechanic on the job site" for the flooring work to continue – in California "you needed to have someone standing by, meaning looking over the shoulder of the individuals." (Tr. 65:12-17) When pressed, Grenier conceded that the

term "standby work" does not appear anywhere in the CBA (Tr. 58:16-20; 72:20-21). Nevertheless, he believed that standby work was accurately described by Article IV, par. 4(b), (d) of the CBA (Er. Exh. 1, p. 12), which requires an Elevator Constructor Mechanic to "supervise and assist" in all work related to the drilling of cylinder wells and to be present "during the entire time the subcontractor performs any work in connection with the drilling ..." (Tr. 56:14-19; 57:1-13; 59:12-15)[2] When asked by the Hearing Officer if the language "supervising and assisting" in the CBA refers to standby work, Grenier answered "yes". (Tr. 58:7-9) Thus, according to Grenier, to stand by under California law, a licensed mechanic had to 'look over the shoulders' of the unlicensed worker and to 'supervise and assist' that worker with floor installation.

Finally, Mr. Greenling understood state law to require that "the mechanic has to in fact be standing or sitting next to the elevator and watching the work". (Tr. 196:20-23) "To be honest", he added, "I'd like to see a written determination of what this is." (Tr. 197:4-5) When asked if he had asked anyone within Otis to follow up with the State on this issue, Greenling responded: "I don't recall asking anybody specifically to follow up on it. Although I hope something is, I hope we come to some conclusion so everybody can go back to work." (Tr. 199:10-17)

For the most part, then, the company's own witnesses confirmed that "standby" requires active oversight and supervision of the installation work. Holliman testified that after Price told the company that the state required standby, Otis began to automatically assign "standby work" in the Sacramento and East Bay areas. (Tr. 122:12-23; 125: 21-25; 129:21-130:6).

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[2] As Mr. Andries and Mr. McGarvey testified, supervision of drilling requires that a mechanic locate the drilling hole, assist with the drilling itself, and check at the end if the shaft is plumb. (Tr. 264:5-265:16; 282:3-16) The same close supervision occurs in working alongside electricians or ironworkers in the pit. (Tr. 311:6-313:21)

The Union witnesses were not aware of the company's discussions with Mr. Price in December 2008, and in fact have never spoken with Mr. Price. (Tr. 248:1-8; 290:9-16; 310:4-7). The record does not support the company's allegation that Otis had assigned standby work at "Local 8's behest." (Tr. 18:4-7; 72:12-15) Holliman repeated the allegation (Tr. 113:9-18), but provided no evidence; in fact, all he testified was that "we received a communication from the State of California inspector Willie Price ... that we needed to supply someone to stand by for the flooring issue..." (Tr. 114:2-7) Greenling testified that the mechanic working on the CalSTRS job told him that "they would have to be working standby" (Tr. 147:14-16), and that when he called McGarvey about this, McGarvey did not request standby, but rather told him that the state was requiring it. (Tr. 147:19-148:14)

In February 2009, the Union was informed by Mike Boyle, Senior Safety Engineer of ERT, and subsequently by Al Tafazoli, Principal Engineer of ERT, that the State would not allow "stand-by" for flooring work, and that for safety reasons all flooring must be performed by a licensed mechanic. Boyle told Barulich on February 9, 2009, that the State was not permitting "standby" work at all at a job site in Sacramento which had been shut down. (Tr. 242:16-243:21). Two days later, on February 11, 2009, Barulich attended the Regional Educational Seminar sponsored by the National Association of Elevator Contractors (NAEC) and Northern California Elevator Industry Group, where Al Tafazoli, then Principle Engineer of ERT, spoke on "Conveyance Law in the State of California." (Union Exh. 3) During his talk, Tafazoli stated that for safety reasons, flooring must be performed by licensed mechanics working for a certified conveyance company. Barulich asked Tafazoli about the project in Sacramento and whether an unlicensed worker could even install a carpet flooring. Tafazoli answered "no, that work needs to be done by a CCCM working for a CQCC. And he repeated that." An industry consultant

then added that "when you change cabs or flooring, you change the weight of a car, you can endanger, compromise the safety of the elevator. And then that's when Al Tafazoli said, yes, that is why the work needs to be done by a CCCM working for a CQCC." (Tr. 244:9-245:9)

At this time, therefore, the Union and its members understood that only a licensed mechanic could do the flooring. According to McGarvey, "The members are calling, whether it be the state or their union, because they're concerned with regard to the flooring issue, what do we do this time, do we standby, many concerns." (Tr. 292:1-5) Later, ERT appeared to change its position, permitting flooring installation to be performed under supervision by a licensed mechanic, but to date ERT has provided no specific guidance on how such supervision should be exercised, leaving licensed mechanics uncertain as to what they can or cannot do when asked to "standby" with their license while an unlicensed individual performs work in the cab.

As a result of this dispute, however, McGarvey stated that "I've been involved in conversation with Debra Tudor [Tavazoli's successor] to ask them to come out with some clean clarification for the contractors and the people with the licenses so they can move forward. Debra has agreed that in the very near future there will be some type of meeting for all parties to participate, and we'll all be allowed to get something off our chest. And the state will make some clear definitions." (Tr. 293:10-17)

About four months after the work at the CalSTRS building, Otis became involved in another large project in Sacramento, at 500 Capitol Mall (Tr. 152:1-3). Greenling testified that he and McGarvey "had a conversation about the guys not doing the standby" on that project. "Mr. McGarvey wanted the guys to be doing something rather than be standing there." (Tr. 152:4-24) Burton testified that at that time McGarvey that the flooring should be performed by a mechanic: "He did reference Labor Code 7300 and stated that per his interpretation per state

code, it should be his flooring ..." (Tr. 217:19-21) McGarvey testified: "I thought a resolve would be a composite crew, which is, in my opinion, one elevator constructor and one floor person that the contractor recognized. We'd meet the requirements of the laws as we understood them at that time and get the job done for the contractor..." (Tr. 292:8-13) The parties agreed to composite crew, but according to Burton and Greenling, the mechanic assigned to that crew was doing nothing but "sitting on a bucket" for approximately one hundred hours – a far cry from the active supervisory process they had been advised to implement by Price. (Tr. 115:14-116:8; 195:10-196:2; 218:17-21)

IV. Standing By at Mercy San Juan Hospital.

As a result of the experience at CalSTRS in December 2008, at 500 Capitol Mall in April 2009, and the various interpretations of the new law that were circulating, many mechanics became increasingly uneasy about so-called"standby" work. On August 18, 2009, prior to the flooring installation at the Mercy San Juan Hospital job site, Matt Andries asked Greenling

> how are we going about this, because it seems like every job seems to be different procedure, and I wanted to know, you know, where are we coming here? I wanted to get information from him before I called the union and got information from them. And I kind of like to do things by the book if that's the way it is written. So he said, I don't really know, you know, where we stand in this situation ... And he said, I can't tell you to find out information for me, but whatever you can find out, great. So I called the Union and asked them – and told them that I got concerns about liability issues of my conveyance card, we all got confusion. So because I got a twin brother that works for Schindler Elevator and he does most of his work in Nevada, and they're absolutely doing everything, and they literally rip out cabs and floors that aren't done by I guess their C-7 licensed people. So, you know, I'm just trying to get information. (Tr. 266:22-267:16)

Testifying about the same conversation, Greenling stated that Mr. Andries told him that he didn't know if leaving the elevator on the bottom floor with the doors open for the

subcontractor was a good idea. Greenling responded "well I don't know either. You know, I don't want to get my contractor into trouble with the state of California, you know. So I said, let me think it about it." (Tr. 177:1-9) Soon after, Greenling testified that he received a call from Mike Boyle who had "got a call from Local 8 saying that there was flooring, somebody was going to put flooring in on those elevators without a conveyance license on standby. And at that point Mr. Boyle made it clear to me that was against California law." (Tr. 177:13-19)

Andries then called McGarvey, who told him that the State was "constantly flipping" their position and recommended that he talk to Mike Boyle directly. (Tr. 267:24-268:4) McGarvey then called Mike Boyle, who took Andries' number and called Andries to tell him that leaving the doors open at the floor level for unlicensed workers to install flooring was "illegal, you can't do it". When Andries communicated that to Ken Greenling, Greenling said "then close the doors, and we'll kind of hold off until we figure out our next step." (Tr. 268:11-24; 299:5-23)

Andries then recalled that Greenling asked him "if the contractor wants to do the flooring today, are you going to do standby? ... And I said, well, no. And even if I could, I couldn't do it tonight anyway, I've got plans." The next day, August 19, 2009, Greenling asked Andries the same question; Andries said "no, I'm not going to. You know, I still don't have this liability issue – I don't know where I stand and how far it's going to go. And so – and I also said, if it was tonight, I can't do it tonight either because now I got to go home and fix my air conditioner." (Tr. 269:2-17) Andries felt that he and Greenling were "both sort of in the middle. He didn't have any real direction to the flooring position anymore than I did. I wasn't getting it from him, and I wasn't getting it from the Union ..."(Tr. 269:20-24)

Describing the same conversation, Greenling testified that "Mr. Andries did not want to do the standby work" because "he had to go work on his air conditioner that night" and "there was a directive from the International, right, that we weren't going to stand by and watch somebody do our work." (Tr. 175:18-176:3) Andries, however, denied ever hearing or communicating such a "directive": "I've never been told by the Union to not do standby for flooring. In fact, when I was calling Pat McGarvey ... he flat told me in the phone conversation that I had with him, Matt, 'I can't tell you, I can't direct you to not do the standby. You don't work for me." (Tr. 270:17-22; 273:1-6) McGarvey testified unequivocally that the Union has not directed anyone not to standby. (Tr. 300:18-301:16) Nevertheless, Greenling sent Andries a disciplinary letter for "refusing to perform standby work." (Tr. 181:9-13) Soon after, another Local 8 member, Norm Franklin, agreed to standby for the flooring work, and the work was completed. (Tr:178:20-179:17)

V. Standing By at Lodi Memorial Hospital.

Initially, Paul Wiesehuegel was the mechanic at the Lodi Memorial Hospital job site. Otis alleged that he asked the project manager on the site to write a change order in order to allow "him and his helper to install the floors" (Tr. 163:14-23), and that the International had given him a directive "not to standby" (Tr. 164:14-16). The company did not bring Wiesehuegel to testify, however, leaving this testimony as unsupported hearsay. In any event, in a subsequent quarterly safety meeting, Wiesehuegel, "who originally had asked for this work ... was addressing others in the room, and he said, well, that's the reason why we couldn't do that , is because the general contractor has these requirements of professional experience in order to install this." (Tr. 213:13-19)

Wiesehuegel was never asked to "stand by" by Otis Elevator; instead, they asked Lee Moore, who initially declined the work, allegedly because he was "caught in the middle of it between us and the union" and because he "was taking his son to school." (Tr. 168:1-25). Again, the company did not call Moore to testify. As he had done with Andries, Greenling then sent Moore a disciplinary letter "for refusing to follow direction". (Tr. 170:12-14). Burton testified that he considered Lee Moore's initial refusal to standby as a "one-man work stoppage" and "an act of insubordination". (Tr. 233:4-234:14) The Union filed a grievance over the discipline against both Andries and Moore, but Grenier testified that the company had not received the grievance until the Board agent provided him with a copy. (Tr. 49:23-25; 50:12-15)

After receiving a written representation from Greenling that the state did not prohibit standby work, Moore agreed to standby at Lodi (Tr. 171:4-11; 304:6-9), and the work commenced the day after the hearing. (Tr. 198:20-22)

ARGUMENT

The Board Should Quash The Notice of 10(k) Hearing On The Grounds That This Matter Involves a Primary *Bona Fide* Labor Dispute Between Otis and Local 8 Concerning the Implementation of New State Law, Rather Than a Jurisdictional Dispute Appropriate For Resolution Through Sections 8(b)(4)(D) and 10(k) of the Act.

It is well established that Sections 8(b)(4)(D) and 10(k) of the Act "were designed to resolve competing claims between rival groups of employees, and not to arbitrate disputes between a union and an employer where no such competing claims are involved." Teamsters Local 107, Highway Truckdrivers & Helpers (Safeway Stores, Inc.), 134 NLRB 1320, 1323 (1961). Accordingly, the Board has explained that a "jurisdictional dispute," within the meaning of Sections 8(b)(4)(D) and 10(k), does not exist "every time an employer elects to reallocate

work among his employees ..." Safeway Stores, 134 NLRB at 1323. This principle has been reiterated and applied in a number of decisions. *See e.g.,* Safeway Stores, 134 NLRB at 1323 (distinguishing a jurisdictional dispute cognizable under Section 10(k) of the Act from one in which "the employer by his unilateral action created the dispute").

Before the Board may proceed to make a determination of whether there is reasonable cause to believe that Section 8(b)(4)(D) has been violated, which, if found violated, would then trigger the Board's duty to settle the dispute under Section 10(k), it must be satisfied that there is a valid jurisdictional dispute. *See* Safeway Stores, 134 NLRB at 1322; Teamsters Local 578 (USCO-Wesco), 280 NLRB 818, 820-821 (1986) ("WESCO"), *affd. sub nom.* USCP-Wesco, Inc. v. NLRB, 827 F.2d 581 (9th Cir. 1987). In making this determination, the Board looks beyond the literal terms of Sections 8(b)(4)(D) and 10(k) of the Act to determine the "real nature and origin of the dispute." WESCO, 280 NLRB at 820.

There is no jurisdictional dispute in the instant case, because the Union has made no claim for the flooring installation at the two Hospital job sites. And even if the Union could be conceived as having made such a claim, Mr. McGarvey's several unequivocal statements at the hearing, as well as in his letters to Mr. Grenier, constitute an effective withdrawal of that claim that removes all semblance of any cognizable jurisdictional dispute in this matter. *See* ITT Communications Equipment & Systems Div., 217 NLRB 397, 938 (1975).

But more important, the plain and very real nature of this dispute has nothing whatever to do with protecting Turner Construction Company and HMH Builders, the general contractors at the Mercy San Juan and Lodi Memorial Hospitals, from a dispute not of their own making. A Board order, say, assigning the "disputed work" to one of the "specialty flooring subcontractors" would pose a daunting challenge to craft, for how would the "disputed work" be defined now

that the work at both Hospitals has been completed and the record contains no basis for defining any broader class of jobs? More importantly, though, such an order by the Board would accomplish nothing. For what Otis seeks is not an order that would permit *the general contractors to assign work* to one or another workforce: rather, Otis seeks an order *permitting Otis itself to assign a certain kind of "work" to its own licensed employees* – a strange kind of work, to be sure, sitting on a bucket with a license in one's pocket. In other words, Otis merely seeks to overcome a legal obstacle it has encountered in California's new conveyance licensing law. But, of course, *that* kind of order Otis seeks is not an order under Section 10(k) at all: it is a simple ruling on a contractual dispute involving what Otis can and cannot do in its collective bargaining relationship with the Union.

Otis has myriad avenues for relief from this self-imposed quandary. Grenier testified that in 1999 the parties had agreed that "if in fact there was dispute over cab interior work that the International would interceded. And if the local was engaging in any kind of work stoppage or otherwise that the International would intercede and would direct the local to process the complaint through the appropriate channels under the, under the collective bargaining agreement, the grievance procedures." (40:4-11) Clearly, Otis could have utilized this very expedient to resolve this matter under the parties' October 15, 1999 letter agreement (Er. Exh. 2, p. 4).

Alternatively, Otis can meet with the Union and the International in an effort to develop a new set of rules in response to California's new conveyance law, and it can participate in meetings with the State to develop a set of workable rules and regulations interpreting the statute. In this respect, the Union and its members cannot be faulted for insisting on adequate guidance on using their licenses to supervise the work of flooring subcontractors. It is one thing

to be asked to lock open a cab and leave to do other work while a subcontractor installs flooring, as reflected in the parties' long-standing past practice. It is quite another to be asked to sit idly by for hours solely to ensure that there will be a license in the vicinity in the event a state inspector shows up. Yet that is exactly what Otis has asked its employees to do – at risk to their own licenses. The Union's request that it's members not "standby" under these circumstances should be exempt from Sections 8(b)(4)(B) and 8(b)(4)(D) as a primary *bona fide* labor dispute.

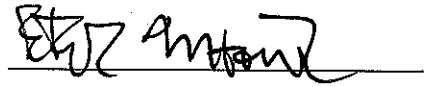
CONCLUSION

The Board has clearly established the principle that Sections 8(b)(4)(D) and 10(k) of the Act are not meant to supplant the collective-bargaining process by creating the appearance of a jurisdictional dispute. This is exactly what has happened here. Accordingly, application of Section 10(k) is wholly inappropriate, and the Board should grant the Union's motion to quash the notice of hearing and dismiss the Section 10(k) proceeding.

Dated: September 29, 2009

LEONARD CARDER, LLP

By



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STATEMENT OF SERVICE

This document is being filed electronically and has been served on the National Elevator Bargaining Association, by and through its counsel, Eric D. Jones, Downs Rachlin Martin PLLC, 199 Main Street, PO Box 190, Burlington, VT, 05402-0190, ejones@drm.com, by electronic mail.

Dated: September 29, 2009 By

PETER W. SALTZMAN