UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE ARDIT COMPANY	:	
	:	
Employer	:	Case No.: 9-RC-83978
	:	
and	:	
	:	
INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFT WORKERS, OHIO KENTUCKY ADMINISTRATIVE COUNCIL, LOCAL NO. 18	:	
	:	
Petitioner	:	
	:	

THE ARDIT COMPANY'S REQUEST FOR REVIEW OF REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION AND ORDER REJECTING THE ARDIT COMPANY'S POST HEARING BRIEF

Now comes the Employer, The Ardit Company ("Ardit" or "Employer"), by and through Counsel and hereby respectfully requests that the Board grant Ardit's Request for Review filed pursuant to Section 102.67 of the Board Rules and Regulations. A Memorandum in Support of said Request for Review is attached hereto.

Respectfully submitted,

/s/ Aaron T. Tulencik

Ronald L. Mason
Aaron T. Tulencik
Mason Law Firm Co., LPA
425 Metro Place North, Suite 620
Dublin, Ohio 43017
p: 614.734.9450
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Counsel for The Ardit Company

MEMORANDUM IN SUPPORT

I. NO UNDUE PREJUDICE WOULD HAVE RESULTED IN ACCEPTING ARDIT'S POST HEARING BRIEF

The Employer filed its Post Hearing Brief Pursuant to Section 102.111(c)(2) of the Board Rules and Regulations. Specifically, the rule states that briefs in representation cases may be filed within a reasonable time after the time prescribed by the Board's rules on good cause shown based upon excusable neglect and when no undue prejudice would result. The Employer sufficiently satisfied the criterion noted above. See, Ardit's July 13, 2012 Motion attached hereto as Exhibit A. The only undue prejudice that occurred in this matter is the fact that Regional Director's Decision was issued so swiftly. It appears the Regional Director's Decision was pre-determined as critical evidence elicited during the Hearing was ignored.

The post hearing briefs were due by the close of business on July 12, 2012. Nonetheless, the Board's electronic filing rules[1] plainly state the following:

> The Agency will accept electronic filings up to 11:59 pm in the local time zone of the receiving office on the due date. Filings accomplished by any other means must comply with the requirements of Section 102.111 of the Board's Rules and Regulations.
>
> - A document will be considered timely filed if the E-Filing receipt reflects that the entire document was received by the Agency's E-Filing system before midnight local time on the due date. (Midnight is considered the beginning of a new day.)
>
> - Parties are reminded that filings accomplished by any other means, e.g. mail, personal delivery or facsimile (if allowed), must be received by the close of business in the receiving office on the due date.

The Regional Director issued his Decision less than 24 hours after the post hearing briefs were due. Moreover, in the Order denying Ardit's Motion, the Acting Regional Director makes

[1] https://www.nlrb.gov/sites/default/files/documents/199/electronic_filings.pdf

much of the fact that Ardit's Motion requesting permission to file its Post Hearing Brief one day late was filed "after the close of business" and "after hours." See, July 16, 2012 Order Denying Ardit's Motion attached hereto as Exhibit B, at pp. 1 & 2. Again, as noted by the Board's e-filing rules, briefs and motions are permitted to be filed at any time of day and, if filed before midnight, are considered filed on that particular day. Only filings accomplished by mail, personal delivery and facsimile must be received by the close of business. Ardit filed its Motion attaching its Post-Hearing Brief at 6:03 p.m. on Friday, July 13, 2012 (approximately 18 hours after it was originally due). See, e-filing confirmation attached hereto as Exhibit C. Accordingly, no undue prejudice would have resulted had the Region accepted Ardit's Post-Hearing Brief which is attached hereto as Exhibit D.

II. THE REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION IS ERRONEOUS AS THE PETITIONED FOR UNIT IS NOT APPROPRIATE

During the Hearing the Employer argued that the International Union of Bricklayers and Allied Craft Workers, Ohio Kentucky Administrative Council Local No. 18 ("Local 18" or "Petitioner") did not have the ability/authority to represent its employees. The Petitioner's President testified that its ability to negotiate the terms and conditions of employment is limited to the specific geographic areas set forth in Article 3 of its pre-hire agreement. (Tr. p. 53.)[2] Article 3, Geographical Jurisdiction, states:

> The jurisdictional area covered by this Agreement for Tile, Terrazzo and Marble Mechanics shall consist of the following: In Ohio: Brown, Butler, Clermont, Hamilton, and Warren Counties in full and the Townships of Dixon, Israel, Gasper, Lanier, Somers and Gratis in Preble County, and in Kentucky: Kenton, Boone, Campbell, Bracken, Gallatin, Grant, Mason, Pendleton and Robertson in full.
>
> The jurisdictional area covered by this finisher contract shall consist of the following counties in Ohio: Adams, Athens, Brown, .Butler, Clermont, Clinton, Fayette, Gallia, Hamilton, Highland, Jackson, Lawrence, Meigs, Pike, Ross,

[2] Relevant portions of the transcript are attached hereto as Exhibit E.

> Scioto, Vinton, Warren, and Washington in full and the Townships of Dixon, Israel, Gasper, Lanier, Somers and Gratis in Preble County; in the State of Kentucky the following Counties: Campbell, Kenton, Boone, Pendleton, Grant, Gallatin, Bracken, Mason, Lewis and Robertson; and in the State of Indiana, the following county: Dearborn.

Moreover, Petitioner has bylaws which specifically reference and/or discuss the areas of exclusive jurisdiction. (Id., p. 56). In turn, other local unions affiliated with the International have specific areas for which they have exclusive jurisdiction to negotiate the terms and conditions of employment. (Id., p. 53).

The Employer's business is located in Columbus, Ohio (Franklin County). The vast majority of the projects the Employer works on are located in Franklin County and its surrounding counties and, as such, Ardit pays into the fringe benefit funds of Local Union No. 55 ("Local 55"). Local 55 is affiliated with the International Union of Bricklayers and Allied Craft Workers, Ohio Kentucky Administrative Council and is headquartered in Columbus, Ohio. The Employer does not currently perform work in the Petitioner's limited geographic area. The Employer last performed work within Petitioner's geographic area in November, 2010. More importantly, Ardit has no outstanding bids to perform work within in Local 18's jurisdiction, nor does it intend to bid on future projects within Local 18's jurisdiction. Accordingly, not only does Local 18 lack the ability to represent the petitioned for unit, Ardit maintains that none of its current employees are eligible to vote under the *Daniel* formula. Nevertheless, the Regional Director concluded that the petitioned for unit was an appropriate unit because "the Board has long held that a union's territorial jurisdiction and limitations do not generally affect the determination of the appropriate unit" and it is a labor organizations "willingness, rather than its constitutional ability to represent employees which is the controlling factor." See, July 13, 2012 Decision and Direction of Election ("Decision") attached hereto as Exhibit F, at p. 4.

A. A Union's Jurisdictional Limitation Is a Relevant Factor in Determining Whether a Petitioned for Unit is Appropriate

The cases relied upon by the Regional Director are inapposite to the unique facts of this case. In *Alley Drywall*, 333 NLRB 1005, 1005 (2001), the Petitioner (Local 5 plasterers) and the intervenor (Local 54 and 56 Bricklayers) had a collective bargaining agreement with the Employer pursuant to § 8(f) of the Act. The 8(f) agreement placed certain geographic limitations on each union where there was overlapping coverage of job classifications. Id. For instance, the 8(f) agreement between the Employer and the Petitioner was inoperative with respect to one county as the work covered by the petition at issue was under the jurisdiction of the intervenor. Id. Nonetheless, the International for the Petitioner unilaterally revoked its agreement with the Bricklayers regarding geographical restrictions. Id. Accordingly, the Petitioner filed its petition to become the certified representative under § 9(a) of the Act of the Employer's employees covered the 8(f) agreement without regard to the previous geographical restrictions. (Id.)

The Board found that the unit sought by Petitioner to be appropriate noting that a union's territorial jurisdiction and limitations do not ***generally*** affect the determination of an appropriate unit. Id at p. 1008. However, the Board made its decision based upon the following facts: (1) the geographic exclusions noted in the 8(f) agreement was ignored by the Employer and made no difference with respect to the terms and conditions of employment of the Employer's employees; (2) the Employer paid its employees the hourly rate set forth it its 8(f) agreement with the Petitioner even when performing work outside of Petitioner's geographic area; (3) the Employer paid the fringe benefits set forth it its 8(f) agreement with the Petitioner to the Petitioner, even when performing work outside of Petitioner's geographic area; (4) granting intervenor's geographical restrictions would divide the employees into different units depending solely on what county they are performing work; (5) the only basis for the historical geographical division

of the units between the two unions were political considerations of maintaining the geographical integrity for the local unions without competition among the local unions; and (6) the Employer utilizes the petitioner's hiring hall and apprenticeship school but not the intervenors'. (Id at pp. 1006 and 1008.)

Here, there is no evidence that the International revoked the geographical jurisdiction limitations placed on its locals with respect to the exclusivity to bargain the terms and conditions of employment. Moreover, Ardit has not performed work it Local 18's jurisdiction since November 2010 and, as such pays the required fringe benefits to Local 55, the employees' home local, not Local 18.

In *CCI Construction Company, Inc*., 326 NLRB 1319, 1323 (1998), the union sought an employer wide unit of sheet metal workers or a unit limited to sheet metal workers employed at the Employer's Pennsylvania jobsites. The Employer maintained that the Petitioner inappropriately sought to represent employees at Employer's jobsites that were outside the scope of the Petitioner's geographic jurisdiction. Id. In any event, the Board concluded that under the circumstances of the case before it, a unit limited to sheet metal workers at the Employer's Pennsylvania jobsites was an appropriate unit. Id. Importantly, there was no record evidence indicating that the Petitioner was bound to a limited geographic jurisdiction with respect to bargaining for the terms and conditions of employment.

In *Groendyke Transport, Inc.*, 171 NLRB 997 (1968), the Petitioner sought to support its petitioned for unit based solely on its territorial jurisdiction. The Board deemed this to be improper in that the union's jurisdiction alone cannot establish the appropriateness of a unit.

Lastly, in *Laboratory Corp. of America*, 341 NLRB 1079, (2004), the union was seeking to limit the petitioned for multi-facility unit to within its local jurisdictional area. In doing so, it

sought to exclude twenty-two (22) of the Employer's other facilities. The Board agreed with the Employer and held the petitioned for unit was not appropriate because the employees of the petitioned for unit did not share a community of interest distinct from that shared at the other facilities. Id. at 1082. Here, the Petitioner is not seeking a multi-facility unit.

Not a single case relied upon by the Regional Director contains record evidence consisting of testimony from the Petitioner's President acknowledging Petitioner's inability to negotiate the terms and conditions of employment for the employees it seeks to represent due to the limited geographic areas expressly set forth in its pre-hire agreement. The Regional Director is quick to cite to the fact that Petitioner's President testified that the Petitioner is ready and willing to represent the petitioned for employees yet he discounts this relevant testimony in his Decision. **The Board may consider a union's jurisdictional limitations as an element in reaching a decision as to the appropriateness of a unit**. See, *Dundee's Seafood, Inc.,* 221 NLRB 1183, 1184 (1975). (Emphasis added).

B. <u>Petitioner's Willingness to Represent the Petitioned for Employees is Moot</u>

The Regional Director concluded that the petitioned for unit was an appropriate unit because it is a labor organizations "willingness, rather than its constitutional ability to represent employees which is the controlling factor." See, Decision, p. 4. Nonetheless, each of the cases cited by the Regional Director deal with situations in which the Employer alleges that the union's constitution does not specifically encompass the classification of employees employed by the Employer[3] and/or contains discriminatory membership provisions.[4] That is not the issue presented herein. Local 18 may be willing and ready to represent Ardit's employees, but as Local 18's President testified to under oath, Local 18 does not have the ability to negotiate the

[3] *"M" System Inc.,* 115 NLRB 1316 (1956); *Mayfair Industries, Inc.,* 126 NLRB 223 (1960); *Hazelton Laboratories, Inc.,* 136 NLRB 1609 (1962); and *Mariah, Inc.,* 322 NLRB 586 (1996).
[4] *Community Service Publishing, Inc.,* 216 NLRB 997.

economic terms and conditions of employment outside its exclusive jurisdiction expressly stated in Article 3.

C. **The Petitioned For Unit Is Not Appropriate**

Local 18 does not have the ability/authority to represent Ardit's employees whose home local is Local 55. Ardit is not of the opinion that the types/classification of employees under its employment are not eligible to join a union affiliated with the International. Ardit is simply arguing that based upon the union's Constitution, its bylaws and the express language of the contract, Local 55, not Local 18, is the appropriate local under these particular circumstances.

In the alternative, Ardit proposes that if Board agrees with the Regional Director and finds that Local 18 has the capacity to represent Ardit's employees in Franklin County, the appropriate unit should be limited to the particular counties listed in Article 3, as Local 18 does not have the authority/jurisdiction to bargain outside said counties. See, *P.J. Dick Contracting, Inc.*, 290 NLRB 150, 152 (1988). In *P.J. Dick* the Employer was engaged in the construction industry and was a member of a multiemployer bargaining association. Id. at p. 150. The bargaining association entered 8(f) agreements with the Petitioner in eleven (11) counties. Id. The Petitioner sought an election to establish itself as the 9(a) representative of the Employer's employees. Id. The Petitioner maintained that the Employer's employees working within its thirty-three (33) county International Union's geographic jurisdiction constituted an appropriate unit. Id. Moreover, the Petitioner argued that even though the Employer performed the majority of its work in a single county, an employee could reasonably expect employment with the Employer in all 33 counties due to expanded operations. Id. The Petitioner alternatively proposed a unit comprised of Employer's employees working within the 11 counties of the current 8(f) agreement.

Conversely, the Employer sought a unit limited to the employees employed by it in the single county where it performed the majority of its contract work. Id. The employer alternatively proposed a unit comprised of its employees working within the counties of the current 8(f) agreement, where it had performed work since 1985. Id.

The Board ultimately found the appropriate to be the 11 counties of the current 8(f) agreement. Id. at p. 151. The Board noted that it was significant that the parties had bargained in this unit, even though it was through a bargaining association since 1979. Furthermore, the Employer recognized the Petitioner as the 8(f) bargaining representative of its employees. Id.

III. THE REGIONAL DIRECTOR ERRED IN GRANTING PETITIONER'S PETITION TO REVOKE EMPLOYER'S SUBPOENA DUCES TECUM

At the conclusion of the Hearing, the Hearing Officer notified the parties that he was going to recommend to the Regional Director that the Petitioner's Petition to Quash the subpoena be granted and that enforcement not be sought. The basis for the Hearing Officer's recommendation was that it is the labor organization's willingness, rather than its constitutional ability to represent employees, that is the controlling factor in cases such as these. The Regional Director agreed with the Hearing Officer's recommendation. See, Decision, p. 5, FN. 3. As noted above, each of the cases relied upon by the Regional Director deal with situations in which the Employer alleges that the union's constitution does not specifically encompass the classification of employees employed by the Employer[5] and/or contains discriminatory membership provisions.[6] Nevertheless, that is not the issue presented herein. Local 18 may be willing and ready to represent Ardit's employees, but as Local 18's President testified to under oath, Local 18 does not have the ability to negotiate the economic terms and conditions of

[5] *"M" System Inc.*, 115 NLRB 1316 (1956); *Mayfair Industries, Inc.*, 126 NLRB 223 (1960); *Hazelton Laboratories, Inc.*, 136 NLRB 1609 (1962); and *Mariah, Inc.*, 322 NLRB 586 (1996).
[6] *Community Service Publishing, Inc.*, 216 NLRB 997.

employment outside its exclusive jurisdiction expressly stated in Article 3. More importantly, as the Board noted in *Dundee Seafood, Inc., supra*, a union's jurisdictional limitations are relevant to this proceeding.

Additionally, service of the subpoena via FEDEX overnight delivery upon the Petitioner was proper. See, *Offshore Mariners United and International Transport Workers Federation*, 338 NLRB 745 (2002)(General Counsel's method of service using Federal Express was authorized under Section 102.113(c) of the Board's Rules, which states that "subpoenas shall be served upon the recipient . . . by leaving a copy thereof at the principal office or place of business of the person to be served.") Petitioner's President admitted during the Hearing that he did receive the subpoena.

Secondly, due to the July 4th Holiday, Petitioner did not receive the subpoena until the morning of the Hearing. Counsel for the Employer requested three subpoenas from Region 9 on Monday July 2, 2012. Counsel paid for the subpoenas to be sent overnight delivery to their office. Counsel for the Employer received the subpoenas on July 3, 2012 and promptly sent them to Petitioner via overnight delivery. Unfortunately, due to the Holiday, Petitioner did not receive the subpoenas until the morning of July 5, 2012. Accordingly, Counsel for Employer sent a courtesy copy of the subpoena to Petitioner's Counsel via e-mail the evening of July 3, 2012. Under the circumstances the timing and service of subpoena were reasonable.

Lastly, the materials sought by Ardit were and still are relevant to this matter. The Petitioner's President testified that the International's bylaws place limits upon Local 18 and Local 18 also has bylaws setting forth areas of exclusive jurisdiction. (Tr. pp 55-56). He also testified that documents do exist which set forth the geographic jurisdiction of each of the local

unions affiliated with the International. (Id. pp. 57-58.) Accordingly, Employer's subpoena should be enforced.

IV. CONCLUSION

Based upon all of the above, the Employer respectfully requests that the Board grant its Request for Review and subsequently dismiss Local 18's petition. In the alternative, the Employer requests that the unit be limited to the specific counties listed in Article 3 of the 8(f) agreement between the Petitioner and the Employer.

Dated at Dublin, Ohio this 27th day of July 2012.

Respectfully submitted,

/s/ Aaron T. Tulencik

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Counsel for The Ardit Company

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 27, 2012, an electronic original of The Ardit Company, Inc's Request for Review was transmitted the National Labor Relations Board, office of the Executive Secretary, via the Department Of Labor, National Labor Relations Board electronic filing system and, further, that copies of the foregoing Answer were transmitted to the following individuals by electronic mail:

Ryan K. Hymore, Esq.
Mangano Law Offices Co., LPA
10901 Reed Hartman Highway, Suite 207
Cincinnati, Ohio 45242
rkhymore@bmanganolaw.com

Counsel for Petitioner

/s/ Aaron T. Tulencik
Aaron T. Tulencik

EXHIBIT A

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

THE ARDIT COMPANY	:	
Employer	:	Case No.: 9-RC-83978
and	:	
INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFT WORKERS, OHIO KENTUCKY ADMINISTRATIVE COUNCIL, LOCAL NO. 18	:	
Petitioner	:	

THE ARDIT COMPANY'S MOTION
TO FILE ITS POST HEARING BRIEF ONE DAY LATE

Now comes the Employer, The Ardit Company ("Ardit" or "Employer"), by and through Counsel and hereby requests that the Regional Director accept Ardit's Post Hearing Brief in the matter referenced above one day late. A Memorandum in Support of said Motion is attached hereto. Also attached hereto is Employers Post Hearing Brief.

Respectfully submitted,

Ronald L. Mason
Aaron T. Tulencik
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Dublin, Ohio 43017
p: 614.734.9450
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Counsel for The Ardit Company

ALL-STATE LEGAL®
A

MEMORANDUM IN SUPPORT

Pursuant to Section 102.111(c)(2) of the Board Rules and Regulations, briefs in representation cases may be filed within a reasonable time after the time prescribed by the Board's rules upon good cause shown based upon excusable neglect and when no undue prejudice would result.

In *Unitec Elevator Services Co.*, 337 NLRB No. 55 (2002), the Board held that excusable neglect would be analyzed pursuant to *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993). In *Pioneer Investment Services* the Supreme Court noted that by empowering courts to accept late filings where the failure to act was the result of excusable neglect, Congress plainly contemplated that the courts would be permitted to accept late filings caused by inadvertence, mistake, or carelessness, as well as intervening circumstances beyond the party's control. Id. at 388. The determination as to what sorts of neglect will be considered "excusable" is simply put, an equitable one, taking account of all relevant circumstances surrounding the party's omission. Id. at 394. This includes the danger of prejudice to the opposing party, the length of the delay and its potential impact on the judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant and whether the movant acted in good faith. Id. Ultimately, the Court held that the inadvertent failure of the creditors' attorney to file proofs of claim within the deadline set by the Court was excusable neglect where there was no prejudice to the opposing party and no evidence that the moving party acted in bad faith.

In the present case, Counsel for Employer inadvertently failed to file its brief within the July 12, 2012 deadline as it mistakenly believed the brief to be due on July 13, 2002 for the

reasons stated in the attached affidavit.[1] Counsel for Petitioner (Mr. Hymore) sent an e-mail to Employer's Counsel at 11:50 p.m. on July 12, 2012 attaching the Petitioner's Brief. Counsel for Employer (Mr. Tulencik) did not view Mr. Hymore's e-mail until he woke the morning of July 13, 2012. Upon reviewing Mr. Hymore's e-mail Mr. Tulencik became aware that our briefs were due July 12, 2012, not July 13, 2012. At 6:27 a.m. Mr. Tulencik responded to Mr. Hymore's e-mail and informed him that Mr. Tulencik was under the impression that the briefs were due today, requested a 1 day extension so as to file it today, and assured Mr. Hymore that he had not and would not review Petitioner's Brief before he filed Employer's brief. See e-mail attached hereto as Exhibit B. Mr. Tulencik has not reviewed Petitioner's brief nor has he had any discussions with anybody at the Firm regarding the contents of Petitioner's Brief.

By mid afternoon, Mr. Hymore had not yet responded to my e-mail. Accordingly, Mr. Tulencik telephoned Mr. Hymore on his cell phone (513.255.5888) and work phone (216.397.5844). Mr. Hymore did not answer and I subsequently left a voicemail message at each of the numbers. On the voicemail I left on Mr. Hymore's cell phone I again inquired as to an extension and also informed Mr. Hymore that Employer would be filing a brief pursuant to the Board's Rules and Regulations. Mr. Hymore has not returned my call.

Mr. Tulencik also telephoned the Hearing Officer, Jonathan Duffey, at 7:08 a.m. at 513.684-3633. Mr. Tulencik left a voicemail to notify him as to Employer's position, that he had contacted Mr. Hymore and requested an extension, that that he had assured Mr. Hymore that he would not view Petitioner's brief and, that in any event, Employer would be filing its brief later today. Mr. Tulencik also telephoned Mr. Duffey later in the day and left another voicemail.

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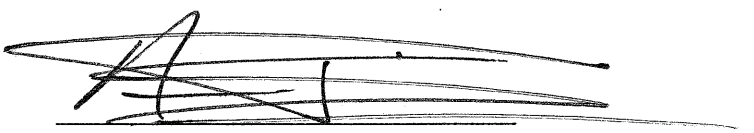
[1] See, Affidavit of Aaron Tulencik Attached hereto as Exhibit A.

Admittedly, the Board in *Unitec* indicated that a late document will not be excused when the reason for the tardiness is solely a miscalculation of the filing date. *Unitec Elevator Services* 337 NLRB No. 55, 428. Here, Counsel for Employer correctly calculated the filing date (seven days from date of Hearing) but erroneously believed the Hearing took place on July 6, 2012. More importantly, accepting Employer's post hearing brief one day late does not prejudice the opposing party nor does it delay the judicial proceedings. Additionally, Counsel for Employer acted in good faith in that Mr. Tulencik immediately contacted opposing counsel, requested an extension and assured Mr. Hymore he would not view Petitioner's brief before Employer filed its brief. This is not a case in which Counsel for Employer brazenly and consciously disregarded the Board's rules and regulations. Accordingly, Counsel for Employer respectfully requests that the Regional Director would equitably excuse Mr. Tulencik's neglect and accept Employer's brief notwithstanding the fact that it is one day late.

Respectfully submitted,



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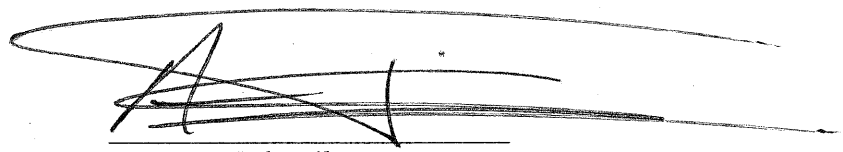
Counsel for The Ardit Company

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 13, 2012, an electronic original of document was transmitted the National Labor Relations Board, Region 9, via the Department Of Labor, National Labor Relations Board electronic filing system and, further, that copies of the foregoing were transmitted to the following individuals by electronic mail:

Ryan K. Hymore, Esq.
Mangano Law Offices Co., LPA
10901 Reed Hartman Highway, Suite 207
Cincinnati, Ohio 45242
rkhymore@bmanganolaw.com

Counsel for Petitioner



Aaron T. Tulencik

AFFIDAVIT OF AARON T. TULENCIK

STATE OF OHIO :
COUNTY OF FRANKLIN :

I, Aaron T. Tulencik, am over the age of 18 and of sound mind. Under oath, freely, and without duress, I attest that the following statements are true and that I have firsthand knowledge of their accuracy.

1. I am Of Counsel at the Mason Law Firm Company, LPA (the "Firm").

2. The Ardit Company ("Ardit") hired the Firm to represent it in the proceedings related to 9-RC-83978.

3. I attended the Hearing in this matter which took place on July 5, 2012 at the U.S. Federal Court house in Cincinnati, Ohio.

4. The post hearing briefs in the aforementioned matter were due on July 12, 2012, but I mistakenly believed briefs were due on July 13, 2012.

5. I was responsible for drafting and filing the Employer's brief.

6. During the storms that rolled through central Ohio June 29, 2012 I lost power to my residence. Power was not restored until Tuesday, July 3, 2012.

7. Due to the 4th of July Holiday and the power outage I inadvertently lost track of the days and mistakenly believed the Hearing was conducted on Friday, July 6, 2012.

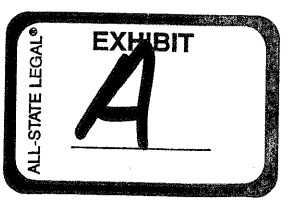
8. Counsel for Petitioner (Mr. Hymore) sent an e-mail to myself at 11:50 p.m. on July 12, 2012 attaching the Petitioner's Brief.

9. I did not view Mr. Hymore's e-mail until I woke the morning of July 13, 2012. Upon reviewing Mr. Hymore's e-mail I became aware that our briefs were due July 12, 2012, not July 13, 2012.

10. At 6:27 a.m. I responded to Mr. Hymore's e-mail and informed him that I was under the impression that the briefs were due today, requested a 1 day extension so as to file it today, and assured Mr. Hymore that I had not and would not review Petitioner's Brief before I filed Employer's brief.

11. I have not reviewed Petitioner's brief nor has he had any discussions with anybody at the Firm regarding the contents of the Brief.

12. By mid afternoon, Mr. Hymore had not yet responded to my e-mail. Accordingly, I telephoned Mr. Hymore on his cell phone (513.255.5888) and work phone (216.397.5844). Mr. Hymore did not answer and I subsequently left a voicemail message at each of the numbers.



13. On the voicemail I left on Mr. Hymore's cell phone, I again inquired as to an extension and also informed Mr. Hymore that Employer would be filing a brief pursuant to the Board's Rules and Regulations. Mr. Hymore has not returned my call.

14. I also telephoned the Hearing Officer, Jonathan Duffey, at 7:08 a.m. at 513.684-3633. I left a voicemail to notify him as to Employer's position, that I had contacted Mr. Hymore and requested an extension, that I had assured Mr. Hymore that I would not view Petitioner's brief and, that in any event, Employer would be filing its brief later today. I also telephoned Mr. Duffey later in the day and left another voicemail.

Further, Affiant Sayeth Naught.

Aaron T. Tulencik

7/13/12

Date

Subscribed to and signed before me this 13th day of July, 2012.

NOTARY PUBLIC Marianne Brooks

Marianne Brooks

My commission expires July 21, 2014.

NOTARIAL SEAL STATE OF OHIO

MARIANNE BROOKS
NOTARY PUBLIC
STATE OF OHIO
Recorded in
Fairfield County
My Comm. Exp. 7/21/14

Aaron Tulencik

From: Aaron Tulencik
Sent: Friday, July 13, 2012 6:27 AM
To: Ryan Hymore
Subject: Re: Ardit

Ryan:

I was under the impression briefs were due today. I have not looked at your brief and will not look at your brief. Would you please grant us a 1 day extension. Thanks and please advise.

Sent from my iPhone
Aaron Tulencik, Esq.
Mason Law Firm Co., LPA
425 Metro Place North, Suite 620
Dublin, Ohio 43017
614.406.1127

On Jul 12, 2012, at 11:50 PM, "Ryan Hymore" <rkhymore@bmanganolaw.com> wrote:

Ron & Aaron:

Please see the attached post-hearing brief and e-filing confirmation.

Regards,

==========
Ryan K. Hymore, Esq.
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<Post Hearing Brief 9-RC-83978 Filing Receipt.pdf>
<Post Hearing Brief 9-RC-83978.pdf>

EXHIBIT B

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATION BOARD
REGION 9

In the Matter of

THE ARDIT COMPANY

Employer

and

Case 9-RC-083978

INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, OHIO KENTUCKY ADMINISTRATIVE DISTRICT COUNCIL, LOCAL UNION NO. 18

Petitioner

ORDER DENYING EMPLOYER'S MOTION FOR AN EXTENSION OF TIME TO FILE ITS POST-HEARING BRIEF AND REJECTION OF EMPLOYER'S POST-HEARING BRIEF

On July 5, 2012, a pre-election hearing was held in the above-captioned case. At the close of the hearing, the hearing officer informed the parties that post-hearing briefs were due by close of business on July 12, 2012. On July 13, 2012, the Employer filed its Motion with the Regional Director to grant the Employer a 1-day extension of time to file its post-hearing brief. The Motion and brief were filed electronically after the close of business. The Decision and Direction of Election had already issued earlier that same day. As discussed below, the Employer's Motion is hereby denied and its post-hearing brief is rejected.

The Employer's counsel asserts in the Motion that counsel mistakenly believed the hearing took place on July 6, 2012 instead of July 5, and thus mistakenly believed the post-hearing brief was due on July 13 instead of July 12. The Employer's counsel contends he correctly calculated the filing date, i.e., 7 days after the hearing, but was mistaken concerning when the hearing took place as a result of a June 29, 2012 power outage in Columbus, Ohio and the July 4th holiday. Additionally, on July 13, counsel for the Employer attempted to contact the Petitioner's attorney several times via e-mail and telephone to seek a 1-day extension to file the Employer's post-hearing brief, but the Petitioner's attorney never responded.

In *Unitec Elevator Services Company*, 337 NLRB 426, 428 (2002), the Board stated that "[t]he Board's Rules, at Section 102.111, describe in specific detail how to count or compute the days in establishing the due date. Henceforth, a late document will not be excused when the reason for the tardiness is solely a miscalculation of the filing date." In the instant matter, the

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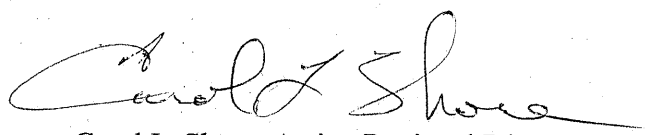
Employer's counsel submitted its post-hearing brief and its Motion for an extension of time to file its post-hearing brief after hours and 1 day after post-hearing briefs were due. In addition, the Employer's counsel was unsuccessful in securing the Petitioner's agreement to allow the Employer to submit its post-hearing brief 1 day late. Although counsel contends he did not miscalculate the number of days after the hearing in which the brief must be filed, but merely was mistaken as to what date the hearing took place, the consequence of that mistake is that the Employer's post-hearing brief was submitted after the deadline. Thus, the sole reason for the late filing was that the Employer miscalculated the date on which its post-hearing brief was due.

Accordingly, it appearing to the undersigned that the Employer has not shown that good cause exists for granting the extension of time,

IT IS HEREBY ORDERED that the Employer's Motion to file its post-hearing brief 1 day late is denied. Additionally, IT IS HEREBY ORDERED that the Employer's post-hearing brief is rejected.

Dated at Cincinnati, Ohio this 16th day of July 2012.



Carol L. Shore, Acting Regional Director
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

EXHIBIT C

NLRB E-Filing System

CASE INFO UPLOAD DOCUMENTS REVIEW CONFIRMATION

Frequently Asked Questions

E-Filing Terms

Documents that may be E-Filed

Print

Confirmation

You have successfully E-Filed document(s). You will receive an E-mail acknowledgement from this office when it receives your submission. This E-mail will note the official date and time of the receipt of your submission. Please save this E-mail for future reference. Please print this page for your records.

NOTE: This confirms only that the document was filed. It does not constitute acceptance by the NLRB.

Confirmation information

Confirmation Number: 484897

Date Submitted: 7/13/2012 6:03:55 PM (GMT-05:00) Eastern Time (US & Canada)

Office: Region 09, Cincinnati, Ohio

Case Information
Case Number: 09-RC-083978
Case Name: THE ARDIT COMPANY
Role: Employer

Contact Information
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Attached E-File(s)

Post-Hearing Brief to ALJ
2012-07-13 Employer's Motion to File Post Hearing Brief and Employer's Post Hearing Brief (Signed).pdf

Print

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EXHIBIT D

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

THE ARDIT COMPANY Employer and INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFT WORKERS, OHIO KENTUCKY ADMINISTRATIVE COUNCIL, LOCAL NO. 18 Petitioner	:	Case No.: 9-RC-83978 **Post Hearing Brief of the Employer, The Ardit Company**

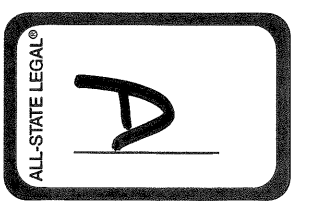
I. GENERAL BACKGROUND

A. The Ardit Company

The Ardit Company ("Ardit" or "Employer") is a commercial terrazzo tile subcontractor with its place of business located at 3535 Johnny Appleseed Court, Columbus, Ohio, 43231. (Tr. pp. 14-15). Specifically, Ardit works on construction projects installing terrazzo floors, tile, marble and stone. (Id. p. 35). The vast majority of Ardit's projects entail public projects for which it bid on, i.e., universities, state jobs and county jobs. (Id. p. 36.) Most, if not all, of these projects are located in Franklin County, Ohio (and surrounding counties) and, as such, Ardit pays into the fringe benefit funds for Local union no. 55 ("Local 55").[1] (Id. p. 27.) Ardit uses the following classification of workers to perform work on its projects: terrazzo workers, tile setters, terrazzo finishers, base grinders, floor grinders and tile finishers. (Id. p. 36.)

Ardit and the International Union of Bricklayers and Allied Craft Workers, Ohio Kentucky Administrative Council Local No. 18 ("Local 18" or "Petitioner") are currently parties

[1] Local 55 is union affiliated with the International Union of Bricklayers and Allied Craft Workers, Ohio Kentucky Administrative Council. Local 55 is headquartered in Columbus, Ohio. (Tr. p. 20)



to an 8(f) bargaining agreement. (Id. pp. 15 and 25 & Employer's Exhibit ["E. Ex."] 4.) The bargaining agreement is set to expire on August 31, 2012. (Id. p. 25.) Accordingly, Petitioner filed a petition with Region 9 seeking to be certified as the 9(a) representative of Ardit's employees for the purposes of collective bargaining.

Article 1, Section 1, Scope of Work of the current bargaining agreement between Ardit and Local 18 states:

> This agreement shall cover all work for all Crafts falling within the jurisdiction of the Union, as defined in Branches of the Trade, Code 1 of the Constitution, Rules of Order and Codes of the International Union of Bricklayers and Allied Craftworkers, which is incorporated herein by reference, except those Crafts specifically addressed in another BAC Collective Bargaining Agreement covering the geographical jurisdiction of this Agreement.

(E. Ex. 4, p. 1.) The bargaining agreement is expressly limited to a specific geographic area. Article 3, Geographical Jurisdiction, states:

> The jurisdictional area covered by this Agreement for Tile, Terrazzo and Marble Mechanics shall consist of the following: In Ohio: Brown, Butler, Clermont, Hamilton, and Warren Counties in full and the Townships of Dixon, Israel, Gasper, Lanier, Somers and Gratis in Preble County, and in Kentucky: Kenton, Boone, Campbell, Bracken, Gallatin, Grant, Mason, Pendleton and Robertson in full.
>
> The jurisdictional area covered by this finisher contract shall consist of the following counties in Ohio: Adams, Athens, Brown, .Butler, Clermont, Clinton, Fayette, Gallia, Hamilton, Highland, Jackson, Lawrence, Meigs, Pike, Ross, Scioto, Vinton, Warren, and Washington in full and the Townships of Dixon, Israel, Gasper, Lanier, Somers and Gratis in Preble County; in the State of Kentucky the following Counties: Campbell, Kenton, Boone, Pendleton, Grant, Gallatin, Bracken, Mason, Lewis and Robertson; and in the State of Indiana, the following county: Dearborn.

(Id., p. 2.).

Ardit does not currently perform work in Local 18's limited geographical jurisdiction noted above. Ardit last performed work in Local 18's geographical jurisdiction in August and November, 2010. (Tr. p. 18 and 21 & E. Ex. 3.) Prior to this time period, the Company

performed work in Local 18's jurisdiction in January, May and September 2009. (Tr. p. 22 & E. Ex. 2.) In November 2010, the Employer had two (2) employees perform work in Local 18's jurisdiction. Each employee performed eight (8) hours of work as noted in the Fringe Benefit Fund's Report. (Tr. pp. 19-21 & E. Ex. 3, pp. 1-4.) In August 2010, the Employer had two (2) employees perform work in Local 18's jurisdiction. One employee performed twenty-four (24) hours of work and the other employee employed thirty-two (32) hours of work as noted in the Fringe Benefit Fund's Report. (Tr. p. 21 & E. Ex. 3, pp. 5-6. Notably, the Fringe Benefit Fund's Report indicates that each of these employees' "Home Local" is Local 55. (Tr. p. 19 & E. Ex. 3.) The home local is where the employees pay their dues and have their cards. (Tr. p. 19.) In January 2009, the Employer had one (1) employee who performed sixteen (16) hours of work in Local 18's jurisdiction. (E. Ex. 2, p. 1.) In May 2009, the Employer had one (1) employee who performed eighty (80) hours of work in Local 18's jurisdiction. (Id., p. 2.) In September 2009, the Employer had two (2) employees who performed work in Local 18's jurisdiction. (Id., pp. 3-4). One employee performed ninety-six (96) hours of work and the other performed (70) hours of work. (Id.) Again, the Fringe Benefit Fund's Report indicates that each of these employees' "Home Local" is Local 55. (Id., pp. 1-4.)

B. The International Union of Bricklayers and Allied Craft Workers, Ohio Kentucky Administrative Council, Local No. 18

Local 18 has exclusive jurisdiction to negotiate the terms and conditions of employment (wages and other benefits) for the limited geographic area expressly stated in Article 3 of the agreement as referenced above. (Tr. p. 53.) Other locals affiliated with the International have exclusive jurisdiction to negotiate the terms and conditions of employment within their limited geographical areas. (Id.) Local 18 has bylaws which specifically reference and/or discuss the areas of exclusive jurisdiction. (Id., p. 56.)

II. LAW AND ARGUMENT

A. The Legal Standard

Generally speaking, when determining the appropriate bargaining unit in the construction industry the Board seeks to fulfill the objectives of ensuring employee self determination, promoting freedom of choice in collective bargaining and advancing industrial peace and stability. *Dexcon Inc.*, 295 NLRB 109, 111 (1989).

> The inquiry first considers the petitioning union's proposals. If the union's proposed unit is inappropriate, the employer's proposals are then scrutinized. Factors relevant to appropriateness are: the similarity of skills, functions, and working conditions throughout the proposed unit; the central control of labor relations; transfer of employees among the Employer's other construction sites; and the extent of the parties' bargaining history. Units with extensive bargaining history remain intact unless repugnant to Board policy or interfere with the rights guaranteed by the Act.

See, *P.J. Dick Contracting Inc.,* 290 NLRB 150, 152 (1988) (internal citations omitted).

B. Eligible Voters

Board precedent holds that the *Daniel* formula shall be applied to determine voter eligibility in all construction industry elections. *Steiny and Co., Inc.*, 308 NLRB 1323, 1326 (1992). The *Daniel* formula provides that, in addition to those eligible to vote under the standard criteria, unit employees are eligible if they have been employed for thirty (30) days or more within the twelve (12) months preceding the eligibility date for the election, or if they had some employment in those twelve (12) months and have been employed for forty-five (45) days or more within the twenty-four (24) month period immediately preceding the eligibility date. Id. Employees who have been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed are not eligible to vote. Id.

Ardit maintains that none of its current employees are eligible to vote as none of its employees have performed work in Local 18's jurisdiction since November 2010. More

importantly, Ardit has no outstanding bids to perform work within in Local 18's jurisdiction, nor does it intend to bid on future projects within Local 18's jurisdiction.

C. Local 18 Does Not Have the Ability to Represent Ardit's Employees Outside of Its Geographic Areas set forth in Article 3

Petitioner's President testified during the Hearing that Local 18's ability to negotiate the terms and conditions of employment is limited to the specific geographic areas set forth in Article 3. In turn, other local unions affiliated with the International have specific geographic areas for which they have exclusive jurisdiction to negotiate the terms and conditions of employment. Simply put, Local 18 does not have the ability/authority to represent Ardit's employees whose home local is Local 55. Ardit is not of the opinion that the types/classification of employees under its employment are not eligible to join a union affiliated with the International. Ardit is simply arguing that based upon the union's Constitution, its bylaws and the express language of the contract, Local 55, not Local 18, is the appropriate local under these particular circumstances.

During the Hearing Petitioner cited a number of cases for the proposition that a union's territorial jurisdiction is irrelevant for the purposes of finding an appropriate unit. The first such case was *Alley Drywall, Inc.,* (2001). In *Alley Drywall* the Petitioner (Local 5 plasterers) and the intervenor (Local 54 and 56 Bricklayers) had a collective bargaining agreement with the Employer pursuant to § 8(f) of the Act. *Alley Drywall*, 333 NLRB 1005, 1005 (2001). The 8(f) agreement placed certain geographic limitations on each union where there was overlapping coverage of job classifications. Id. For instance, the 8(f) agreement between the Employer and the Petitioner was inoperative with respect to one county as the work covered by the petition at issue was under the jurisdiction of the intervenor. Id. Nonetheless, the International for the Petitioner unilaterally revoked its agreement with the Bricklayers regarding geographical

restrictions. Id. Accordingly, the Petitioner filed its petition to become the certified representative under § 9(a) of the Act of the Employer's employees covered the 8(f) agreement without regard to the previous geographical restrictions. (Id.)

The Board found that the unit sought by Petitioner to be appropriate noting that a union's territorial jurisdiction and limitations do not *generally* affect the determination of an appropriate unit. Id at p. 1008. However, the Board made its decision based upon the following facts: (1) the geographic exclusions noted in the 8(f) agreement was ignored by the Employer and made no difference with respect to the terms and conditions of employment of the Employer's employees; (2) the Employer paid its employees the hourly rate set forth it its 8(f) agreement with the Petitioner even when performing work outside of Petitioner's geographic area; (3) the Employer paid the fringe benefits set forth it its 8(f) agreement with the Petitioner to the Petitioner, even when performing work outside of Petitioner's geographic area; (4) granting intervenor's geographical restrictions would divide the employees into different units depending solely on what county they are performing work; (5) the only basis for the historical geographical division of the units between the two unions were political considerations of maintaining the geographical integrity for the local unions without competition among the local unions; and (6) the Employer utilizes the petitioner's hiring hall and apprenticeship school but not the intervenors'. (Id at pp. 1006 and 1008.)

Here, there is no evidence that the International revoked the geographical jurisdiction limitations placed on its locals with respect to the exclusivity to bargain the terms and conditions of employment. Moreover, Ardit has not performed work it Local 18's jurisdiction since November 2010 and, as such pays the required fringe benefits to Local 55, the employees' home local, not Local 18.

Next, Petitioner cited *Mariah Inc.* In *Mariah Inc.* the Employer sought to introduce the Petitioner's constitution, bylaws and contracts with other employers in the area in order to show that the Petitioner does not and cannot represent the type of employees employed by the Employer and sought in the Petition. *Mariah Inc.*, 322 NLRB 586, 587 (1996). The Board noted that the fact that the current contracts to which Petitioner is a party to may cover employees only engaged in plumbing and pipefitting work is not relevant to whether Petitioner is qualified to represent the petitioned for employees. Id. The fact the work surpasses the traditional craft boundaries does not eliminate the community of interest and/or render the overall employee unit sought by the Petitioner inappropriate. Id. at p. 587.

The issues presented herein have nothing to do with the "classification" of employees sought to be represented by Local 18. The issue is whether Local 18 has the ability to represent Ardit's employees outside the specific geographic area expressly stated in Article 3. Petitioner's own President indicated they only have exclusive jurisdiction in the areas plainly stated in Article 3. Notwithstanding, Ardit does not perform work in said areas. It matters not that the union is ready and willing to represent Ardit's employees because they simply do not have the ability to do so outside their clearly outlined geographic area.

Petitioner also cited *Alden Press, Inc.* In *Alden Press*, the Employer maintained that the Petitioner was disqualified from seeking an election on the grounds that it engaged in discriminatory practices on the basis of sex. *Alden Press, Inc.*, 212 NLRB 580, 580 (1974). The Employer subpoenaed the following records from the petitioner: membership lists indicating the sex of all members, present and preceding constitution and bylaws, pension plan agreements, health and welfare arguments, lists of individuals who had applied for membership, certain collective bargaining agreements and certain other documents containing evidence bearing on

the issue of the Petitioner's disqualification to obtain or retain certification. Id. The Board revoked the subpoenas and held that the disqualification of the Petitioner based upon a union's capacity to *fairly* represent employees would not effectuate the policies of the Act to litigate such issues at the pre-election stage of the proceedings. Id at p. 581. The facts of *Alden Press* are wholly inapposite the issues presented herein and should not be considered.

Petitioner also cited *CCI Construction Company, Inc.* In *CCI Construction* the union sought an employer wide unit of sheet metal workers or a unit limited to sheet metal workers employed at the Employer's Pennsylvania jobsites. *CCI Construction Company, Inc.*, 326 NLRB 1319, 1323 (1998). The Employer maintained that the Petitioner inappropriately sought to represent employees at Employer's jobsites that were outside the scope of the Petitioner's geographic jurisdiction. Id. In any event, the Board concluded that under the circumstances of the case before it, a unit limited to sheet metal workers at the Employer's Pennsylvania jobsites was an appropriate unit. Id. Importantly, there was no record evidence indicating that the Petitioner was bound to a limited geographic jurisdiction with respect to bargaining for the terms and conditions of employment.

Lastly, the Petitioner cited *Groendyke Transport, Inc.,* 171 NLRB 997 (1968) and *Building Construction Employers Association*, 147 NLRB 222, (1964). In both cases, the Petitioner sought to support its petitioned for unit based solely on its territorial jurisdiction. The Board deemed this to be improper in that the union's jurisdiction alone cannot establish the appropriateness of a unit. The facts in *Groendyke Transport* and *Building Construction Employer's Association* are inapposite to the facts presented herein and should not be relied upon.

D. Should the Regional Director Find an Appropriate Unit, Said Unit Should Be Limited to the Counties Expressly Outlined in Article 3 of the Agreement

The facts of this case are similar to the circumstances in *P.J. Dick Contracting, Inc., supra.* In *P.J. Dick* the Employer was engaged in the construction industry and was a member of a multiemployer bargaining association. Id. at p. 150. The bargaining association entered 8(f) agreements with the Petitioner in eleven (11) counties. Id. The Petitioner sought an election to establish itself as the 9(a) representative of the Employer's employees. Id. The Petitioner maintained that the Employer's employees working within its thirty-three (33) county International Union's geographic jurisdiction constituted an appropriate unit. Id. Moreover, the Petitioner argued that even though the Employer performed the majority of its work in a single county, an employee could reasonably expect employment with the Employer in all 33 counties due to expanded operations. Id. The Petitioner alternatively proposed a unit comprised of Employer's employees working within the 11 counties of the current 8(f) agreement.

Conversely, the Employer sought a unit limited to the employees employed by it in the single county where it performed the majority of its contract work. Id. The employer alternatively proposed a unit comprised of its employees working within the counties of the current 8(f) agreement, where it had performed work since 1985. Id.

The Board ultimately found the appropriate to be the 11 counties of the current 8(f) agreement. Id. at p. 151. The Board noted that it was significant that the parties had bargained in this unit, even though it was through a bargaining association since 1979. Furthermore, the Employer recognized the Petitioner as the 8(f) bargaining representative of its employees. Id. Accordingly, Ardit proposes that if the Regional Director finds that Local 18 has the capacity to represent Ardit's employees in Franklin County, the appropriate unit should be limited to the

particular counties listed in Article 3 as Local 18 does not have the authority/jurisdiction to bargain outside said counties.

E. The Petition to Quash the Subpoena Should Not Be Granted

At the conclusion of the Hearing, the Hearing Officer notified the parties that he was going to recommend to the Regional Director that the Petition to Quash the subpoena be granted and that enforcement not be sought. (Tr. p. 65.) The basis for the Hearing Officer's recommendation was that it is the labor organization's willingness, rather than its constitutional ability to represent employees, that is the controlling factor in cases such as these. (Id.) Each of the cases cited by the Hearing Officer deal with situations in which the Employer alleges that the union's constitution does not specifically encompass the classification of employees employed by the Employer[2] and/or contains discriminatory membership provisions.[3] Nevertheless, that is not the issue presented herein. Local 18 may be willing and ready to represent Ardit's employees, but as Local 18's President testified to under oath, Local 18 does not have the ability to negotiate the economic terms and conditions of employment outside its exclusive jurisdiction expressly stated in Article 3.

Additionally, service of the subpoena via FEDEX overnight delivery upon the Petitioner was proper. See, *Offshore Mariners United and International Transport Workers Federation,* 338 NLRB 745 (2002)(General Counsel's method of service using Federal Express was authorized under Section 102.113(c) of the Board's Rules, which states that "subpoenas shall be served upon the recipient . . . by leaving a copy thereof at the principal office or place of business

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[2] *"M" System Inc.,* 115 NLRB 1316 (1956); *Mayfair Industries, Inc.,* 126 NLRB 223 (1960); *Hazelton Laboratories, Inc.,* 136 NLRB 1609 (1962); *Kodiac Island Hospital,* 144 NLRB 929 (1979); and *Northwest Airlines Flight Attendant Union Local 2000,* 321 NLRB 1383.

[3] *Community Service Publishing, Inc.,* 216 NLRB 997.

of the person to be served.") Petitioner's President admitted during the Hearing that he did receive the subpoena.

Secondly, due to the July 4th Holiday, Petitioner did not receive the subpoena until the morning of the Hearing. Counsel for the Employer requested three subpoenas from Region 9 on Monday July 2, 2012. Counsel paid for the subpoenas to be sent overnight delivery to their office. Counsel for the Employer received the subpoenas on July 3, 2012 and promptly sent them to Petitioner via overnight delivery. Unfortunately, due to the Holiday, Petitioner did not receive the subpoenas until the morning of July 5, 2012. Accordingly, Counsel for Employer sent a courtesy copy of the subpoena to Petitioner's Counsel via e-mail the evening of July 3, 2012. See Petitioner's Exhibit [P. Ex. 1], p. 6.). Under the circumstances the timing and service of subpoena were reasonable.

Lastly, the materials sought by Ardit were and still are relevant to this matter. The Petitioner's President testified that the International's bylaws place limits upon Local 18 and Local 18 also has bylaws setting forth areas of exclusive jurisdiction. (Tr. pp 55-56). He also testified that documents do exist which set forth the geographic jurisdiction of each of the local unions affiliated with the International. (Id. pp. 57-58.) Accordingly, Employer's subpoena should be enforced.

III. CONCLUSION

Based upon all of the above, the Employer requests that Local 18's petition be dismissed. In the alternative, the Employer requests that the unit be limited to the specific counties listed in Article 3 of the 8(f) agreement between the Petitioner and the Employer. See, E. Ex. 4.

Respectfully submitted,

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Counsel for The Ardit Company

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 13, 2012, an electronic original of The Ardit Company, Inc's Post Hearing Brief was transmitted the National Labor Relations Board, Region 9, via the Department Of Labor, National Labor Relations Board electronic filing system and, further, that copies of the foregoing Answer were transmitted to the following individuals by electronic mail:

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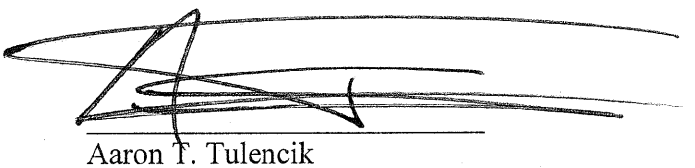
rkhymore@bmanganolaw.com

Counsel for Petitioner



Aaron T. Tulencik

EXHIBIT E

1 THE UNITED STATES OF AMERICA

2 BEFORE THE NATIONAL LABOR RELATIONS BOARD

3 REGION 9

4

5 CASE NO. 9-RC-083978

6

7 In the Matter of:

8 THE ARDIT COMPANY

9 Employer,

10 and

11 INTERNATIONAL UNION OF BRICKLAYERS

12 AND ALLIED CRAFTWORKERS, OHIO, KENTUCKY

13 ADMINISTRATIVE DISTRICT COUNCIL, LOCAL UNION NO. 18

14 Petitioner.

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17

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19

20

21 The above entitled matter came on for hearing

22 pursuant to notice before JONATHAN DUFFEY, Hearing

23 Officer, at the Potter Stewart Courthouse, 100 East

24 Fifth Street, Room 305, Cincinnati, Ohio, on Thursday,

25 July 5, 2011, at 11:00 a.m.

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1 A P P E A R A N C E S

2 On Behalf of the Petitioner:

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10 On Behalf of the Employer:

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12 Aaron Tulencik, Esq.

13 Mason Law Firm

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17

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1 right. Did my questions open up any additional areas
2 of inquiry, for the Employer?
3 MR. TULENCIK: No.
4 HEARING OFFICER DUFFEY: Okay. For
5 the Petitioner?
6 MR. HYMORE: No, nothing further.
7 HEARING OFFICER DUFFEY: Okay. Ms.
8 Johnson, thank you very much.
9 (WITNESS EXCUSED)
10 HEARING OFFICER DUFFEY: All right.
11 Does the Employer care to call any additional
12 witnesses?
13 MR. MASON: We will call the Union's
14 business agent on cross.
15 HEARING OFFICER DUFFEY: Okay. All
16 right. All right. Will you raise your right hand.
17 WHEREUPON,
18 FREDDY HUBBARD,
19 A witness herein, having been first duly cautioned and
20 sworn, was examined and testified as follows:
21 HEARING OFFICER DUFFEY: Sit down.
22 And please state your full legal name for the record.
23 THE WITNESS: Full legal name is
24 Freddy Ray Hubbard, Sr.
25 HEARING OFFICER DUFFEY: Okay.

1 DIRECT EXAMINATION

2 BY MR. MASON:

3 Q. Would you state your position with the

4 Union?

5 A. I'm the secretary/treasurer of the Ohio-

6 Kentucky Administrative District Council, and the

7 president of Bricklayers and Allied Craftworkers,

8 Local 18, Ohio.

9 Q. And how long have you held that position?

10 A. Well, this -- I filled the first position,

11 the first mentioned position for around four years,

12 and the second mentioned position since around 1995.

13 Q. Okay. Well, why don't you explain for the

14 record what the first versus the second is.

15 A. Well, the first I said was the

16 secretary/treasurer of the Ohio-Kentucky

17 Administrative District Council, I've held for

18 approximately four years.

19 The second as president of Local 18, Ohio

20 Bricklayers and Allied Craftworkers approximately

21 since 1995.

22 Q. Okay. In that area of expertise that you

23 have with your union, you have a Collective Bargaining

24 Agreement for Local 18, do you not?

25 A. We do.

1 counties?

2 A. Those are the economic negotiated counties

3 that -- that determine the economic conditions that --

4 that certain areas have to follow by. And those

5 counties are negotiated in that agreement.

6 Q. And Local 18 has the exclusive jurisdiction

7 to negotiate in that area; right?

8 A. That's correct.

9 Q. And other locals have exclusive

10 jurisdiction, as well, for their locals; correct?

11 A. They do.

12 MR. HYMORE: Just note my continuing

13 objection.

14 HEARING OFFICER DUFFEY: Okay. It's

15 noted, Mr. Hymore. Thank you.

16 MR. HYMORE: Renewed and continuing.

17 HEARING OFFICER DUFFEY: Fair enough.

18 DIRECT EXAMINATION (CONT'D)

19 BY MR. MASON:

20 Q. And what is in -- in that -- you refer to

21 that as the terms and conditions within that county

22 limit.

23 Is that for like wages and other benefits,

24 is that what it is?

25 A. Yes.

1 Q. Does the International set other
2 requirements that has to be in the Collective
3 Bargaining Agreement beyond that?
4 A. Beyond wages and conditions?
5 Q. Yes, sir.
6 A. I'm -- I'm unaware of any mandate to
7 instill anything in any Collective Bargaining
8 Agreement.
9 Q. So the Constitution would help us determine
10 what, if any, limits there may be?
11 A. I can't answer that.
12 Q. How do you get the authority to have this
13 exclusive jurisdiction over the counties of Hamilton,
14 Brown, Butler, et cetera, that's in Article III of
15 your Local 18 agreement?
16 A. Legally, I'm not sure.
17 Q. Is there some document that's generated by
18 the International that gives you that exclusive
19 jurisdiction?
20 A. Possibly.
21 Q. And those documents would also be part of
22 the subpoena that we asked for, for those documents;
23 correct?
24 A. In an unreasonable amount of time, yes.
25 Q. I understand.

1 MR. HYMORE: I just feel the urge to
2 renew my objection. This is getting ridiculous. I
3 cited six or seven Board cases that say this is
4 completely irrelevant.
5 HEARING OFFICER DUFFEY: Okay. Your
6 objection's noted.
7 MR. MASON: I think we get an
8 opportunity to file a brief to respond to those, Your
9 Honor, so thank you very much for your notations,
10 again, of your continuing objection, which has already
11 been agreed to.
12 (Pause.)
13 DIRECT EXAMINATION (CONT'D)
14 BY MR. MASON:
15 Q. You're aware of the fact that there are
16 bylaws of the International Union, as well; correct?
17 A. Yes, sir.
18 Q. And that the bylaws have limits placed on
19 your local?
20 A. Affiliates.
21 Q. Affiliates.
22 A. Uh-huh.
23 Q. Do you call your local as affiliate --
24 A. Yes. Uh-huh.
25 Q. So when I say local, it means Local 18 as

1 an affiliate?

2 A. Of the International Union.

3 Q. Okay. And does Local 18 also have bylaws?

4 A. Yes, sir.

5 Q. Okay. And do those bylaws set forth any

6 discussions with respect to the areas of exclusive

7 jurisdiction?

8 A. Yes, sir.

9 Q. And did you bring those bylaws with you

10 today?

11 A. I never had time. It was unreasonable

12 amount of time frame on the request.

13 Q. With respect --

14 A. Had you gotten that to me earlier, I could

15 have done it.

16 Q. All right. I think the record will be more

17 than adequate to stipulate when we were able to get

18 the subpoena from the Board and serve you.

19 A. And I'm going to keep saying it, too.

20 Q. So -- well, say it all you want, sir.

21 A. Okay.

22 Q. With respect to -- is there any

23 correspondence between the International Union and

24 your affiliated local regarding areas of jurisdiction?

25 A. Presently?

1 Q. Well, has -- has there been anything
2 written in the past to you about it?
3 A. Well, I would have to research that.
4 Q. I agree. Now, each local -- how many of
5 these affiliated locals are in Ohio, do you know?
6 A. You want to count along with me?
7 Q. Well, I'm asking you if you know.
8 A. I -- I can -- I can give you the number.
9 Q. All right. Do you know --
10 A. Okay. There's 3.
11 Q. -- the geographical area?
12 A. There's 3, 6, 7 Ohio, 7 Kentucky, 8 Ohio, 9
13 Ohio, 10 Ohio, 16, 18, 32, 39, 40, 40 -- 43, 44, 45,
14 52, and 55.
15 Q. And --
16 A. And 7 -- 7 Kentucky, and 17 Kentucky.
17 Q. And do you know with respect to each one of
18 those the specific geographical areas that each one of
19 those covers?
20 A. Do -- do I know every one of them on hand?
21 Q. Yes, sir.
22 A. No, sir.
23 Q. But you have record --
24 A. But I will tell you that all those locals
25 mentioned cover the entire state of Ohio, and

1 two-thirds of the state of Kentucky. That the Ohio
2 and Kentucky Administrative District Council has
3 exclusive collective bargaining authority over.
4 Q. With respect to those areas, the
5 geographical areas, I assume that there are documents
6 that set forth all of those --
7 A. Absolutely.
8 Q. I assume that you have possession of those
9 documents at your local somewhere?
10 A. Every single Collective Bargaining
11 Agreement. I think I've sent you most of them in the
12 past.
13 (Pause.)
14 MR. MASON: Your Honor, at this point
15 in time, I'm going to request that I be able to recall
16 this witness once these documents are produced.
17 They go to the heart of the very issue that
18 we're dealing with here. He's acknowledged they
19 exist.
20 Simply the fact that he hasn't had enough
21 time, well, we'll ask that the -- the hearing be
22 rescheduled to allow us the time to allow him to do
23 it. I'd like to be able to recall this witness for
24 that.
25 HEARING OFFICER DUFFEY: Okay. I'm

EXHIBIT F

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F

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATION BOARD
REGION 9

In the Matter of

THE ARDIT COMPANY

Employer

and

Case 9-RC-083978

INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS, OHIO KENTUCKY ADMINISTRATIVE DISTRICT COUNCIL, LOCAL UNION NO. 18

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

I. INTRODUCTION:

The Employer, a commercial terrazzo tile subcontractor, provides terrazzo, marble, and tile installation services from its facility in Columbus, Ohio. The Petitioner has filed a petition with the National Labor Relations Board under Section 9(a) of the National Labor Relations Act seeking to represent a bargaining unit consisting of the Employer's tile, marble, and terrazzo installers and helpers, excluding office clerical employees, all professional employees, and guards and supervisors as defined in the Act. The Employer does not dispute the appropriateness of the proposed bargaining unit but asserts that the Petitioner, based out of Cincinnati, Ohio, is not the appropriate labor organization to represent the Employer's employees because of the Petitioner's territorial and jurisdictional limits. The Employer is signatory to a Section 8(f) agreement between the Tile, Marble, and Terrazzo Contractors Association of Greater Cincinnati and the Petitioner effective from September 1, 2010 through August 31, 2012.

I have carefully reviewed and considered the record evidence and the arguments of the parties at the hearing and in their post-hearing briefs. [1]/ I find that all of the Employer's tile setters, terrazzo workers, tile finishers, terrazzo finishers, floor grinders, and base grinders constitute an appropriate bargaining unit and the Petitioner is capable of representing the unit. In explaining how I came to my determination on this issue, I will describe the Employer's operations, discuss the duties of the employees in the unit found appropriate, set out the applicable legal precedent and then analyze the issue in relation to that precedent. There are approximately eight employees in the bargaining unit that I have found to be appropriate.

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[1]/ Petitioner timely filed its post-hearing brief, and the arguments contained within were considered in making my decision. The Employer failed to file a post-hearing brief.

II. FACTUAL OVERVIEW:

Michelle Johnson, president and co-owner, Norma Martina, co-owner, Alex Johnson and Jim Traverse work at the Employer's Columbus, Ohio facility and direct the Employer's operations. Michelle Johnson is responsible for day-to-day office work, including billing, receiving, and payroll. Norma Martina, in conjunction with Michelle Johnson, determines issues regarding the hiring, discipline and termination of employees. Alex Johnson is responsible for determining the Employer's staffing needs. Johnson, with input from Michelle Johnson and Norma Martina, also has the added responsibility for laying off employees if dictated by the Employer's volume of business. Jim Traverse, an estimator, assesses project costs and provides estimates when the Employer intends to bid on a project.

The Employer's job projects are primarily in Franklin County in central Ohio but does have some projects in other Ohio counties. The majority of the Employer's business is obtained through bids on public work projects, including projects with universities, and counties and state governmental entities. The Employer rarely performs work on private or non-commercial jobs. Because the Employer is engaged in a finish trade, its work is usually conducted indoors and under cover. Layoffs occur as a consequence of a reduction in available work rather than on a seasonal basis.

The record discloses that the Employer employs approximately eight field employees who complete the actual installation of terrazzo floors, tile, marble, stone, and installation of materials that are installed on walls up to a specific height. Of the eight field employees, three are classified as a tile setter/terrazzo worker, and the remaining five are classified as finishers. Within the finisher classification, the record shows the Employer further classifies employees as tile finishers, terrazzo finishers, floor grinders and base grinders. The tile setter actually sets and installs the tile in place. The tile finisher unloads and stages materials on the job site, obtains the necessary materials for the tile setter, and completes grouting work after the tile is set. The terrazzo worker, similar to the tile setter, actually installs the terrazzo onto the floor. The terrazzo finisher obtains the materials and prepares the mixes that are needed by the terrazzo worker. The floor grinder operates the floor grinding machine which is a larger machine used on the bare areas of the floor to grind the terrazzo. The base grinder operates a machine that grinds the edges of the tile. Tile finishers operate mixers and floats that are used in the finishing process. Field employees also use tile cutters, several types of trowels, tile nips, base and floor grinders, straight edges, chalk lines, levels, sponges, rollers, and water saws. These machines and tools are used throughout the setting and finishing processes.

There is no distinction between field employees regarding what they wear while working. Field employees are not required to wear a uniform and generally dress in construction-type clothing: jeans, shirts, appropriate footwear, and safety equipment, including hardhats and safety glasses. The record does not reflect information about the wages or benefits that the employees receive when they are not working under the terms of the 8(f) agreement.

As previously noted, the parties are signatory to an 8(f) agreement that covers essentially the same job classifications as the bargaining unit sought by the Petitioner. Article 3 of the

Agreement specifies the jurisdictional area for tile, terrazzo and marble mechanics, which includes all of Brown, Butler, Clermont, Hamilton, and Warren Counties in Ohio and the Townships of Dixon, Israel, Gasper, Lanier, Somers and Gratis in Preble County. The jurisdictional area for finishers includes all of Adams, Athens, Brown, Butler, Clermont, Clinton, Fayette, Gallia, Hamilton, Highland, Jackson, Lawrence, Meigs, Pike, Ross, Scioto, Vinton, Warren, and Washington Counties in Ohio and the Townships of Dixon, Israel, Gasper, Lanier, Somers and Gratis in Preble County.

III. LEGAL ANALYSIS:

I note that no objection has been raised regarding the appropriateness of the bargaining unit sought by the Petitioner. Based on the record as a whole, I find that the tile setters, terrazzo workers, tile finishers, terrazzo finishers, floor grinders, and base grinders are a readily identifiable group who share a community of interest, and constitute an appropriate unit for purposes of collective bargaining. In addition, I note that the Board has made clear that the unit sought for collective bargaining need only be an appropriate unit. Thus, the unit sought need not be the ultimate, or the only, or even the most appropriate unit. *Overnite Transportation Co.*, 322 NLRB 723 (1996). When deciding whether the unit sought in a petition is appropriate, the Board focuses on whether the employees share a "community of interest." *NLRB v. Action Automotive*, 469 U.S. 490, 494 (1985). In turn, when deciding whether a group of employees shares a community of interest, the Board considers whether the employees sought are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised. *United Operations, Inc.*, 338 NLRB 123 (2002).

Here, the record reflects that the Employer's field employees share a community of interest under the Board's traditional criteria. Their work has a shared purpose and is functionally integrated; the employees work as a group in order to complete projects. In order for the tile setter to complete his specific portion of the job, the tile finisher obtains and stages the necessary materials; once the tile setter completes the installation, the tile finisher then completes the grouting work. Similarly, the terrazzo worker relies upon the terrazzo finisher to obtain materials and prepare mixes in order to install the terrazzo. The floor grinder is responsible for grinding pieces of terrazzo, and the base grinder handles grinding on the edges of the tile work. All the field employees work together to complete projects and are the only employees whose job functions require manual labor and the physical installation of tile, marble, and terrazzo. In addition, all the field employees wear similar construction clothing and utilize the same safety equipment. In contrast, the Employer's other personnel spend a majority of their time in an office setting. Finally, these same job classifications are generally included under the parties' existing Section 8(f) Agreement.

The Employer argues that the Petitioner is not the appropriate labor organization to represent its employees because those employees primarily work in Franklin County and the surrounding counties, none of which are included in Article 3 of the parties' Agreement. Further, the Employer contends that another local affiliate traditionally represents employees in

the Columbus, Ohio area and would be a more appropriate union to represent its employees. However, "the Board has long held that a Union's territorial jurisdiction and limitations do not generally affect the determination of the appropriate unit." *Laboratory Corporation of America Holdings*, 341 NLRB 1079, 1083 fn. 12 (2004). See, *Groendyke Transport*, 171 NLRB 997, 998 (1968); *Alley Drywall, Inc.*, 333 NLRB 1005, 1008 (2001).

In *CCI Construction Co., Inc.*, the Board, in response to an employer's argument that certain employer job sites were outside of the union's geographical jurisdiction and thus should not be included in the unit, stated that "[t]he geographical representational limitations of Local 19 or any other local, however, are not relevant to the determination of an appropriate unit." *CCI Construction Co., Inc.*, 326 NLRB 1319, 1323 (1998). In addition, "the Board has consistently held that it is a labor organization's 'willingness, rather than its constitutional ability' to represent employees 'which is the controlling factor.'" *Mariah, Inc.*, 322 NLRB 586, 587 fn. 3 (1996), citing *Mayfield Industries, Incorporated*, 126 NLRB 223, 224 fn. 1 (1960). See also, *Community Service Publishing*, 216 NLRB 997, 1000 (1975) ("the willingness of a union to represent employees, rather than the eligibility of the employees to membership in that union, is controlling"); *"M" Systems*, 115 NLRB 1316, 1320 fn. 2 (1956) ("the Board has uniformly held that the willingness of a petitioner to represent employees, rather than the eligibility of employees to membership in the petitioner, is controlling under the Act"); *Hazelton Laboratories*, 136 NLRB 1609, 1612 (1962) ("well established that the willingness of a union to represent employees, rather than the eligibility of the employees to membership in that union, is controlling").

At the hearing, the Petitioner's president, Freddy Ray Hubbard, Sr., testified that the Petitioner is willing to represent the petitioned-for employees regardless of where the employees work. Accordingly, based on Hubbard's testimony and the above-cited precedent, I find the geographical limitations in the Agreement cited by the Employer are not relevant to the determination of an appropriate unit.

IV. EXCLUSIONS:

The parties agreed and the record shows that Michelle Johnson, President and Co-Owner, Norma Martina, Co-Owner, and Alex Johnson, are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I will exclude them from the unit found appropriate. [2/] In addition, the parties agreed that Jim Traverse, Estimator, should be excluded from the proposed bargaining unit because he primarily works in the office, does not perform any tile, marble, or terrazzo work in the field and his job function is to estimate bids for the Employer's projects. Since he lacks a community of interest with the field employees, I will also exclude Traverse from the unit found appropriate.

[2/] The parties stipulated that these individuals possess and exercise one or more of the following indicia of supervisory status: the ability to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them or to adjust their grievances, or effectively, to recommend such action utilizing independent judgment in exercising such authority and, therefore, should be excluded from the bargaining unit.

V. CONCLUSIONS AND FINDINGS:

Based upon the entire record in this matter and in accordance with the above-referenced narrative, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed. [3]

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All tile, marble, and terrazzo installers and helpers employed by the Employer at or out of its facility in Columbus, Ohio, excluding office clerical employees and all professional employees, and guards and supervisors as defined in the Act.

VI. DIRECTION OF ELECTION:

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote on whether they wish to be represented for purposes of collective bargaining by the International Union of Bricklayers and Allied Craftworkers, Ohio Kentucky Administrative District Council, Local Union No. 18. The date, time, and place of the election will be specified in the notice of election that the Boards' Regional Office will issue subsequent to this Decision.

A. VOTING ELIGIBILITY:

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision and Direction of Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in

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[3] Prior to hearing, the Employer served a subpoena duces tecum on Petitioner's president, seeking, among other documents, the Constitution and by-laws of the Petitioner, the International Union of Bricklayers and Allied Craftworkers, and the bylaws of the Ohio Kentucky Administrative District Council. The Petitioner filed a Petition to Revoke the Employer's subpoena duces tecum on several grounds, including that the information sought by the Employer was not relevant to the issues being litigated at hearing. At the hearing, the Hearing Officer recommended that I grant the Petition to Revoke because the information sought was not relevant to a determination of issues in the hearing. As I have noted above, it is the Union's willingness and ability to represent employees rather than its constitutional territorial limitations that are relevant considerations. Having fully considered the Employer's arguments and based on the record as a whole, I agree with the Hearing Officer's recommendation and grant the Petitioner's Petition to Revoke the Employer's subpoena duces tecum.

an economic strike which commenced less then 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Also eligible to vote shall be all employees in the unit who have been employed for a total of 30 working days or more within the period of 12 months preceding the eligibility date for the election or who have had some employment in that period and who have been employed 45 working days or more within the 24 months immediately preceding the eligibility date for the election and who have not been terminated for cause or quit voluntarily prior to the completion of the last job for which they were employed. *Daniel Construction Co.*, 133 NLRB 264 (1961), as modified in 167 NLRB 1078 (1967), and *Steiny & Co.*, 308 NLRB 1323 (1992). [4]/

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

B. EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS:

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **July 20, 2012**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted to the

[4]/ This formula is used in all construction industry elections unless the parties stipulate not to use it. *Signet Testing Laboratories*, 330 NLRB 1 (1999).

Regional Office by electronic filing through the Agency's website, www.nlrb.gov [5]/ by mail, or by facsimile transmission at 513-684-3946. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of two copies of the list, unless the list is submitted electronically or by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

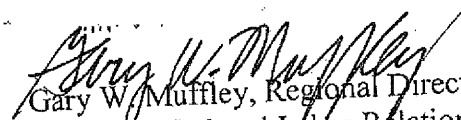
C. NOTICE OF POSTING OBLIGATIONS:

According to Section 103.20 of the Board's Rules and Regulations, the Employer, if an election is subsequently ordered, must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to 12:01 a.m. of the day of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VII. RIGHT TO REQUEST REVIEW:

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by **July 27, 2012**. The request may be filed electronically through the Agency's website, www.nlrb.gov [6]/, but may **not** be filed by facsimile.

Dated at Cincinnati, Ohio this 13th day of July 2012.



Gary W. Muffley, Regional Director
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271

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[5]/ To file the eligibility list electronically, go to the Agency's website at www.nlrb.gov, select **File Case Documents**, enter the NLRB Case Number and follow the detailed instructions.

[6]/ To file the request for review electronically, go to www.nlrb.gov, select **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions.