

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 00-70029 & 00-70562

CALIFORNIA PORTLAND CEMENT CO.
d/b/a CATALINA PACIFIC CONCRETE CO.

Petitioner-Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent-Cross-Petitioner

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION 12

Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE
NATIONAL LABOR RELATIONS BOARD

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of California Portland Cement Co., d/b/a Catalina Pacific Concrete Co. ("the Company") to review a final order of the National Labor Relations Board ("the Board"), issued on November 26, 1999, and reported at 330 NLRB No. 27 (ER 410).¹ The Board has filed a cross-

¹ "ER" refers to the two-volume "Excerpts of Record" filed by the Company. References preceding a semicolon are to the Board's

application for enforcement of its order. International Union of Operating Engineers, Local Union 12 ("the Union") has intervened on behalf of the Board's application for enforcement.

The Board had subject matter jurisdiction under Section 10(a) of the National Labor Relations Act ("the Act") (29 U.S.C. §§ 151, 160(a)). The Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)); the unfair labor practices occurred in Los Angeles and Orange Counties, California.

The Company filed its petition for review on January 7, 2000. The Board filed its cross-application for enforcement on May 10, 2000. Both were timely, as the Act places no time limit on the institution of proceedings to review or enforce Board orders. The Board's order is final with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)).

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(5) and (1) of the Act by unilaterally changing unit employees' terms and conditions of employment, unilaterally removing batch plant operators from the bargaining unit, and withdrawing recognition from the Union as the collective-bargaining representative of unit employees.

findings; those following are to the supporting evidence.

STATEMENT OF THE CASE

Acting on unfair labor practice charges filed by the Union, the Board's Regional Director, on behalf of the General Counsel, issued an unfair labor practice complaint alleging in pertinent part that the Company had violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by refusing to bargain with the Union. Following a hearing, an administrative law judge issued a decision on August 17, 1998, finding merit in most of the complaint allegations. (ER 266-86.) After the Company filed exceptions to the administrative law judge's decision, the Board issued its decision and order on November 26, 1999, affirming the judge's findings and conclusions with minor modifications. (ER 410-18.) The Board's findings of fact are summarized directly below; its conclusions and order are summarized thereafter.

I. THE BOARD'S FINDINGS OF FACT

A. Background; the Company Makes Changes in the Duties of Batch Plant Operators Without Notifying the Union; Contract Negotiations Take Place in 1994 and 1995

The Company is engaged in the business of processing and selling rock, sand, gravel and related products in Southern California. (ER 412; 42-43, 198.) Since at least September 1991, the Company and Union have maintained a collective-bargaining relationship. (ER 412; 204.) The Union represents a unit of batch plant operators ("BPOs") and plant repairmen. (ER 412; 236.) The last collective-bargaining agreement was in

effect from September 15, 1991 to September 15, 1994. (ER 412; 204, 234.)

BPOs' core duties include mixing ready-mix concrete product. (ER 412; 88.) In 1992, the Company, without notifying the Union, added dispatching to the BPOs' existing duties. (ER 414; 112, 114.) The BPOs thereupon began to determine how many trucks were needed and at what times in order to meet production requirements. (ER 414; 167-70.)

In September 1994, the parties commenced negotiations for a new contract. (ER 412; 48.) They agreed to work day-to-day under the soon-to-expire 1991-94 agreement, pending developments in concurrent rock, sand and gravel industry contract negotiations. (ER 412; 48.) The parties did not meet again until July 1995, at which time the Company tendered what it characterized as its final offer, including a 12 percent wage reduction and, for the first time, a cap on health and welfare benefits. (ER 412; 50-54, 254-61.) The Company also sought to remove from the contract a provision that prohibited supervisory employees from performing work customarily done by employees covered by the agreement. (ER 413; 53, 254.)

Due to the lack of progress in industry negotiations, the Union began an industry-wide strike on July 26, 1995. (ER 413; 44.) During the strike, most of the Company's BPOs crossed the picket line and returned to work, although the plant repairmen, who comprised about one quarter of the bargaining unit, remained

on strike. (ER 413; 158.) BPO John Davis, the union steward, was among those who crossed the picket line. He subsequently sent a letter to the Company requesting that the deduction of union dues from his paycheck be terminated. (ER 415; 158, 264.)

B. In 1996, the Company Again Adds Duties to the BPO Classification Without Giving Notice to the Union

In April 1996, the Company added more duties to the BPO classification. (ER 414; 62-63.) On April 3 and 4, 1996, it held employee meetings to discuss the changes, and followed up on April 6 with a memo to the BPOs, including union steward John Davis, but gave no notice to the Union of the changes. (ER 414; 62-64, 118, 262-63.) The BPOs' added duties included interviewing applicants for driver jobs, approving driver hires, participating in driver discipline, scheduling of orders, dispatching drivers, providing input into staffing requirements and starting times, determining driver stopping times, clocking out drivers, and ordering and scheduling aggregates and cement. (ER 414; 263.) In addition, the Company designated the BPOs as management representatives on accident review boards, where they had previously served as bargaining unit representatives. (ER 414; 69-72.) The Company also assigned BPOs increased involvement in evaluation of capital projects and modifications to equipment, selection of the driver of the year for Orange County facilities, and attendance at management training seminars. (ER 414; 72-78.) At some point after April, the Company switched the BPOs from the Union's health plan to the

company plan. (ER 414-15; 87.) In January 1997, BPOs received their first pay increase, of 25 cents per hour, since the changes. (ER 414; 86-87.)

C. In 1997, the Union Requests Resumption of Contract Negotiations; the Company Refuses and Withdraws Recognition of the Union

On April 18, 1997, after other unfair labor practice charges filed by the Union against the Company were resolved and a decertification petition filed by an employee was withdrawn, the Union requested that the Company resume bargaining for the successor contract. (ER 413; 45, 240.) The Company refused, asserting a good-faith doubt as to the Union's support by either a majority of all unit employees or separate units of its BPOs or plant repairmen. It also contended that the BPOs had been made supervisors and were no longer unit members. (ER 413; 241.) On April 28, the Union responded, reminding the Company that the BPOs had been considered bargaining unit members in past collective-bargaining agreements, and stating that the Union did not consent to the removal of the BPOs from the unit. (ER 413; 242.) On August 5, after the Union reached agreement with one or more of the industry's major producers, it made an unconditional offer on behalf of all striking employees to return to work at the Company. (ER 413; 40, 243.) In October, the Company changed the title of BPO to plant supervisor I, II, or III. (ER 415; 89-91.) The following winter, some plant

supervisors were put on salaries rather than hourly pay. (ER 415; 90.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Truesdale and Members Fox and Hurtgen) found (ER 410), in agreement with the administrative law judge, that the Company violated Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) by unilaterally changing the terms and conditions of employment of the BPOs and removing them from the bargaining unit. The Board further found that the Company violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union.

The Board's order (ER 417) requires the Company to cease and desist from the unfair labor practices found and from in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act (29 U.S.C. § 157). Affirmatively, the Board's order requires the Company upon request to rescind the unilateral changes in the BPOs' terms and conditions of employment and to return the BPOs to the bargaining unit. In addition, the Board's order requires the Company upon request to recognize and bargain with the Union as the exclusive bargaining representative of the employees in the bargaining unit and, if an understanding is reached, to embody that understanding in a signed agreement. The Board also ordered the Company to post copies of a remedial notice to employees. (ER 411, 417.)

SUMMARY OF ARGUMENT

The Board reasonably found that the Company unilaterally changed the BPOs' terms and conditions of employment, unilaterally removed them from the bargaining unit, and withdrew recognition of the Union as exclusive collective-bargaining representative of unit employees, all in violation of Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)). The Company does not dispute that it added duties to the BPOs. The Board reasonably rejected the Company's argument that informing employees, including the union steward, of the April 1996 changes constituted notice to the Union. For that reason, the Board also rejected the Company's argument that the Act's statute of limitations barred consideration of the Union's April 1997 unfair labor practice charges. The record amply supports the Board's finding that the Company had no reasonable basis for believing that the steward had the authority to act as the Union's agent for receiving notice of the changes in April 1996. The Board reasonably rejected the Company's additional argument that the BPOs had been supervisors since 1992, finding instead that the BPOs did not exercise independent judgment in performing their limited dispatching tasks.

The Board also reasonably found that the Company's withdrawal of recognition was unlawful because it was not raised in a context free of employer unfair labor practices. The record soundly supports the Board's finding that there exists a

sufficient causal relationship between the Company's unfair labor practices and any loss of the Union's support by employees: encumbering unit employees with significant additional duties, purporting to turn them into supervisors, and removing them from the bargaining unit and the Act's protection, all without notice to or bargaining with the Union, reasonably would contribute to employees' loss of support for the Union.

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY UNILATERALLY CHANGING TERMS AND CONDITIONS OF EMPLOYMENT, UNILATERALLY REMOVING EMPLOYEES FROM THE BARGAINING UNIT, AND WITHDRAWING RECOGNITION FROM THE UNION AS THE COLLECTIVE-BARGAINING REPRESENTATIVE OF UNIT EMPLOYEES

A. The Company's Unlawful Unilateral Changes

1. Applicable principles and standard of review

Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of its employees. Section 8(d) of the Act (29 U.S.C. § 158(d)) defines collective bargaining as the parties' mutual obligation "to meet . . . and confer in good faith with respect to wages, hours and other terms and conditions of employment" Bargaining is mandatory with respect to subjects that fall within that statutory language. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 347, 349 (1958).

It is therefore settled that an employer violates Section 8(a)(5) and (1) of the Act (29 U.S.C. § 158(a)(5) and (1)) "if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment." Litton Financial Printing v. NLRB, 501 U.S. 190, 198 (1991), citing NLRB v. Katz, 369 U.S. 736, 741-48 (1962) (employer's unilateral change in employment conditions "is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal"). Accord Southwest Forest Indus., Inc. v. NLRB, 841 F.2d 270, 273 (9th Cir. 1988); Queen Mary Restaurants Corp. v. NLRB, 560 F.2d 403, 408 (9th Cir. 1977). Further, the duty to bargain continues after a collective-bargaining agreement expires, and the employer may not then institute unilateral changes, absent bargaining to impasse. NLRB v. Carilli, 648 F.2d 1206, 1214 (9th Cir. 1981); Clear Pine Mouldings, Inc. v. NLRB, 632 F.2d 721, 729 (9th Cir. 1980), cert. denied, 451 U.S. 984 (1981).

It is also settled that "once a specific job has been included within the scope of the bargaining unit . . . the employer cannot unilaterally remove or modify that position without first securing the consent of the union or the Board." Hill-Rom Co., Inc. v. NLRB, 957 F.2d 454, 457 (7th Cir. 1992). See also Taos Health Systems, Inc., 319 NLRB 1361 n.2 (1995). This proposition is grounded in practical considerations: "if an employer could vary unit descriptions at will, it would have the

power to sever the link between a recognizable group of employees and its union." Hill-Rom, 957 F.2d at 457.

The Board's factual findings are conclusive if supported by substantial evidence on the record as a whole. A reviewing court "may [not] displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

2. The Company unlawfully changed the batch plant operators' duties and removed them from the bargaining unit without giving notice to the Union

The instant case is not factually complex. Briefly, in 1995, after the Union's industry-wide strike began, many members of the Company's BPO and repairmen unit crossed the picket line and returned to work for the Company. In April of the following year, the Company enhanced the BPOs' duties significantly. Although, as discussed more fully below, the Company was statutorily bound to negotiate with the Union before making such changes in working conditions, it never did, other than to inform Union Steward Davis (himself a BPO). When the Union protested the unilateral action, the Company withdrew recognition of it as collective-bargaining representative, partly on the ground that the BPOs were now statutory supervisors and were not entitled to representation. See Section 2(11) of the Act. (29 U.S.C. § 152(11)).

It is clear that the Company's changes affected terms and conditions of employment, and were therefore mandatory subjects of bargaining. Thus, to the BPOs' core functions, the Company added ostensibly supervisory responsibilities. The Company's April 4, 1996, memo lists significant additions to the BPOs' responsibilities, including involvement in the hiring and disciplinary process, scheduling of drivers, and receipt of products. (ER 262-63.) Further, as Company Vice-President Robert West testified, it made additional contemporaneous changes, including having BPOs switch sides of the table--from employee representative to management representative--on accident review boards, and having them evaluate capital projects and modifications, and participate in management seminars. (ER 69-78.)

Irrespective of whether the changes effectively transformed the BPOs into genuine supervisors, the attempt to promote them to supervisory status was a mandatory subject of bargaining with the Union. See Luther Manor Nursing Home, 270 NLRB 949, 960 (1984), enforced sub. nom. UFCW, Local 304A v. NLRB, 772 F.2d 421 (8th Cir. 1985); Lutheran Home of Kendallville, Indiana, 264 NLRB 525, 525, 536-37 (1982). See also Telemundo de Puerto Rico, Inc. v. NLRB, 113 F.3d 270, 279 (1st Cir. 1997) ("any proposed changes that would convert unit employees to statutory supervisor status [is] a mandatory subject of collective bargaining"). In essence, in overhauling the BPOs' job description, the Company sought to

strip them of their employee status and protection under the Act, and remove them from the unit, without a word to the Union.² See Tonkin Corp. of California, 165 NLRB 607, 608-09 (1967) (changing drivers from employees to independent contractors found unlawful), enforced 420 F.2d 495 (9th Cir. 1969). That it could not lawfully do. In the circumstances, the Board's conclusion that the Company refused to bargain by adding to the BPOs' duties without advising the Union is amply supported in the record.

3. The Company's defenses are unmeritorious
 - a. The Company did not give the Union notice of the contemplated changes and the Union's charges were timely filed

It is well established that an employer must provide express notice to the collective-bargaining representative prior to implementing changes to employees' terms and conditions of employment. Failure to provide such notice precludes any possibility of either reaching agreement on proposed changes or of bargaining to impasse. NLRB v. Compact Video Services, 121 F.3d 478, 481-82 (9th Cir. 1997) (advertisements and letters to employees rather than union found insufficient notice). In the instant case, the Company did not contact the Union to notify it

² By removing the BPOs from the bargaining unit, the Company necessarily changed the scope of the unit, which is not a mandatory subject of bargaining. See Hill-Rom Co., Inc. v. NLRB, 957 F.2d 454, 457 (7th Cir. 1992). Accordingly, neither party in collective bargaining could force upon the other an alteration in the scope of the established bargaining unit. NLRB v. Int'l Union of Operating Engineers, 532 F.2d 902, 907 (3d Cir. 1976),

of the changes to the BPO position and unit, as company counsel and Vice-President West admitted. (ER 33, 64, 118.)

The Company attempts to excuse its failure to give the Union notice by pointing to the information about the changes provided to employees, including Union Steward Davis. But simply informing employees of proposed changes is not the equivalent of giving notice to a collective-bargaining representative. NLRB v. Walker Construction Co., 928 F.2d 695, 696-97 (5th Cir. 1991).

The Company's principal contention is that because Davis was a steward, he was not merely an employee, but was also automatically an agent of the Union, and notice to him was therefore notice to the Union. Under applicable common-law agency principles, however, the burden of proving agency status is upon the party asserting such status. See e.g. Millard Processing Servs., Inc. v. NLRB, 2 F.3d 258, 262 (8th Cir. 1993), cert. denied, 510 U.S. 1092 (1994). The Company did not offer any evidence to establish that Davis was the Union's agent for the purpose of receiving notice of changes. Nor does the applicable 1991-94 collective-bargaining agreement contain any provision designating the steward as the Union's agent, either generally or for the purpose of receiving notice of changes contemplated by the Company. Indeed, in the one instance where the issue of notice is mentioned in the collective-bargaining

cert. denied, 429 U.S. 1072 (1977); Newspaper Printing Corp. v. NLRB, 625 F.2d 956, 963 (10th Cir. 1980).

agreement, the section explicitly requires that notice be given to the steward and the Union. (ER 222, Art. 13 § 1(a).)³

Further, it is difficult to understand how Davis could be seen as an agent for the Union in light of the particular circumstances presented. First, the Company purported to have made him and the other BPOs supervisors as early as 1992, and unquestionably was asserting that they were supervisors in April 1996. As the Board found (ER 410), the Company could hardly have believed that notice to Davis was notice to the Union, given its view that he had become a representative of management. In addition, as shown in the Facts (see above at p. 5), Davis crossed the picket line and revoked his dues deduction authorization. Thus, as the administrative law judge observed (ER 416), "Davis' interests and the Union's were not only adverse, but were antagonistic to each other. There is simply no way that any notice to Davis . . . satisfied [the Company'] obligation."⁴

³ The other provisions of the contract cited by the Company (Br 19, ER 227-29) are inapposite. For example, the grievance procedure provision (ER 227-29) cited by the Company (Br 19) notes only the steward's possible involvement at the lowest step, and grants him no particular authority in that regard.

⁴ The cases cited by the Company (Br 19-22) in support of its claim that Davis was a union agent are readily distinguishable. In Lee Way Motor Freight, Inc., 229 NLRB 832 (1977), the collective-bargaining agreement and the union by-laws expressly granted stewards the authority to transmit information and messages to the union. In Southern Newspapers, Inc. d/b/a The Baytown Sun, 255 NLRB 154, 160 (1981), the Board specifically found that the steward, who attended all negotiation sessions,

The Company also contends (Br 16-18), as a procedural argument, that the Board was precluded from finding unfair labor practices because the Union did not file its unfair labor practice charges within the six-month statute of limitation contained in the Act. (Section 10(b) of the Act (29 U.S.C. § 160(b)). The Company asserts that the Union's 1997 charges were untimely because the six months began to run in April 1996, when the Company advised the BPOs of their increased duties. The relevant date, however, was in April 1997, the same month that the Union filed the charges: that was when the Company first asserted to the Union that the BPOs were no longer in the unit. See Stone Boat Yard v. NLRB, 715 F.2d 441, 445 (9th Cir. 1983), cert. denied, 466 U.S. 937 (1984) (express notice of specific proposals required); Am. Distrib. Co., Inc. v. NLRB, 715 F.2d 446, 451 (9th Cir. 1983) (same), cert. denied, 466 U.S. 958 (1984). As discussed above, notice to Davis was insufficient to

was "more than a steward" and was "closely tied to the union." In the instant case, Steward Davis had no role in negotiations and exhibited virtually no ties to the Union. In Robert E. McKee, Inc., 233 NLRB 283 (1977), the steward acted in conjunction with the union business agent in secondary picketing so that it was obvious that he was representing the union. Finally, in Aztec Bus Lines, Inc., 289 NLRB 1021 (1988), the chief steward was involved in grievance processing and attended meetings with employer and union representatives and clearly acted for the union in that capacity. In this case, unlike those relied upon by the Company, Steward Davis was neither granted any authority to act for the Union nor held out by the Union as its agent.

put the Union on notice and hence insufficient to trigger the limitations period.⁵

b. The BPOs are not statutory supervisors

The Company contends (Br 25-27) that the BPOs have been supervisors since 1992, when they assumed dispatching duties, and, therefore, that the Company had no duty to bargain with the Union regarding changes in 1996 to their terms and conditions of employment. As we now show, that argument was reasonably rejected by the Board.

Section 7 of the Act (29 U.S.C. § 157) grants collective-bargaining rights only to "employees," and Section 2(3) of the Act (29 U.S.C. § 152(3)) provides that "[t]he term 'employee' . . . shall not include . . . any individual employed as a supervisor. . . ." Section 2(11) of the Act (29 U.S.C. § 152(11)), in turn, defines "supervisor" as:

⁵ The cases cited by the Company (Br 23-25) are distinguishable. In NLRB v. Dynatron/Bondo Corp., 176 F.3d 1310 (11th Cir. 1999), the union was plainly aware of changes made by the employer because it received disciplinary notices stemming from a new tardiness rule. There, in fact, the union stated its opposition to the changes at least nine months prior to charges being filed. In Nat'l Treasury Employees Union v. Fed. Labor Relations Auth., 798 F.2d 113 (5th Cir. 1986), a non-NLRA case, the Court found that the union president had prior knowledge of the employer's intent to make changes. Union representatives were also given the opportunity to attend the meeting at which the changes were announced. Finally, the Company's citation to SAS Elec. Servs., Inc., 323 NLRB 1239 (1997), is curious, inasmuch as it supports the Board's decision here. In that case, the judge, with Board affirmance, found that the unfair labor practices charges were not time-barred, because there was no evidence that union knew or should have known that the employer was dishonoring the contract.

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 2(11) enumerates those supervisory powers in the disjunctive, but the requirement that any of those powers be exercised with independent judgment is read in the conjunctive. See, e.g., NLRB v. S.R.D.C., Inc., 45 F.3d 328, 332 (9th Cir. 1995); Telemundo de Puerto Rico, Inc. v. NLRB, 113 F.3d 270, 274 (1st Cir. 1997). Accordingly, an individual is not a supervisor within the meaning of Section 2(11) of the Act if he "exercise[s] some supervisory authority in carrying out his duties [but fails to] exercise[] independent judgment in performing such duties." NLRB v. S.R.D.C., Inc., 45 F.3d at 332 (internal quotations omitted). The burden of proving supervisory status rests upon the party asserting it. NLRB v. Bakers of Paris, Inc., 929 F.2d 1427, 1445 (9th Cir. 1991).

In enacting Section 2(11) of the Act, Congress sought to distinguish between truly supervisory personnel, who are vested with "genuine management prerogatives," and employees--such as "straw bosses, leadmen, and set-up men, and other minor supervisory employees'"--who enjoy the Act's protections even though they perform "minor supervisory duties." NLRB v. Bell Aerospace Co., 416 U.S. 267, 280-81 (1974) (quoting Sen. Rep. No.

105, 80th Cong., 1st Sess. 4 (1947)). Consistent with this congressional intent, "reviewing courts must take care to assure that exemptions from NLRA coverage are not so expansively interpreted as to deny protection to workers the Act was designed to reach." Holly Farms Corp. v. NLRB, 517 U.S. 392, 399 (1996). Accord McDonnell Douglas Corp. v. NLRB, 655 F.2d 932, 936 (9th Cir. 1981) ("it is important for the Board not to construe supervisory status too broadly, for a worker who is deemed to be a supervisor loses his organizational rights"), cert. denied, 455 U.S. 1017 (1982).

Further, Section 2(11) of the Act "requires that distinctions be drawn between gradations of authority 'so infinite and subtle that of necessity a large measure of informed discretion is involved in the exercise by the Board of its primary function to determine those who as a practical matter fall within the definition of a "supervisor."'" NLRB v. Adrian Belt Co., 578 F.2d 1304, 1311 (9th Cir. 1978) (quoting MEBA v. Interlake Steamship Co., 370 U.S. 173, 179 n.6 (1962)). "[T]he Board has expertise 'in making the subtle and complex distinction between supervisors and employees,' and thus the normal deference [courts] give to the Board is 'particularly strong' when it makes those determinations." NLRB v. S.R.D.C., Inc., 45 F.3d 328, 333 (9th Cir. 1995), quoting George C. Foss v. NLRB, 752 F.2d 1407, 1410 (9th Cir. 1985).

In the instant case, substantial evidence supports the Board's finding (ER 410 n. 2) that the Company failed to meet its burden of showing that the additional duties assigned to the BPOs in 1992 involved the use of independent judgment.⁶ The one BPO who testified at the hearing, Michael Chosek, established that the BPOs' duties, even after the addition of the dispatching responsibilities in 1992, did not require the use of independent, as opposed to routine, judgment: dispatching merely required keeping a record of the trucks and tracking loads on certain jobs. (ER 167-70.) Nor did determination of the dispatching order require independent judgment, as it was done on a seniority basis. (ER 167-68.) The BPOs had no authority to clock out drivers and did not participate in hiring decisions. (ER 169-70.) Moreover, at some of the Company's facilities, non-BPO employees continued to perform the dispatching function. (ER 168-69.)

⁶ The cases cited (Br 26-28) by the Company are inapposite; those cases, unlike the instant one, involved the actual exercise of independent judgment. See Spring Valley Farms, Inc. 272 NLRB 1323 (1984) (feed delivery manager used independent judgment in equalizing work loads, which significantly affected driver income and determining which drivers, if any, worked overtime; job description stated she directly supervised employees); Safety Tank Lines, Inc., 224 NLRB 144, 145 (1976) (dispatcher manned office, approved time off, conducted daily business of terminal, and signed checks; her assignments determined driver pay); Quality Transport Inc., 211 NLRB 198, 201-02 (1974) (dispatchers granted time off, and disciplined drivers, and exercised independent judgment in determining if late reports on drivers were warranted); Queen City Transports, 141 NLRB 964, 972 (1963) (authority to effectively recommend hiring was basis for supervisory status).

The Board reasonably found that the BPOs' dispatch duties--circumscribed as they were by external requirements and fixed procedures--did not involve the exercise of independent judgment, and thus did not rise to the level of supervisory authority. See Providence Alaska Medical Ctr. v. NLRB, 121 F.3d 548, 552 (9th Cir. 1997) (nurses not supervisors where assignments were circumscribed by parameters of existing schedule); NLRB v. Meenan Oil Co., 139 F.3d 311, 321 (2d Cir. 1998) (dispatchers' tasks governed by employer's policies and parameters, and did not require independent judgment); B.P. Oil, Inc., 256 NLRB 1107, 1109-10 (1981) (dispatchers not supervisors where decisionmaking was governed by preexisting priorities and commonsense considerations).

The Company relies largely (Br 27-28) on testimony that, after the 1992 changes, BPOs communicated with customers and quoted prices. (ER 114-16.) Evidence of duties relating to customer contact, however, fails to establish that alleged supervisors directed the work of other employees at all, let alone in a manner requiring independent judgment, as required by the Act. Empress Casino Joliet Corp. v. NLRB, 204 F.3d 719, 721 (7th Cir. 2000) ("supervisory status is relative to employees rather than to customers"); Goldies, Inc. v. NLRB, 628 F.2d 706, 711 (1st Cir. 1980) (countermen responsible for sales, price

quotes, and customer contact did not exercise independent judgment, and were not supervisors).⁷

- c. The Union neither waived its right to bargain nor abandoned the bargaining unit

The Company also asserts (Br 23-24) that the Union essentially waived its right to bargain prior to implementation, because, even absent notice, the Union had an affirmative duty to inform itself that changes were contemplated and then seek to discuss them with the Company. As noted above (p. 13), however, the Act places the burden squarely on the employer to advise an incumbent union that changes are contemplated before it becomes possible to waive the right to bargain. Even then, "[a] waiver must generally be clear and unmistakable." Am. Distrib. Co., Inc. v. NLRB, 715 F.2d 446, 450 (9th Cir. 1983). Accord NLRB v. Unbelievable, Inc., 71 F.3d 1434, 1440-41 (9th Cir. 1995). It is true that a union may waive bargaining rights through inaction, but not without clear notice of the employer's intent to implement changes. NLRB v. Unbelievable, Inc., 71 F.3d at 1440-41; Am. Distrib. Co., Inc. v. NLRB, 715 F.2d at 450. Absent such notice, there can be no waiver. As discussed above, the

⁷ The Company also points to (Br 27) the 1996 changes themselves to argue that, because the BPOs have been supervisors since 1992, it was not required to bargain about the 1996 changes to their job classification. Duties not established until 1996 obviously cannot be evidence of supervisory status since 1992. Further, assuming that the 1996 unilateral changes made the BPOs genuine supervisors, those very changes constitute unfair labor practices. See discussion above, pp. 11-13. They may not,

Company failed to provide notice in the instant case. In the absence of such notice, the Company's waiver argument must fail.⁸

Finally, the Company contends (Br 29-30) that the Union "abandoned" the unit and had no contact with the Company for two years, from the cessation of picketing in September 1995 until mid-1997. The Company fails to cite any authority for the proposition that union inactivity alone excuses unilateral changes. Indeed, the Court rejected that argument in Pioneer Inn Assocs. v. NLRB, 578 F.2d 835, 839 (9th Cir. 1978). There, the union had been inactive for two to three years and then reasserted its role, and requested negotiations for a successor collective-bargaining agreement. The Court affirmed the Board's finding that the employer's unilateral changes, refusal to bargain and withdrawal of recognition were unlawful. Id. The instant case is even more compelling: the Union here actively pursued numerous unfair labor practice cases (not involved in the

therefore, be a legitimate basis for stripping the BPOs of their rights and protections under the Act.

⁸ Contrary to the Company's related argument (Br 28-29), even acquiescence to prior unilateral changes does not waive a union's right to bargain over subsequent changes. See, e.g., NLRB v. Miller Brewing Co., 408 F.2d 12, 15 (9th Cir. 1969) ("an opportunity once rejected does not result in a permanent 'close-out'"). Further, the cases cited (Br 29) by the Company are inapposite. In McKinney v. Emery Air Freight Corp., 954 F.2d 590, 594-95 (9th Cir. 1992), a non-NLRA case, the Court's discussion of "past practice" related to contract interpretation, not unfair labor practices. In Citizens Nat'l Bank of Willmar, 245 NLRB 389 (1979), the union, unlike here, was notified of the changes, but failed to request bargaining. Similarly, in Associated Milk Prods., Inc., 300 NLRB 561, 563 (1990), the Board found that the union had notice of contemplated changes.

instant case) during the time period it allegedly abandoned the unit. (ER 249-53.) It is implausible that a union that abandoned the employees would undertake the time and expense of prosecuting unfair labor practices on their behalf. In the circumstances, then, the Union can hardly be said to have abandoned the unit.

B. The Company's Unlawful Withdrawal of Recognition

1. Introduction and applicable principles

Absent unusual circumstances, a labor organization is irrebuttably presumed to enjoy the support of a majority of unit employees during the first year following Board certification or voluntary recognition. On expiration of the certification year, the presumption of majority status becomes rebuttable: an employer may withdraw recognition if it can show that the labor organization does not, in fact, enjoy majority support, or if it possesses a reasonable good-faith doubt of the labor organization's majority status. Absent such a showing, however, an employer violates Section 8(a)(5) and (1) of the Act by withdrawing recognition from an incumbent union. NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 787 (1990). See also Hotel, Motel and Restaurant Employees and Bartenders Union Local 19 v. NLRB, 785 F.2d 796, 799 (9th Cir. 1986); NLRB v. Katz's Delicatessen of Houston Street, Inc., 80 F.3d 755, 764 (2d Cir. 1996); Terrell Machine Co. v. NLRB, 427 F.2d 1088, 1090 (4th Cir.), cert. denied, 493 U.S. 924 (1989).

Reasonable doubt regarding the union's majority status cannot be raised in a context of employer activity tending to cause disaffection from the union. Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 687 (1944); Hotel, Motel and Restaurant Employees and Bartenders Union Local 19 v. NLRB, 785 F.2d 796, 799 (9th Cir. 1986); NLRB v. Sky Wolf Sales, 470 F.2d 827, 830 (9th Cir. 1972); Proxy Communications of Manhattan, Inc. v. NLRB, 873 F.2d 552, 554 (2d Cir. 1989) ("[a]n employer cannot use the good-faith doubt defense to reap benefit from its own unfair labor practices"). Accordingly, "an employer cannot lawfully withdraw recognition from a union if it has committed as yet unremedied unfair labor practices that could have reasonably tended to contribute to employee disaffection from the union." United Supermarkets, Inc. v. NLRB, 862 F.2d 549, 553 n.6 (5th Cir. 1989) (citing Chicago Magnesium Casting Co., 256 NLRB 668, 674 (1981)); NLRB v. Hi-Tech Cable Corp., 128 F.3d 271, 279 (5th Cir. 1997). In order to find that a withdrawal of recognition was tainted, the Board is not required to have proof of a causal link between the employer's unfair labor practices and the union's loss of its majority. Rather, it need only find a reasonable tendency that the unfair labor practices contributed to employee disaffection. NLRB v. Hi-Tech Cable Corp., 128 F.3d 271, 279 (5th Cir. 1997); Columbia Portland Cement Co. v. NLRB, 979 F.2d 460, 465 (6th Cir. 1992).

2. The Company lacked a good-faith doubt of the Union's majority status

The Company justifies (Br 30) its withdrawal of recognition and subsequent refusal to bargain by asserting that it doubted that the Union maintained the support of a majority of the unit. The Board reasonably found (ER 410), however, that the Company lacked a good-faith doubt of the Union's majority status in light of the likely causal relationship between the Company's unfair labor practices and any loss of support.

The Board has identified those factors that are relevant in assessing whether a causal relationship exists between an employer's unfair labor practices and a union's loss of employee support. Master Slack Corp., 271 NLRB 78, 84 (1984) ("Master Slack"). Those factors include the length of time between the unfair labor practices and the withdrawal of recognition; the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; any possible tendency to cause employee disaffection from the union; and the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union. Id.

This Court has observed that "the Board many times has expressed the view that the unlawful refusal of an employer to bargain collectively with its employees' chosen representatives disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions."

Louisiana-Pacific Corp. v. NLRB, 858 F.2d 576, 578 (9th Cir.

1988) (quoting Franks Bros. Co. v. NLRB, 321 U.S. 702, 704 (1944)). In particular, unilateral implementation of changes to some employees' working conditions tends to undermine all employees' support of their representative as it suggests that the union has no power to affect wages or other terms and conditions of employment. See NLRB v. Auto Fast Freight, Inc., 793 F.2d 1126, 1131 (9th Cir. 1986); Microimage Display Div. of Xidex Corp. v. NLRB, 924 F.2d 245, 253 (D.C. Cir. 1991); Capitol-Husting Co., Inc. v. NLRB, 671 F.2d 237, 247 (7th Cir. 1982); Guerdon Indus., Inc., 218 NLRB 658, 661 (1975) (unilateral changes negated the legality of subsequent withdrawal of recognition).

The record here amply demonstrates that the Company converted the BPOs into ostensible supervisors, attempted to strip them of their employee status and corresponding protection of the Act, and removed them from the unit. See above, pp. 12-13. It can hardly be denied that removing 75 percent of the bargaining unit--the BPOs--and unilaterally implementing significant changes to their terms and conditions of employment, without notice to the Union, would have the likely effect of contributing to a loss of support for the Union among unit employees. Short of discharging these now exposed employees, it is hard to imagine how the Company could more effectively cause a loss of majority support.

Although the changes to BPOs' duties were instituted a year before the withdrawal of recognition, any perceived lack of temporal proximity (Br 39) is illusory, for the changes were essentially permanent. In the circumstances, the removal of the BPOs' from the unit continued to affect daily work life cumulatively, and reinforce the notion that the Company had simply ignored the Union in undertaking a major revision of employment conditions. The revamping of the BPO job description undoubtedly had a lasting effect, particularly since the changes have never been rescinded.

Nor is there merit to the Company's contention (Br 38-39) that the Board failed to follow Master Slack or justify its finding of a sufficient causal relationship between the Company's unlawful conduct and any alleged loss of support. The Board, however, expressly relied (ER 410) on its decision in Pirelli Cable Corp., 323 NLRB 1009, 1010 n.1 (1997), enforcement denied, 141 F.3d 503, 521 (4th Cir. 1998), which itself cites (323 NLRB at 1010) the Board's decision in Master Slack. Accordingly, the Board did not depart from precedent in reaching its conclusion that the Company unlawfully withdrew recognition from the Union. See, e.g., NLRB v. Metropolitan Life Ins. Co., 380 U.S. 438, 443 n.6 (1965) (Board may articulate the basis of its order by reference to other decisions); Aqua Chem, Inc., Cleaver Brooks Div. v. NLRB, 910 F.2d 1487, 1492 n.6 (7th Cir. 1990) (rejecting employer's argument that Board's lack of explanation renders its

decision erroneous where the reasoning behind the Board's conclusion is obvious), cert. denied, 501 U.S. 1238 (1991).

The Company also asserts (Br 39) that it had a good-faith doubt of the Union's majority status during the pendency of the decertification petition, before it withdrew recognition. See p. 26, above. For all the record shows, however, it did not raise its concerns until after the petition was withdrawn, when the Union requested bargaining. It is suspicious that the Company failed to assert union inactivity until the Union undertook a more active role, after the strike. Pioneer Inn Assocs. v. NLRB, 578 F.2d 835, 840 (9th Cir. 1978).⁹

The Company also enumerates (BR 31-33) various additional factors in support of its claim of a good-faith doubt. As the Board held (ER 410), the Company "could not in good faith rely on evidence allegedly supporting a claimed doubt of the Union's continuing majority status because the claim was not raised in a context free of employer unfair labor practices."¹⁰ Further, the

⁹ The Company wholly fails to support its claim that it in fact had a good-faith doubt of the Union's support even before 1996. The testimony of Company Vice-President West regarding alleged employee discontent all relates to April 1997. Moreover, the Company's comparison (Br 41-42) between the instant case and Hotel, Motel and Restaurant Employees and Bartenders Union Local 19 v. NLRB, 785 F.2d 796, 800 (9th Cir. 1986), is flawed. In that case, discontent with the union predated the employer's unfair labor practices. Here, the Company failed to produce evidence that any employee discontent existed prior to its unilateral changes in 1996.

¹⁰ In any event, the Company's assertions of a good-faith doubt based on employee expressions of dissatisfaction with the Union

Company's reliance (Br 33-35) on the Supreme Court's opinion in Allentown Mack Sales and Serv., Inc. v. NLRB, 522 U.S. 359 (1998), is misplaced. Allentown Mack addressed the nature and sufficiency of evidence that would support a good faith doubt; it did not, however, involve the employer's assertion of a good-faith doubt in the context of its own unfair labor practices, as is the case here. See Beverly Farm Found., Inc. v. NLRB, 144 F.3d 1048, 1053-54 (7th Cir. 1998).

Finally, the Company claims (Br 46) that the Board erred by affirming the administrative law judge's decision despite the lack of explicit credibility findings. The dispositive facts relied upon by the Board, however, do not require credibility determinations. It is undisputed that the Company implemented changes to the BPOs' terms and conditions of employment without notifying the Union, and that it subsequently withdrew recognition. The resolution of the major issue in dispute-- whether notice to Union Steward Davis constituted notice to the Union--does not turn on credibility determinations, but chiefly

are not borne out by case law. For example, the fact that employees crossed the picket line is irrelevant. NLRB v. Wilder Const. Co., Inc., 804 F.2d 1122, 1126 (9th Cir. 1986) (refusal to strike is not interpreted as rejection of union unless employer has clear evidence that, in crossing picket line, individual intended to terminate union relationship and employer was aware of it). Further, contrary to the Company's argument (Br 32), there is no presumption that striker replacements are anti-union. NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 788-96 (1990). In addition, the testimony from Vice-President West was vague, and consisted largely of second- and third-hand information as to employee sentiment toward the Union. (ER 120, 125, 127-36.)

on the application of settled legal principles to uncontested facts. Moreover, even had credibility been a factor in the outcome of the case, there is no need for explicit credibility findings where the conclusions based on the evidence are supported by the record as a whole. Loral Defense Systems-Akron v. NLRB, 200 F.3d 436, 453 (6th Cir. 1999); NLRB v. Katz's Delicatessen of Houston St., Inc., 80 F.3d 755, 765 (2d Cir. 1996). As discussed above, the record amply supports the Board's findings.

CONCLUSION

For the foregoing reasons, the Board respectfully requests that judgment enter denying the Company's petition for review and enforcing the Board's order in full.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Board counsel state that they are unaware of any related case pending in this Court or any other court.

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