Alpha Associates *and* Union of Needletrades, Industrial & Textile Employees (Unite), AFL–CIO, CLC. Cases 11–CA–19638 and 11–CA–19828

May 31, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

Pursuant to charges filed by UNITE, AFL–CIO, CLC (the Union) on September 6, 2002 (subsequently amended on October 28, 2002, and March 12, 2003), and January 29, 2003 (amended on March 12, 2003), the General Counsel of the National Labor Relations Board issued a consolidated complaint on March 31, 2003, alleging that the Respondent, Alpha Associates, violated Section 8(a)(5) and (1) of the Act by (1) unilaterally laying off unit employees without notifying or bargaining with the Union, (2) unilaterally granting a wage increase to unit employees without notifying or bargaining with the Union, and (3) failing and refusing to meet and bargain with the Union since January 16, 2003. The Respondent filed a timely answer admitting in part and denying in part the allegations of the complaint.

On May 5, 2003, the General Counsel filed with the Board a Motion for Summary Judgment. On May 8, 2003, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On June 3, 2003,[1] in response to the Notice to Show Cause, the Respondent filed an opposition to the General Counsel's Motion for Summary Judgment, to which the General Counsel subsequently filed a response. Also on June 3, the Union filed a memorandum in support of the General Counsel's motion.

Ruling on Motion for Summary Judgment

The complaint alleges that the Respondent, without notifying the Union or affording it an opportunity to bargain, laid off various unit employees beginning on or about March 8, 2002, and, additionally, unilaterally granted a wage increase on July 29, 2002. The complaint further alleges that, since on or about January 16, 2003, the Respondent has failed and refused to meet and bargain with the Union. The Respondent admits having engaged in all of the above-described conduct. Nevertheless, the Respondent asserts that it has not committed a violation of the Act, as it has no obligation to bargain with the Union. Specifically, the Respondent contends principally that its earlier recognition of the Union was invalid, as the Union never demonstrated, or offered to demonstrate, that it represented a majority of the unit employees. The Respondent additionally alleges that the recognized bargaining unit described in the complaint is inappropriate.[2]

In agreement with the General Counsel, and for the reasons expressed more fully below, we find that the Respondent is precluded from challenging either the validity of its prior voluntary recognition of the Union or the appropriateness of the recognized unit. Further, for the reasons set forth below, we find that there are no factual issues warranting a hearing in this matter, and that the Respondent's affirmative defenses are inadequate to defeat the Motion for Summary Judgment.[3]

A. Section 10(b) Precludes Respondent's Challenge to its Earlier Voluntary Recognition of the Union Based on Alleged Lack of Majority Status at Time of Recognition

As the General Counsel accurately asserts, the Board consistently has held that Section 10(b) of the Act precludes an employer from defending against a refusal-to-bargain allegation on the basis that its initial recognition of the union, occurring more than 6 months prior to the filing of unfair labor practice charges raising the issue, was invalid or unlawful. See *Route 22 Honda*, 337 NLRB 84, 85 (2001); *Morse Shoe*, 227 NLRB 391, 394 (1976), supplemented by 231 NLRB 13 (1977), enfd. 591 F.2d 542 (9th Cir. 1979); *North Bros. Ford*, 220 NLRB 1021, 1021 (1975).[4] Further, whether or not the

[1] The Board granted the Respondent's successive requests for an extension of time to file an opposition to the General Counsel's Motion for Summary Judgment.

[2] Finally, as we discuss in greater detail below, the Respondent also proffers defenses specific to each of the alleged unfair labor practices.

[3] We additionally reject as without merit the Respondent's contention that the General Counsel's Motion for Summary Judgment was not timely filed. Sec. 102.24(b) of the Board's Rules and Regulations provides that summary judgment motions must be filed "no later than 28 days prior to the scheduled hearing" in a particular case. However, that section additionally provides that, if the hearing is scheduled fewer than 28 days after the date for filing an answer to the complaint, the Motion for Summary Judgment "shall be filed promptly."

On March 31, 2003, the General Counsel both issued the consolidated complaint in this proceeding and scheduled a hearing on the complaint for May 19. The Respondent, having been granted two extensions of time, filed a timely answer to the complaint on April 30. As a result of the extensions of time granted to the Respondent, the hearing in this proceeding was scheduled fewer than 28 days after the date for filing an answer to the complaint. Accordingly, pursuant to Sec. 102.24(b), the General Counsel was required to file his Motion for Summary Judgment "promptly." The General Counsel filed the Motion for Summary Judgment on May 5, a mere 5 days after the Respondent filed its answer. Under these circumstances, we reject the Respondent's contention that the General Counsel's motion was untimely.

[4] The Board's policy in this regard is premised on the notion that, if the time limitations prescribed by Sec. 10(b) foreclose a direct attack on the validity of an employer's recognition of a union—through the filing of unfair labor practice charges alleging a violation of Sec. 8(a)(2) or 8(b)(1)(A)—an employer should not be permitted to attack that recognition indirectly via a defense to an 8(a)(5) charge after the 6-month

recognized union had proffered evidence demonstrating its majority status at the time of recognition is irrelevant. The rule concerning nonconstruction industries is plain: "If an employer voluntarily recognizes a union based solely on that union's assertion of majority status, without verification, an employer is not free to repudiate the contractual relationship that it has with the union outside the 10(b) period, i.e., beyond the 6 months after initial recognition, on the ground the union did not represent a majority when the employer recognized the union." *Oklahoma Installation Co.*, 325 NLRB 741, 742 (1998), enf. denied on other grounds 219 F.3d 1160 (10th Cir. 2000);[5] see *Moisi & Son Trucking*, 197 NLRB 198 (1972). Accordingly, as the Respondent's voluntary recognition of the Union in this case occurred more than 6 months prior to the Union's filing of the first unfair labor practice charge alleging the Respondent's refusal to bargain,[6] we conclude that Section 10(b) bars the Respondent's challenge to its earlier recognition of the Union based on the absence of proof of the Union's majority status.

B. Respondent is Estopped from Challenging its Earlier Voluntary Recognition of the Union

In further agreement with the General Counsel, we conclude that the Respondent additionally is estopped from withdrawing recognition from the Union based on either an absence of proof of majority status at the time of recognition or the alleged inappropriateness of the recognized unit.[7] The principle of equitable estoppel is premised on the notion that a party that obtains a benefit by engaging in conduct that causes a second party to rely on "the truth of certain facts" should not be permitted to later controvert those facts to the prejudice of the second party. See *R.P.C., Inc.*, 311 NLRB 232 (1993). The Board has identified the requisite elements of estoppel as (1) knowledge; (2) intent; (3) mistaken belief; and (4) detrimental reliance. See *Red Coats*, 328 NLRB 205, 206 (1999); *R.P.C.*, supra at 233. In addition, in light of the underlying premise of the estoppel doctrine, the Board also assesses whether the party to be estopped has received a benefit as the result of its actions. See *Red Coats*, supra at 207; *R.P.C.*, supra at 233.

The Board previously has applied the doctrine of estoppel to preclude employer unfair labor practice defenses similar to those proffered by the Respondent in the instant case. See, e.g., *Red Coats*, supra (finding that respondent was estopped from withdrawing recognition from union based on alleged inappropriateness of units, as respondent previously had voluntarily recognized the union as the representative of the challenged units and, in fact, had insisted upon bargaining in the challenged single-location units); *R.P.C.*, supra (finding that the respondent was estopped from withdrawing recognition from union based on a claim that the union had achieved its status as bargaining representative through a flawed affiliation process, as the respondent had recognized and bargained with the union despite its awareness of the affiliation); *Sewell-Allen Big Star*, 294 NLRB 312 (1989), enfd. 943 F.2d 52 (6th Cir. 1991), cert. denied 504 U.S. 909 (1992) (concluding that the respondent was estopped from challenging the validity of merger process as a defense to the allegation that the respondent unlawfully withdrew recognition, as the respondent had continued to deal with the union despite its knowledge of merger). As in those cases, in which the Board found the requisite knowledge and intent in the respondents' acceptance of the events that they later sought to challenge, the requisite knowledge and intent in the instant case is demonstrated by the Respondent's voluntary recognition of the Union as the bargaining representative of the production and maintenance employees.[8] Further, the Respondent's conduct of bargaining with the Union for more than a year prior to its repudiation of the bargaining relationship (via its unilateral actions) surely induced the Union to believe that the Respondent would forgo any subsequent challenge to the propriety of the unit or to the

period has elapsed. See *Sewell-Allen Big Star*, 294 NLRB 312, 313 (1989), enfd. 943 F.2d 52 (6th Cir. 1991), cert. denied 504 U.S. 909 (1992).

[5] As the issue is not relevant to this proceeding, Chairman Battista and Member Schaumber do not pass on the conclusions reached by the Board in *Oklahoma Installation* regarding the type or extent of evidence required to establish a Sec. 9(a) relationship in the construction industry.

[6] The Respondent voluntarily recognized the Union as of August 14, 2001; on September 6, 2002, the Union filed the first of the 8(a)(5) charges that serve as the basis for the consolidated complaint.

[7] As set forth in the complaint, the bargaining unit in this case is defined as follows:

> All production and maintenance employees including textile operators, beam/warp/weaver, rubber workers, fixer and lead operator, employed at Respondent's North Charleston, South Carolina facility; excluding all office clerical employees, professional employees, quality control department employees, guards and supervisors as defined in the Act.

[8] To demonstrate the "knowledge" required for purposes of the estoppel doctrine, it need not be established that the Respondent possessed actual knowledge that the Union in fact represented a majority of the unit employees. "The party to be estopped [need not have] knowledge of all the details or even the bona fides of the event in issue. Rather, to be estopped a party must have had knowledge of an event and have had the opportunity either to accept or refuse to accept the ramifications of that event." *R.P.C.*, supra at 233 fn. 10.

In the instant case, the Respondent clearly had knowledge of the event, i.e., it was the party that extended recognition. And, it had the opportunity (within 6 months) to accept or refuse to accept the legal consequences of that event.

Union's majority status as of the time of recognition. See *Red Coats*, supra at 206; *R.P.C.*, supra at 233. Thus, the Union, acting in reliance on its mistaken belief as to the Respondent's intentions, relied to its detriment on the Respondent's actions. Had the Respondent promptly challenged the propriety of the unit or the Union's majority status, the Union would have been in a stronger position to establish its authority through the Board's processes.[9] See *Red Coats*, supra at 206–207; *R.P.C.*, supra at 233. Finally, as a result of its conduct, the Respondent has obtained the benefit of avoiding potentially costly and time-consuming litigation (or, alternatively, a union organizing campaign), as well as the continued stability of its labor relations. See *Red Coats*, supra at 207. Under these circumstances, "[t]he policies of the Act are not served by allowing the Respondent to use the process of voluntary recognition to gain [a] benefit, only to cast off this process when it does not achieve what it desires in negotiations." Id. Accordingly, we conclude that the Respondent is foreclosed from belatedly contesting the Union's majority status (as of the time of recognition) or the propriety of the recognized unit.

C. The Recognized Unit is an Appropriate One

Further, and in any event, we conclude that the Respondent has failed to demonstrate the existence of a genuine issue of material fact regarding the appropriateness of the recognized bargaining unit as described in the complaint. In the context of an employer's voluntary recognition of a union, as in the instant case, extant precedent provides that the Board's obligation to assess the appropriateness of the bargaining unit under Section 9(b) is limited to a determination that the agreed-upon unit is not inconsistent with the Act or contrary to Board policy. See *NLRB v. Cardox Division* 699 F.2d 148, 155–156 (3d Cir. 1983); *Red Coats*, supra at 207; *Central Washington Hospital*, 303 NLRB 404, 412–413 (1991), enfd. *NLRB v. Universal Health Systems*, 967 F.2d 589 (9th Cir. 1992). Thus, where "where a unit has been agreed to by the parties, and is not prohibited by the statute, such a unit is appropriate under the Act, regardless of whether the Board would have certified such a unit ab initio." *Red Coats*, supra, at 207.

In the present case, the Respondent simply asserts that the recognized unit is inappropriate because the unit description "contains positions that either did not exist in the relevant time period or do not currently exist." Viewing the Respondent's assertion in the light most favorable to it, the assertion fails to reveal the existence of a genuine issue of fact with respect to the "appropriateness of the unit" as defined in the above-described precedent. The asserted fact that certain positions set forth in the unit description did not, and do not, exist does not itself establish the inappropriateness of the unit. Clearly, the Respondent's contention does not suggest that the unit is contrary to the Act or Board policy. Indeed, it is well established that a unit of production and maintenance employees is presumptively appropriate. See *Appliance Supply Co.*, 127 NLRB 319 (1960). Moreover, the Respondent does not allege that the unit improperly includes a classification of employees that the statute or Board policy dictates be excluded (e.g., managerial employees or guards). The Respondent does not even suggest that the unit inappropriately encompasses an individual who lacks a sufficient community of interest with the other unit employees; rather, the Respondent merely asserts that the unit description nominally references one or more positions that do not exist. Under these circumstances, we find that the Respondent's asserted defense fails to reveal the existence of any genuine issue as to the appropriateness of the recognized unit.

D. Respondent's Affirmative Defenses are Without Merit

Having concluded that the Respondent is foreclosed from belatedly contesting the Union's majority status or the propriety of the recognized unit, we turn to the allegation-specific defenses proffered by the Respondent. First, as a defense to the complaint allegation that the Respondent has failed and refused to bargain with the Union since January 16, 2003, the Respondent asserts that a "reasonable period of time" has elapsed since its voluntary recognition of the Union on August 14, 2001.

It is well established that an employer's voluntary recognition of a union gives rise to an irrebuttable presumption that the union possesses majority support; that irrebuttable presumption remains in force for a "reasonable period of time." See *Royal Coach Lines*, 282 NLRB 1037 (1987), enf. denied on other grounds 838 F.2d 47 (2d Cir. 1988); *Keller Plastics Eastern*, 157 NLRB 583 (1966). Upon the expiration of a reasonable period of time, however, the union continues to enjoy a *rebuttable* presumption of majority status. Thus, an employer cannot simply withdraw recognition from a union after a reasonable period of time has elapsed. Rather, an employer may withdraw recognition from the union only if it possesses evidence that the union has in fact lost ma-

[9] Indeed, the Union initially had filed an unfair labor practice charge alleging that the Respondent, as a successor employer, had violated Sec. 8(a)(5) by refusing to recognize the Union as the bargaining representative of the Respondent's production and maintenance employees; the Union withdrew the charge, however, after the Respondent agreed to voluntarily recognize the Union.

jority support. See *Levitz*, 333 NLRB 717 (2001).[10] The Respondent here does not suggest that the Union no longer possesses majority support.

The Respondent additionally asserts that the parties were unable to agree on contract terms, and that such failure to agree "may have risen to the level of impasse." The Respondent cites no facts in support of its conclusory statement, however. Additionally, as noted by the General Counsel, documentary evidence (e.g., a letter dated January 16, 2003, from the Union to the Respondent's counsel) supports precisely the opposite conclusion—that the parties (or, at the least, the Union) were willing to meet and discuss various contract proposals.[11] Accordingly, the Respondent's conclusory assertion does not give rise to a genuine issue of material fact.

With respect to the Respondent's alleged unilateral implementation of a wage increase on July 29, 2002, the Respondent simply contends that the wage increase was consistent with its past practice regarding wage increases at its other operations. The Respondent's assertion in this regard fails to raise any genuine issue of material fact as to whether the Respondent's conduct violated Section 8(a)(5), as the Respondent's past practice *at other facilities* does not serve as a justification for the Respondent's unilateral implementation of a wage increase at the facility at issue here.

Finally, with respect to the alleged unilateral layoff of unit employees, the Respondent contends that its decision was the result of "extreme economic pressures brought on by a flood of imports on the market" and, accordingly, did not violate the Act. It is axiomatic that an employer's decision to lay off employees is a mandatory subject of bargaining; thus, in the absence of an agreed-upon contractual provision on the subject, an employer is obligated to bargain with an incumbent union with respect to both the decision to conduct a layoff and the effects of any such decision. See *Farina Corp.*, 310 NLRB 318, 320 (1993). That an employer's determination to lay off employees is motivated by economic considerations does not relieve an employer of its bargaining obligation. Id. However, if an employer can demonstrate that "economic exigencies" compelled prompt action, the Board will excuse the employer's failure to notify and bargain with the union prior to implementing its decision. See *Bottom Line Enterprises*, 302 NLRB 373 (1991). The Board has characterized the economic exigency exception as a heavy burden, however; thus, the Board has limited its application of the exception to "extraordinary events which are 'an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.'" *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995) (quoting *Angelica Healthcare Services*, 284 NLRB 844, 852–853 (1987)). "Absent a dire financial emergency, the Board has held that economic events such as the loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages do not justify unilateral action." *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995).[12]

Applying these principles to the instant case, the facts asserted by the Respondent—even viewed in the light most favorable to the Respondent—are insufficient to establish the requisite "extraordinary event" necessary to relieve the Respondent of its obligation to notify and bargain with the Union regarding the layoff of unit employees. The Respondent claims that it decided to cease manufacturing textile material as a result of its competitors' sale of the material at a price lower than the cost at which the Respondent could manufacture it and, consequently, that it laid off unit employees "in response to significant competitive pressures." First, as noted above, an employer's operation at a competitive disadvantage does not constitute an "economic exigency." See *RBE*, supra at 81. More significantly, the Respondent does not allege any facts to suggest that the competitive pressures that compelled its action had emerged only recently, or that a "precipitate worsening of [the] situation" necessitated immediate action (such that the Respondent could not have bargained with the Union first). See *Hankins Lumber*, 316 NLRB at 838. Accordingly, the Respondent has not established the existence of a genuine issue of

[10] Alternatively, an employer may file an RM petition if it has a "good faith uncertainty" as to the whether the union at issue possesses majority support. See *Levitz*, supra.

Chairman Battista and Member Schaumber did not participate in *Levitz*, and they express no view as to whether it was correctly decided. Even under pre-*Levitz* precedent, however, the Respondent had no objective basis for doubting the Union's majority status.

[11] The letter was attached to the Motion for Summary Judgment. The Respondent's response does not controvert the letter.

[12] Although the Board additionally has recognized a category of lesser economic exigencies—those that do not rise to the level of an "extraordinary event" relieving an employer of its obligation to bargain entirely, but that nevertheless compel prompt action as the result of an occurrence that was beyond the employer's control—the existence of such lesser exigencies does not excuse an employer's failure to bargain with the union. See *RBE*, supra at 81–82. Rather, the existence of such circumstances merely will allow an employer engaged in contract negotiations to implement a unilateral change after providing notice to the union and bargaining to impasse on the matter proposed for change (as contrasted with an impasse in bargaining for the contract as a whole). Id. at 82.

As it is undisputed that the Respondent in this case did not notify or bargain with the Union regarding the layoffs, the Board need not determine whether the facts as alleged by the Respondent could support a finding of such lesser economic exigencies.

fact warranting a denial of summary judgment on this issue.[13]

For all the foregoing reasons, we conclude that there are no factual issues warranting a hearing in this matter, and that the Respondent's affirmative defenses are inadequate to defeat the General Counsel's Motion for Summary Judgment. Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a New Jersey corporation with a place of business in North Charleston, South Carolina, has been engaged in the manufacture and sale of fabrics and composites for use in thermal insulation and other products. During the 12-month period preceding issuance of the complaint, the Respondent, in the course and conduct of its business operations, purchased and received at its North Charleston facility goods valued in excess of $50,000 directly from points outside the state of South Carolina, and sold and shipped products valued in excess of $50,000 from its North Charleston facility directly to points outside the State of South Carolina. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. We further find that Union of Needletrades Industrial & Textile Employees (UNITE), AFL–CIO, CLC (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Beginning on or about March 8, 2002, the Respondent unilaterally laid off six bargaining unit employees without notifying or bargaining with the Union. In addition, on July 29, 2002, the Respondent unilaterally granted a wage increase to unit employees without notifying or bargaining with the Union. Finally, since on or about January 16, 2003, the Respondent has failed and refused to meet and bargain with the Union as the representative of the unit employees. We find that the Respondent's conduct in this regard violates Section 8(a)(5) and (1) of the Act.

[13] The Respondent has failed to assert any other potential defenses to the allegation that it unilaterally laid off unit employees (e.g., that the layoffs were merely a consequence of a change in the scope or direction of the Respondent's business or other nonmandatory subject of bargaining, see *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981)). Thus, such defenses have been waived.

CONCLUSIONS OF LAW

1. The Respondent, Alpha Associates, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. UNITE is a labor organization within the meaning of Section 2(5) of the Act.

3. At all material times since August 14, 2001, the Union has been the exclusive collective-bargaining representative of the Respondent's employees in the following appropriate unit:

> All production and maintenance employees including textile operators, beam/warp/weaver, rubber workers, fixer and lead operator, employed at Respondent's North Charleston, South Carolina facility; excluding all office clerical employees, professional employees, quality control department employees, guards and supervisors as defined in the Act.

4. By laying off unit employees without first notifying the Union or affording it an opportunity to bargain; by granting a wage increase to unit employees without first notifying the Union or affording it an opportunity to bargain; and by failing and refusing to meet and bargain with the Union since on or about January 16, 2003, the Respondent has violated Section 8(a)(5) and (1) of the Act.

5. The Respondent's actions described above constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order the Respondent to cease and desist from engaging in such conduct, and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent unlawfully withdrew recognition from the Union, we shall order the Respondent to recognize and bargain with the Union in the unit described below with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, to embody such understanding in a signed agreement.

Having found that the Respondent unlawfully granted a wage increase to unit employees on July 29, 2002, without notifying the Union or affording it an opportunity to bargain, we shall order the Respondent, if requested by the Union, to rescind the unilateral wage increase.

Having found that the Respondent unlawfully laid off bargaining unit employees beginning on or about March

8, 2002, without notifying the Union or affording it an opportunity to bargain, we shall order the Respondent to bargain with the Union concerning the layoff decision and its effects. Additionally, we shall order the Respondent to offer reinstatement to employees Melvin Smith, Thomas Kelly, Benjamin Williams, Dorothy Triplett, Thomas Brown, and Andrea Wright, and to make those employees whole for any loss of earnings and other benefits resulting from the unilateral layoffs. See *Wilen Mfg. Co.*, 321 NLRB 1094 (1996); *Farina Corp.*, 310 NLRB 318 (1993); *Lapeer Foundry & Machine*, 289 NLRB 952 (1988). The make-whole order shall include interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent's backpay liability shall run from the date of the layoffs until the date the employees are reinstated to their same or substantially equivalent positions, or have secured equivalent employment elsewhere. Backpay shall be based on the earnings that the employees normally would have received during the applicable period, less any interim net earnings, and shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Finally, for the reasons set forth in *Caterair International*, 322 NLRB 64 (1996), we find that an affirmative bargaining order is warranted in this case as a remedy for the Respondent's unlawful withdrawal of recognition from the Union. We adhere to the view that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." Id. at 68.

In several cases, however, the U.S. Court of Appeals for the District of Columbia Circuit has required that the Board justify, on the facts of each case, the imposition of such an order. See, e.g., *Vincent Industrial Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Bldg. Material v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent*, the court stated that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." *Vincent*, 209 F.3d at 738.

We have examined the particular facts of this case as the D.C. Circuit requires, and we find that a balancing of the three factors warrants an affirmative bargaining order.[14]

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the Respondent's refusal to recognize and bargain with the Union. At the same time, an affirmative bargaining order does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation because its duration is only temporary.

Moreover, we have found that, in addition to its refusal to meet and bargain with the Union, the Respondent has committed several other violations of the Act. Indeed, less than 7 months after its voluntary recognition of the Union, the Respondent unilaterally laid off bargaining unit employees and granted a wage increase to unit employees without bargaining with the Union. By this conduct, the Respondent undermined the Union's opportunity effectively to bargain. As the Union was never given a truly fair opportunity to reach an accord with the Respondent, it is only by restoring the status quo ante and requiring the Respondent to bargain with the Union for a reasonable period of time that the employees will be able to fairly assess for themselves the Union's effectiveness as a bargaining representative.

(2) An affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent's incentive to delay bargaining in the hope of discouraging support for the Union. It also ensures that the Union will not be pressured by the Respondent's withdrawal of recognition to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order.

(3) A cease-and-desist order, without a temporary decertification bar, would be inadequate to remedy the Respondent's refusal to bargain with the Union because it would permit a decertification petition to be filed before the Respondent has afforded the employees a reasonable time to regroup and bargain through their representative in an effort to reach an initial collective-bargaining agreement. Such a result would be particularly unfair in

[14] In *Caterair International*, supra, the Board disagreed with the case-by-case analysis required by the D.C. Circuit. Chairman Battista and Member Schaumber do not agree with the view expressed in *Caterair International*, supra, that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) violation." They agree with the District of Columbia Circuit Court of Appeals that a case-by-case analysis is required to determine if the remedy is appropriate. See *Saginaw Control & Engineering*, 339 NLRB 541, 546 fn. 8 (2003). They recognize, however, that the view expressed by the Board in *Caterair International*, supra, is extant Board law.

circumstances such as those here, where the Respondent's other unfair labor practices were serious unilateral actions that were likely to have a continuing effect, thereby tainting employee disaffection from the Union arising during that period or immediately thereafter. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who might oppose continued union representation.

For all the foregoing reasons, we find that an affirmative bargaining order, with its temporary decertification bar for a reasonable period of time, is necessary to fully remedy the Respondent's unlawful refusal to bargain with the Union in this case.

ORDER

The National Labor Relations Board orders that the Respondent, Alpha Associates, North Charleston, South Carolina, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the following appropriate unit:

> All production and maintenance employees including textile operators, beam/warp/weaver, rubber workers, fixer and lead operator, employed at Respondent's North Charleston, South Carolina facility; excluding all office clerical employees, professional employees, quality control department employees, guards and supervisors as defined in the Act.

(b) Granting a wage increase to unit employees without first providing adequate notice to the Union and affording it a meaningful opportunity to bargain with respect to such change.

(c) Laying off unit employees without first providing adequate notice to the Union and affording it a meaningful opportunity to bargain over the decision and its effects.

(d) 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.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of unit employees with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) If requested by the Union, rescind the wage increase unlawfully granted to the unit employees through the Respondent's unilateral action; provided, however, that nothing in this Order shall be construed as requiring the Respondent to rescind the wage increase unless the Union requests such action.

(c) On request, bargain with the Union concerning its decision to lay off unit employees beginning on March 8, 2002, and the effects of that decision.

(d) Within 14 days of this Order, offer Melvin Smith, Thomas Kelly, Benjamin Williams, Dorothy Triplett, Thomas Brown, and Andrea Wright full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

(e) Make Melvin Smith, Thomas Kelly, Benjamin Williams, Dorothy Triplett, Thomas Brown, and Andrea Wright whole for any loss of earnings and other benefits they suffered as a result of the Respondent's unlawful layoffs in the manner set forth in the remedy section of this decision.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its North Charleston, South Carolina facility copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps should be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former

[15] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted By Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employees employed by the Respondent at any time since March 8, 2002.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to meet and bargain with the Union of Needletrades, Industrial & Textile Employees (UNITE), AFL–CIO, CLC, as the exclusive representative of our employees in the following appropriate unit:

All production and maintenance employees including textile operators, beam/warp/weaver, rubber workers, fixer and lead operator, employed at Respondent's North Charleston, South Carolina facility; excluding all office clerical employees, professional employees, quality control department employees, guards and supervisors as defined in the Act.

WE WILL NOT unilaterally grant a wage increase, or unilaterally change any other term or condition of your employment, without notifying and affording the Union an opportunity to bargain about such matters.

WE WILL NOT unilaterally lay off unit employees without notifying and affording the Union an opportunity to bargain about such matters.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain with Union of Needletrades, Industrial & Textile Employees (UNITE), AFL–CIO, CLC, and put in writing and sign any agreement reached on terms and conditions of employment for you.

WE WILL, if requested by the Union, rescind the wage increase granted to you.

WE WILL, on request, bargain with the Union concerning the decision to lay off unit employees, and the effects of that decision.

WE WILL offer to Melvin Smith, Thomas Kelly, Benjamin Williams, Dorothy Triplett, Thomas Brown, and Andrea Wright full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

WE WILL make the above-referenced employees whole for any loss of earnings or other benefits they suffered as a result of the unlawful conduct found in this case, with interest.

ALPHA ASSOCIATES