

**United Steelworkers of America AFL–CIO–CLC,
Local #7912 and U.S. Tsubaki, Inc., automotive
division.** Case 1–CB–9680

September 25, 2002

DECISION AND ORDER

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

On May 9, 2001, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent Union filed exceptions and a supporting brief. The Charging Party Employer filed a brief in support of the administrative law judge's decision and the General Counsel filed an answering brief to the Respondent's exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, as further explained below, and to adopt the recommended Order.

The judge found that the Respondent violated Section 8(b)(3) of the Act when it refused the Employer's requests, on and after June 20, 2000, to negotiate a collective-bargaining agreement for a unit of automotive division employees at the Employer's Chicopee, Massachusetts facility. The Employer had relocated these employees in 1996 from its Holyoke, Massachusetts facility, where they had been represented by the Union as part of a larger bargaining unit. Pursuant to a unit clarification petition filed by the Employer, the Board found that the relocated employees constituted a separate appropriate unit in which the Union retained its representative status. *U.S. Tsubaki, Inc.*, 331 NLRB 327 (2000).

The Board's final determination reversed a May 1997 decision by the Board's Regional Director for Region 1. After the Regional Director's decision, the parties executed a new collective-bargaining agreement, effective from October 1, 1997, to September 30, 2001, covering the original Holyoke unit, including the relocated Chicopee employees. During these negotiations, the Respondent refused the Employer's requests to bargain for separate units. The Employer therefore agreed to a single contract for a single unit, but it communicated its refusal to waive pursuit of its request for Board review and reversal of the Regional Director's decision.

After the Board issued its Decision on Review, reversing the Regional Director and clarifying the original unit by finding a separate Chicopee plant unit appropriate, the Employer again requested bargaining for a contract covering this separate unit. The Respondent refused. In defense of this refusal, it has consistently maintained that it had no obligation to bargain for a separate contract

covering the newly clarified Chicopee unit until the 1997–2001 contract expired.

For the reasons set forth below and in the judge's decision, we find no merit in the Respondent's exceptions. We hold that when the Board finds a group of relocated employees to be a separate appropriate unit, an existing collective-bargaining agreement covering those employees in their original bargaining unit does not apply, absent explicit agreement by the employer and union that it should continue to apply. There was no such agreement here. Accordingly, we affirm the judge's finding that the Respondent violated Section 8(b)(3) by refusing to bargain for the new unit.

Although the Board has never addressed the precise issue presented here, the result follows from precedent establishing and applying unit clarification principles in the context of a group of employees relocated to another facility from an existing bargaining unit.¹ In *Gitano Distribution Center*, 308 NLRB 1172 (1992), the Board held that when an employer transfers some of its represented employees at one location to a new location, there is a rebuttable presumption that the relocated employees constitute a separate appropriate unit at their new facility.

In a footnote to *Gitano* (at 1175 fn. 21), the Board stated, in relevant part:

The issue of whether an existing contract would be applicable to the new facility is not before us in the present case. However, if the new facility is a separate unit, it would appear that the contract would not apply, without an agreement that it would apply. See *Kroger Co.*, 219 NLRB 388 (1975).

In *Armco Steel Co.*, 312 NLRB 257 (1993), the Board held that it would give full effect to the *Gitano* analysis in unit clarification proceedings to determine what bargaining unit or units exist after an employer's reorganization resulting in the relocation of employees. Accordingly, the Board rejected the contention that *Gitano* limited unit clarification proceedings to a determination of the inclusion or exclusion of relocated employees vis-à-vis the historical unit from which they came. Instead, the Board permitted the further determination of whether relocated employees, together with any new employees, would constitute a separate appropriate bargaining unit. 312 NLRB at 259.

¹ This case is distinguishable from a situation where the employer relocates an entire store to a new location, rather than just a portion of the employees. In the case of an entire store relocation, an employer must apply an existing contract to a new facility if the operations are substantially the same at the new location and the transferees from the old facility constitute a substantial percentage of the employees at the new facility. See *King Soopers, Inc.*, 332 NLRB 32 (2000), enf'd, 254 F.3d 738 (8th Cir. 2001).

In *Armco*, the Board expressly recognized the above-quoted footnote from *Gitano* as relevant to its analysis. *Id.* Thus, in both *Gitano* and *Armco*, although the Board did not squarely face the issue of whether an existing contract would apply to a new separate unit of relocated employees, it strongly suggested that it would not. Furthermore, there is other precedent supporting the proposition that a collective-bargaining agreement executed during the pendency of a representational matter before the Board may no longer apply when that issue is resolved. In *RCA Del Caribe*, 262 NLRB 963 (1982), the Board determined the obligations of parties who are negotiating for a collective-bargaining agreement when a rival union files a representation petition seeking to oust the incumbent union. The Board held that in such a situation the employer is required to continue bargaining with the incumbent union pending the outcome of the election, but that any contract executed would become null and void in the event that the incumbent union is displaced as representative of the bargaining unit. 262 NLRB at 965. See also *Wayne County Neighborhood Legal Services*, 333 NLRB 146, 148 fn. 10 (2001). The Board recognized that such continued recognition promotes stability in industrial relations without frustrating employee free choice. See *RCA Del Caribe*, 262 NLRB at 965.

In this case, the Employer's decision to bargain with the original unit while pursuing its request for review by the Board was the option least disruptive to the bargaining process. Upon the Union's request for bargaining following the Regional Director's decision that the relocated employees did not constitute a separate unit, the Employer had three options: (1) refuse to bargain and risk facing an unfair labor practice charge; (2) bargain and abandon its position that the relocated employees constituted a separate unit; or (3) bargain with the original unit while preserving its right to request review. The first choice would have delayed bargaining *even as to the undisputed continuing historical Holyoke unit* until the Board's resolution of the unfair labor practice charge and/or the Employer's request for review. The second option would have resulted in the Employer's forfeiture of its lawful, and ultimately successful, request for review in the unit clarification case. Under these circumstances, we cannot fault the Employer for choosing the third option—bargaining with the Union's original unit while pursuing its lawful appeal—as this option was certainly most beneficial to industrial relations. See *Show Industries*, 326 NLRB 910, 912 (1998) (employer's offer to bargain only over effects of plant closure while challenging unit certification was not unlawful).

Our colleague asserts that there is no policy basis for the result that we reach. We suggest that the policy basis

is Section 9 of the Act. The parties to a bargaining relationship are obligated to bargain *in an appropriate unit*. As of June 2000, it was clear that Chicopee was a separate appropriate unit. Thus, the Employer thereby acquired a right to bargain in that unit. The issue is whether the Employer intended to postpone the effectuation of that right until the end of the contract. The only showing of such an intent was the Employer's contractual recognition of the Union in a two-plant unit. However, this contractual recognition was granted at a time when the extant decision (of the Regional Director) ruled that there was a two-plant unit. The Employer told the Union that its agreement to the contract was not intended as a waiver of its right to contest the Regional Director's decision. In these circumstances, it has not been shown that the Employer intended to postpone, for any time, the effectuation of its right to bargain in a separate Chicopee unit, should it prevail before the Board.

We have no quarrel with our dissenting colleague's view that employees, through their union representative, have the right to agree with an employer to a bargaining unit that may not conform to the scope of the initially certified or recognized unit. That is not what happened in this case.

The Regional Director, by denying the Employer's petition for clarification, effectively defined the two-plant unit, including the relocated employees, as *the established unit*. The Employer then filed a request for review. From the Employer's perspective, its best legal alternative was to agree to the Union's demand to bargain in the two-plant unit unless and until the Board ruled favorably on the request for review. From the Union's perspective, it was continuing to bargain on behalf of all employees in the initial unit. Consequently, the parties' new contract for a two-plant unit was not the product of any voluntary mutual agreement to vary the scope of the extant unit.

Such an agreement would have been manifest if the parties had included in their new contract a provision expressly agreeing to continue its coverage for the two-plant unit even if the Board found that a separate Chicopee unit was appropriate. They did not do so. To the contrary, although we find it was not obligated to do so, the Respondent clearly communicated that it would seek bargaining in a separate Chicopee unit if, as ultimately occurred, the Board found a separate unit appropriate.

White-Westinghouse, 229 NLRB 667, 672 (1977), cited by the dissent, is distinguishable. In that case, unlike here, the union and the predecessor employer mutually agreed to merge separately certified single plant units into a multiplant unit, effectively destroying the

separate identity of the initial units. The respondent successor agreed to continue the established unit by assuming the existing multiplant agreement.

In sum, we cannot agree with the Respondent's position in this case. If we were to adopt the view that it had no obligation to bargain about a new contract for the Chicopee unit until the 1997–2001 contract for the Holyoke unit expired, we would undermine the utility of the unit clarification process as a means for applying the *Gitano* analysis. Indeed, for the duration of any extant bargaining agreement in the historical unit, the Respondent's view would deny relocated employees in a newly-clarified separate unit the full benefit of the separate collective-bargaining representation to which they are entitled, even if that agreement has years yet to run.

Based on the foregoing, we find that the statutory policy of maintaining labor relations stability is far better served by requiring immediate bargaining, upon request, for a collective-bargaining agreement in the newly clarified separate Chicopee unit. We therefore affirm the judge's conclusion that the Respondent violated Section 8(b)(3) by refusing the Employer's request for such bargaining.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, United Steelworkers of America, AFL–CIO–CLC, Local #7912, Holyoke and Chicopee, Massachusetts, its officers, agents, and representatives, shall take the action set forth in the Order.

MEMBER LIEBMAN, dissenting.

As the majority acknowledges, this case presents an issue of first impression. I would frame that issue this way:

When a party seeking to clarify a two-plant bargaining unit into separate units agrees to a collective-bargaining agreement covering the original unit, will the Board give effect to the agreement, after it subsequently clarifies the unit as sought, resulting in two separate units?

“The object of the National Labor Relations Act is industrial peace and stability, fostered by collective-bargaining agreements” *Auciello Iron Works v. NLRB*, 517 U.S. 781, 785 (1996). Here, that object is best promoted by giving effect to the parties' agreement. My colleagues apparently would agree, but only if the agreement is clear and unequivocal in stating that it will continue to apply, notwithstanding the Board's subsequent unit clarification. I see no basis, either in the Board's earlier decisions or in the policies of the Act, for imposing this requirement.

Facts

The essential facts are these: Originally, the Employer operated two divisions (the roller chain division and the automotive division) at a single facility in Holyoke, Massachusetts. Employees in both divisions were represented by the Union in a single bargaining unit, covered by the same collective-bargaining agreement. In November 1996, the Employer moved the automotive division to Chicopee, Massachusetts.

After the Union rejected the Company's request to bargain separately with respect to the two divisions, the Employer filed a unit clarification petition with the Board in February 1997. It sought to divide the bargaining unit into two separate units, one covering the Holyoke employees and the other covering the Chicopee employees. In May 1997, the Board's Regional Director dismissed the petition. The Employer requested the Board's review.

While that request was pending, the Employer and the Union reached a new collective-bargaining agreement, effective from October 1997 through September 2001, which covered both the Holyoke and the Chicopee employees (the original bargaining unit). The Employer made clear during negotiations that it would continue to pursue its appeal of the Regional Director's decision on unit clarification. But the new agreement did not provide that it would become ineffective or would otherwise be modified, if the Board ruled in the Employer's favor.

In June 2000, during the term of the agreement, the Board reversed the Regional Director. *U.S. Tsubaki, Inc.*, 331 NLRB 327 (2000). Applying *Gitano Distribution Center*, 308 NLRB 1172 (1992), the Board found, as the Employer had requested, that two separate bargaining units were appropriate. It also found that the Union continued to represent the employees in both units, because the Chicopee employees were transferees from the original unit. The Board's decision did not address the continuing effect of the parties' collective-bargaining agreement.

Following the Board's decision, the Employer—who viewed the decision as nullifying the parties' agreement—sought to bargain with the Union for a new contract covering the Chicopee employees. The Union refused, citing the existing agreement. The Employer filed an unfair labor practice charge, and these proceedings followed.

Analysis

The majority holds that “when the Board finds a group of relocated employees to be a separate appropriate unit, an existing collective-bargaining agreement covering those employees in their original bargaining unit does not apply, absent express agreement by the employer and

union that it should continue to apply.” Neither the doctrinal basis for this holding, nor the policies it serves, are clear to me.

What does seem clear, in contrast, are its destabilizing effects. The Board consistently has recognized the need to avoid disrupting a bargaining relationship by clarifying a bargaining unit during the term of a contract.¹ Here, of course, the unit was clarified, and the issue is when the clarification becomes operative. On balance, industrial stability is better served by respecting the agreement for its duration and by requiring bargaining for a new agreement covering the clarified unit only afterwards. The majority identifies no persuasive, countervailing considerations. I address the majority’s arguments in turn.

1. The majority argues that its holding follows, in part, from the Board’s decisions in *Gitano*, supra, and *Armco Steel Co.*, 312 NLRB 257 (1993). As the majority acknowledges, however, those decisions did not resolve the issue presented here. Neither case involved the division of a single bargaining unit into two separate units, each comprising only employees who had always been union represented.

In *Gitano*, the employer had transferred union-represented employees to a new facility at which workers were *not* represented. The union’s majority status thus was an issue, and the Board was required to balance the statutory rights of transferred employees and the rights of employees already working at the new facility. The Board held that (1) it would apply a rebuttable presumption that the unit at the new facility was a separate appropriate unit; and (2) if the presumption was not rebutted, it would apply a “fact-based majority test” to determine whether the employer was required to recognize the union. 308 NLRB at 175.

In *Armco Steel*, in turn, the union sought to clarify a bargaining unit (the salaried employees unit) at one facility to include certain job classifications that had once been within the unit, but which had since been moved to a different facility, where employees historically had been excluded from the unit. The Board held that, applying *Gitano*, a unit clarification proceeding was available to decide not only whether the relocated employees could be included in the salaried unit, but also whether some other existing unit could include them. 312 NLRB at 259.

Citing a footnote in *Gitano*, which was then quoted in *Armco Steel*, the majority observes that “although the Board did not squarely face the issue of whether an exist-

ing contract would apply to [a] separate unit of relocated employees, it strongly suggested that it would not.” The *Gitano* footnote states:

The issue of whether an existing contract would be applicable to the new facility *is not before us in the present case*. However, if the new facility is a separate unit, it would appear that the contract would not apply, without an agreement that it would apply. See *Kroger Co.*, 219 NLRB 388 (1975).

308 NLRB at 1175 fn. 21 (emphasis added).² As a review of the decisions demonstrates, neither *Gitano* nor *Armco Steel* provides guidance here. No issues concerning the union’s majority status are implicated in this case. The union undisputedly had the authority to represent employees at both the Holyoke and the Chicopee facilities. And the agreement reached by the employer and the union undisputedly covered employees at both facilities. Read literally, moreover, the *Gitano* footnote actually undercuts the majority’s position: there *was* an agreement in this case that the contract would apply to both facilities, which was reached after the unit clarification issue had been joined. In any case, the majority never explains how the principles applied in *Gitano* or *Armco Steel* lead to the result reached here.

2. The majority’s position is not based solely on those two decisions. It also cites *RCA Del Caribe*, 262 NLRB 963 (1982), which held that a contract executed with an incumbent, when a rival union has filed a representation petition, will become null and void if employees select the rival. That rule was based on the policy of protecting employee free choice. Clearly, this policy does not come into play here, where the Union’s continued status as bargaining representative was not challenged.³

In summarizing its holding, the majority asserts that giving effect to the agreement “would deny relocated employees in a newly clarified separate unit the full benefit of the separate collective-bargaining representation to which they are entitled,” at least during the agreement’s term. That assertion, however, ignores the fact that the Chicopee employees were already represented by the Union in reaching the agreement. There is no suggestion that the Union lacks majority support among Chicopee employees or that it violated its duty of

² The decision cited in the *Gitano* footnote, *Kroger Co.*, involved a collective-bargaining agreement in which the employer, a grocery store chain, agreed to recognize the union as the representative of employees in stores added to the division in which the union already represented employees. The Board enforced the agreement, after imposing the condition that the union prove its majority status in a newly added store.

³ See *Harte & Co.*, 278 NLRB 947, 950 (1986) (considerations addressed in *RCA Del Caribe* not applicable when employer and union agree to extend collective-bargaining agreement to new facility that represents relocation of existing operation).

¹ See, e.g., *Edison Sault Electric Co.*, 313 NLRB 753 (1994) (Board will not entertain unit clarification petition during contract term, if petitioner did not reserve right to file petition, during bargaining).

fair representation with respect to those employees. Nullifying the agreement at the Employer's request, and over the Union's objection, strikes me as a dubious way to promote employees' Section 7 rights.⁴ More important, nullifying the agreement means that the Chicopee employees lose the "fruits of their collective activity," a factor the Board has weighed heavily in holding that an employer must apply an existing contract to a relocated plant in circumstances comparable to those here. *Rock Bottom Stores*, 312 NLRB 400, 402 (1993). It cannot be that employees' statutory interests must be destroyed in order to save them.

Insofar as it invokes the policies underlying Section 9 of the Act, moreover, my colleagues' position is internally inconsistent in relying on both the purported right of the Employer to bargain in separate units and the purported right of employees to representation in separate units. If the right of employees is implicated here, then the Employer's willingness to postpone bargaining in separate units until the end of the contract should not be given effect—although my colleagues would do that, if the parties' intent were clear. In any case, it seems to me that employees who have chosen a union as their bargaining representative have delegated to the union the authority to negotiate on their behalf, including to agree to a bargaining unit that may not conform to the scope of the initial unit. Accord: *White-Westinghouse Corp.*, 229 NLRB 667, 672 (1977).⁵ Here, the Board's unit clarification decision did not state that Chicopee could not be part of a larger, agreed-upon unit, at least for the duration of the pending agreement.

3. Next, the majority seems to argue that because the Employer's course of conduct here—bargaining with the original unit, while pursuing unit clarification before the Board—avoided disruptions in bargaining at an earlier point in time, it would be unfair to give effect to the collective-bargaining agreement now.

The majority's position is mistaken. Giving effect to the agreement, *for its duration*, does not (indeed *did not*) prevent the Employer from pursuing unit clarification and from ultimately enjoying the benefit of the Board's ruling, when the agreement expires (as it apparently has).

Nor was the Employer foreclosed, as a legal matter, from taking advantage of the unit clarification during the

term of the agreement—had it negotiated with the Union to do so. The Employer could have insisted that the agreement provide for the possibility that the Board would clarify the unit, by (for example) including a re-opener provision triggered by the Board's ruling. Alternatively, the Employer could have insisted on an agreement of shorter duration (as opposed to a 4-year term, which insured that the Board's decision would issue mid-term). The Employer took neither step.

That executing the agreement when the Employer did may have avoided economic disruption is not an argument for inviting disruption later. The majority's approach is inconsistent with the "fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract." *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970).

4. Finally, the majority suggests that permitting the Union to refuse to bargain would "undermine the utility of the unit clarification process." I disagree. As I have pointed out, the Employer here will enjoy the benefit of the process; it is simply a matter of time. Here, it was proper to entertain the Employer's unit clarification petition, even during the life of the contract, because the Employer clearly reserved its right to pursue unit clarification. But it is quite another thing to allow the Employer to escape its agreement with the Union on the basis of the subsequent unit clarification, when the agreement itself contains no escape clause. In that situation, the employer has effectively agreed to the unit definition, for the duration of the contract.

For all of these reasons, I would hold the Employer to its agreement, and I accordingly would find that the Union has not violated Section 8(b)(3) in refusing to bargain separately in the Chicopee unit.

Tom Morrison Esq., for the General Counsel.

Warren Pyle, Esq., for the Union.

Martin P. Marta, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in Boston, Massachusetts, on April 16, 2001. The charge and amended charges were filed on August 31, 2000, and September 14, 2000. The complaint was issued on January 25, 2001, and alleged as follows:

1. That until November 1996 the Employer recognized the Union in the following unit:

All full-time and regular part-time production and maintenance employees, group leaders, and watchmen employed at the Employer's 821 Main Street, Holyoke, Massachusetts location, but excluding office clerical employees, technical and professional employees, guards, supervisors as defined in

⁴ See, e.g., *Auciello Iron Works*, supra, 517 U.S. at 791 ("The Board is . . . entitled to suspicion when faced with an employer's benevolence as its workers' champion against their certified union.").

⁵ The majority contrasts *White-Westinghouse*, supra, to this case, by arguing that here, there was no agreement to bargain in a two-plant unit. Of course, there was such an agreement: the Employer signed a collective-bargaining agreement after the separation of the business into two facilities and after filing a unit clarification petition—that covered both locations in a single bargaining unit.

professional employees, guards, supervisors as defined in the Act, and all other employees.

2. That in November 1996, the Employer moved its automotive division from its Holyoke location to its Chicopee location.

3. That on June 13, 2000, the Board, at 331 NLRB 327, issued an Order clarifying the unit described above by establishing two separate units as follows:

All full-time and regular part-time production and maintenance employees, group leaders, and watchmen employed at the Employer's 106 Longsack Drive, Chicopee, Massachusetts location, but excluding office clerical employees, technical and professional employees, guards, supervisors as defined in the Act, and all other employees (automotive division unit.)

All full-time and regular part-time production and maintenance employees, group leaders, and watchmen employed at the Employer's 821 Main Street, Holyoke, Massachusetts location, but excluding office clerical employees, technical and professional employees, guards, supervisors as defined in the Act, and all other employees (roller chain division unit.)

4. That the most recent collective-bargaining agreement between the company and the Union has a term effective from October 1, 1997, to September 30, 2001.

5. That since August 29, 2000, the Employer has requested the Respondent to meet and bargain collectively with the Employer for a new collective-bargaining agreement for the automotive division unit.

6. That since August 29, 2000, the Respondent Union has failed and refused to bargain with the Employer for a new collective-bargaining agreement for the automotive division unit.

FINDINGS OF FACT

I. JURISDICTION

The parties agree and I find that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

The Union has represented employees in a plant in Holyoke, Massachusetts, since about 1979 when the facility was owned by Acme Chain Corporation. The present Employer, U.S. Tsubaki, purchased the assets of that facility in 1989 and continued to employ the same employees. At the same time, it recognized the Union as the collective-bargaining representative of these employees.

U.S. Tsubaki is an Illinois corporation with facilities located throughout the United States. At some point in 1990, it began an automotive division at the Holyoke location whereby it produced timing chains for automakers. Although this was a different product, the employer and the Union covered this set of employees within the overall Holyoke bargaining unit. As a consequence, three successive collective-bargaining agreements were executed which treated the employees of the two divisions as a single bargaining unit covered by the same contract.

In November 1996, the Company moved the automotive division to Chicopee, Massachusetts, which was about 5 miles away from the Holyoke plant. This move was made because of increased automotive business. At the time, the Company requested that the Union agree to sever the bargaining units and to bargain regarding the moved automotive division as a separate unit. The Union refused. At the time of the move, and the request, the parties were in the midterm of a collective-bargaining agreement that was effective from July 3, 1994, to September 30, 1997.

On February 26, 1997, the Company filed a unit clarification petition in Case 1-UC-710 which essentially sought to have the Board modify the existing bargaining unit by severing the existing unit into two separate unit, one comprising the Holyoke facility employees, and the other the automotive employees located in Chicopee.

On May 23, 1997, the Regional Director for Region 1 issued a Decision and Order which dismissed the petition. She concluded that there was insufficient reason to disturb and modify the existing collective-bargaining unit. The Company filed a request for review with the Board seeking to reverse the Regional Director's decision.

In late spring or summer 1997, and while the request for review was pending, the parties entered into negotiations for a new collective-bargaining agreement. Once again the Company requested that that the Union bargain for two contracts covering each set of employees separately. The Union refused and notwithstanding the pending unit clarification proceeding, the Company executed a new single contract covering both plants. In this regard, the Company's representative stated that it entered into the new agreement, rather than waiting for the Board to make a decision in the UC matter, because it did not want to face a strike.¹ Notwithstanding the fact that the Company executed a new contract covering both sets of employees, it notified the Union orally and in writing, that it was not waiving or withdrawing its intention of pursuing relief via the unit clarification petition. The new contract ran from October 1, 1997, to September 30, 2001.

On June 13, 2000, the Board issued a Decision and Order, reversing the Regional Director. In essence, the Board ordered that the preexisting unit be split into two separate units, one for the Holyoke plant employees and the second for the automotive division employees located in Chicopee, Massachusetts.

On June 20, 2000, Company Attorney Martin P. Marta called Union Representative Lowell Alexander and asked for a meeting to discuss the NLRB's decision in the unit clarification case. In a confirming letter, Marta stated that "in the meantime, and without waiving any of the rights of the Company or either Division, the Divisions have each decided to follow and abide by the existing collective-bargaining agreement . . . until further notice."

In July 2000, and again in August, Marta called Alexander in an effort to set up a meeting to discuss the effect of the unit

¹ Given the fact that the Regional Director had dismissed the company's unit clarification petition, the Company would have run the risk of (1) facing an 8(a)(5) complaint if it insisted on bargaining on a two unit basis and (2) having any strike be adjudged an unfair labor practice strike.

clarification order. On August 8, 2000, the parties agreed to meet on August 29.

On August 29, 2000, representatives of the Union met with the Company. At this meeting, Marta stated that the Company wanted to start bargaining for a new contract covering the automotive division inasmuch as it was his opinion that the Board's unit clarification order essentially nullified the existing contract insofar as the automotive division employees were concerned. He also argued that when the parties commenced such bargaining, the Company did not want the Union to appoint to its bargaining committee, employees who were employed at the Holyoke plant. The Union's counsel, Warren Pyle, responded that inasmuch as there was, in existence, a collective-bargaining agreement covering the automotive division employees, and since that agreement was not set to expire until September 30, 2001, the Union had no obligation to bargain for a new contract covering that unit. He did state that the Union might consider voluntary bargaining for a new contract, if the contract for both units was opened up, in which case, the Union would be making new demands for both units. The Company rejected this possibility. The bottom line, however, as far as the Union was concerned was that it did not recognize any obligation to bargain with respect to the Chicopee plant until the extant contract expired.

The present charge was filed on August 31, 2000, and on September 5, 2000, Marta wrote to the Union as follows:

As you know, the Company's position is that the 1999-2001 collective-bargaining agreement . . . is not bidding on the automotive division and the Company has filed an unfair labor practice charge because the Union has refused to bargain for a new agreement. This is to notify you that, in the interest of maintaining a good working relationship with your Union and in order to maintain stability and security for employees and the company, the Company will continue to apply the provisions of the Agreement at the automotive division until further notice. In so doing, the Company is not waiving any of its rights but, instead, is voluntarily choosing to continue to apply the Agreement for an indefinite time. In the event the Company intends to discontinue applying all or any portion of the Agreement, it will give the Union at least one week's written notice

On January 9, 2001, soon after the Regional Director made a decision to issue an 8(b)(3) complaint against the Union, Pyle wrote to Marta as follows:

I have conferred with my clients and we are prepared to meet with you and the U.S. Tsubaki representatives to seek a resolution of the issues concerning the company's request that a new agreement be negotiated for the automotive division in light of the determination of the Regional Director to issue a complaint. Steelworkers is not agreeing to bargain a new agreement and it maintains its position that the current agreement remains in effect as negotiated for its terms. But Steelworkers will meet with the company and explore practical and creative ways to satisfy the needs of the parties and to avoid litigation.

On January 12, 2001, Marta responded and rejected Pyle's suggestion as representing no difference from the Union's position back on August 29. The letter also advised that absent negotiations, the Company reserved the right to make changes in the terms and conditions of the automotive division employees.

Thereafter, on January 16, 2001, Union Attorney Pyle wrote to Marta and stated inter alia,

United Steelworkers does not agree with the company's contention that the agreement covering both divisions, negotiated and signed after the relocation of the automotive division, is somehow null and void merely because the National Labor Relations Board has ruled that the two divisions are separate bargaining units. The union is willing to discuss the issues arising out of the clarification of certification, including the company's request for separate agreements to replace the current agreement. But the union is not prepared to enter such discussions on the basis that the current agreement is not effective in the automotive division. The union will take appropriate action if the company makes unilateral changes in the terms and conditions of the agreement.

On January 17, 2001, Marta replied and reiterated the positions that the parties had taken from August 29, 2000, to the date of the letter. The Company reasserted its view that the Board's decision clarifying the unit did, as a matter of law, nullify the existing collective-bargaining agreement but only insofar as the employees in the automotive division and that it wanted to commence bargaining separately with the Union for this unit.

As no meeting of the minds ever took place, the Regional Director issued the instant complaint.²

III. ANALYSIS

In my opinion, this case is analogous to testing of certification cases. That is, those cases where a union is certified after an election and the employer wishes to test the validity of the Board's unit determination by refusing to bargain.

In the present case, the Employer, instead of engaging in self-help by refusing to bargain, utilized the Board's processes in order to clarify the bargaining unit. Initially, the Regional Director dismissed the Employer's petition and the Employer requested review. While that matter was pending, the existing contract came up for negotiation and the Employer agreed to the Union's insistence that bargaining be conducted on the existing two plant unit basis.

While, the Union asserts that the Employer's bargaining was consensual, this is not exactly the case. This is because the Employer was, at the time, faced with the Regional Director's conclusion that the existing two plant unit was appropriate and if it insisted, as a condition of reaching agreement, that the units be severed, it would have run the risk of facing a refusal to bargain complaint and a potential finding that any strike would

² It is noted that the Union filed an 8(a)(5) charge against the Company alleging, in substance, that the Company was, in effect, abrogating the existing contract insofar as the automotive division in Chicopee, Massachusetts. That charge was neither dismissed nor withdrawn and apparently is pending at the Advice Section of the General Counsel's office awaiting decision in the present case.

have been an unfair labor practice strike. Thus, at the time of bargaining, as the Board had not yet decided if it would accept the request for review, the employer ran substantial legal and practical risks if it placed its bets on what the Board might do in the future.

There does not seem to be any statutory provision or case law directly on point. The General Counsel and the Charging Party rely on such cases as *Gitano Distribution Center*, 308 NLRB 1172 fn. 21 (1992); *Armco Steel Co.* 312 NLRB 257 (1993); and *Kroger Co.*, 219 NLRB 388 (1975). But as the Respondent points out, none of these cases directly holds that after a unit clarification petition, the existing contract, insofar as any newly created unit, should be rendered nugatory.

The General Counsel analogizes this case to *RCA Del Caribe*, 262 NLRB 963 (1982), where the Board held that in the face of an election petition by a rival union, an employer is still required to continue to bargain with an incumbent union, but that any contract executed will become null and void in the event that the incumbent union is displaced.³

The Respondent contends that notwithstanding the unit clarification proceeding, the Employer voluntarily entered into a contract for the historical two plant unit and that the Board has no authority to vacate or nullify that contract during its term. Citing *H. K. Porter v. NLRB*, 379 U.S. 99 (1970); *Machinists Lodge 91 v. United Technologies Corp.*, 87 F.Supp.2d 116, 134 (D.Conn. 2000), affd. 230 F.3d 569 (2d Cir. 2000); and *NLRB v. American National Insurance Co.*, 343 U.S. 395 (1952).

In my opinion, the Board, when it clarified the unit by separating the new plant from the old, the consequence should be to nullify the negotiated contract insofar as the new unit was concerned. The Board having determined that there should now be two separate collective-bargaining units it would, in my opinion, be anomalous to hold that notwithstanding such conclusion, the Employer will not be allowed, for a substantial period of time, (until the termination of the existing contract), to bargain in the newly created appropriate collective-bargaining unit. Such a conclusion, in my opinion, would serve to vitiate the whole purpose of having a unit clarification procedure, which is a mechanism to resolve bargaining unit issues in an orderly manner instead of having them spill out into contentious bargaining, attended by potential strikes or lockouts.

CONCLUSIONS OF LAW

1. The Respondent, United Steelworkers of America, AFL–CIO–CLC, Local #7912, has violated Section 8(b)(3) by refusing to bargain collectively with U.S. Tsubaki, Inc., automotive division in the following described unit:

All full-time and regular part-time production and maintenance employees, group leaders, and watchmen employed at the Employer's 106 Longsack Drive, Chicopee, Massachusetts location, but excluding office clerical employees, techni-

cal and professional employees, guards, supervisors as defined in the Act, and all other employees.

2. The unfair labor practice found herein affects commerce within the meaning of Section 2(2), (6), and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Charging Party requests that the Remedy include some provision which would prevent the Union from designating employees from the Holyoke unit from participating in the negotiations for the Chicopee unit. This request is denied as each side is entitled to choose its own representatives and in the absence of unusual circumstances, neither party may refuse to bargain with the representatives chosen by the other party. *Victoria Packing Corp.*, 332 NLRB 597 (2000).

ORDER

The Respondent, United Steelworkers of America, AFL–CIO–CLC, Local #7912, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing to bargain with U.S. Tsubaki, Inc., automotive division, in following described appropriate unit.

All full-time and regular part-time production and maintenance employees, group leaders, and watchmen employed at the Employer's 106 Longsack Drive, Chicopee, Massachusetts location, but excluding office clerical employees, technical and professional employees, guards, supervisors as defined in the Act, and all other employees.

(b) In any like or related manner restraining or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

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

(a) On request, bargain with the Employer in the appropriate unit described above, concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Within 14 days after service by the Region, post at its facility in Auburn, Massachusetts, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 1 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall 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

³ Sec. 8(d) of the Act provides inter alia, that the duty to abide by an existing collective-bargaining agreement will cease to exist, when "the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a)"

⁴ 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."

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 employees employed by the Respondent at any time since August 29, 2000.

(c) 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 AND MEMBERS
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 the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain with U.S. Tsubaki, Inc., automotive division, in following described appropriate unit.

All full-time and regular part-time production and maintenance employees, group leaders, and watchmen employed at the Employer's 106 Longsack Drive, Chicopee, Massachusetts location, but excluding office clerical employees, technical and professional employees, guards, supervisors as defined in the Act, and all other employees.

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

WE WILL on request, bargain with U.S. Tsubaki, Inc., automotive division in the unit described above and, if an understanding is reached, embody the understanding in a signed agreement.

UNITED STEEL WORKERS OF AMERICA, AFL-
CIO-CLC, LOCAL #7912