

**Concrete Form Walls, Inc. and Alabama Carpenters
Regional Council, Local 127.** Case 10–CA–36280

August 31, 2006

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND SCHAUMBER

This is a refusal-to-bargain case in which the Respondent is contesting the Union's certification as bargaining representative in the underlying representation proceeding. Pursuant to a charge filed on May 23, 2006, the General Counsel issued the complaint on May 26, 2006, alleging that the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing the Union's request to bargain following the Union's certification in Case 10–RC–15381. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On June 13, 2006, the General Counsel filed a Motion for Summary Judgment. On June 15, 2006, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent did not file a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits its refusal to bargain, but contests the validity of the Union's certification on the ground that the Board erred in ordering the opening and counting of seven determinative challenged ballots in the representation proceeding.¹

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

¹ 346 NLRB No. 80 (2006). On April 25, 2006, pursuant to the Board's direction, the seven determinative challenged ballots were opened and counted by the Regional Director and a final revised tally of ballots issued, which showed that a majority of valid votes had been cast for the Union. Accordingly, the Union was certified on May 3, 2006.

Accordingly, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, an Alabama corporation with an office and place of business in Birmingham, Alabama (the Respondent's facility), has been engaged in erecting concrete walls in the building and construction industry.

During the 12-month period preceding issuance of the complaint, the Respondent, in conducting its business operations described above, derived gross revenues in excess of \$50,000, in performing services for various Alabama enterprises, which enterprises, in turn, on an annual basis, purchase and receive goods valued in excess of \$50,000 in interstate commerce, directly from suppliers located outside the State of Alabama and/or ship goods to or perform services valued in excess of \$50,000, for companies located outside the State of Alabama.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that Alabama Carpenters Regional Council, Local 127 (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Certification*

Following the election held June 24, 2003, the Union was certified on May 3, 2006, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All production and construction employees; excluding office clerical employees, supervisors and guards as defined by the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. *Refusal to Bargain*

The Union, by letter dated May 18, 2006, requested that the Respondent recognize and bargain with it as the exclusive collective-bargaining representative of the employees in the certified unit.

By letter dated May 22, 2006, the Respondent refused the Union's request for bargaining. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a) (5) and (1) of the Act.

CONCLUSION OF LAW

By refusing since May 22, 2006, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an understanding is reached, to embody the understanding in a signed agreement.²

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Concrete Form Walls, Inc., Birmingham, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Alabama Carpenters Regional Council, Local 127, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) 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) On request, bargain with the Union as the exclusive representative of the employees in the following appro-

² Although this bargaining order is based upon the certification, the Board remains of the view that a bargaining order is also warranted under *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). See *Concrete Form Walls, Inc.*, 346 NLRB No. 80, slip op. at 7-10 (2006). Thus, even if a reviewing court disagrees with the disposition of the challenged ballots and sets aside the certification, the Board believes that a bargaining order would nonetheless be warranted. In this regard, we note that a finding of ineligibility as to the seven employees would not destroy the Union's card majority status.

Member Schaumber agrees that a bargaining order based upon the certification is appropriate but he dissented from the issuance of the bargaining order under *Gissel*; see 346 NLRB No. 80, slip op. at 10-12, and hence does not agree with the views expressed in the above paragraph.

priate unit on terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All production and construction employees; excluding office clerical employees, supervisors and guards as defined by the Act.

(b) Within 14 days after service by the Region, post at its facility in Birmingham, Alabama, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 10, 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 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 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 May 22, 2006.

(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
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

³ 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."

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain with Alabama Carpenters Regional Council, Local 127, as the exclusive representative of the employees in the bargaining unit.

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, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All production and construction employees; excluding office clerical employees, supervisors and guards as defined by the Act.

CONCRETE FORM WALLS, INC.