

Deposit Telephone Company, Inc. and International Brotherhood of Electrical Workers, Local 83, AFL-CIO. Case 3-CA-22391

January 31, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND KIRSANOW

The principal issue in this case is whether the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with International Brotherhood of Electrical Workers, Local 83, as the exclusive collective-bargaining representative of its employees.¹ Subsidiary issues are (1) whether there was substantial continuity of representation following the merger of Local 83's predecessor, IBEW Local 1125, and seven other locals into Local 83; and (2) whether the exclusion of the Respondent's employees, who were not members of Local 1125, from participating in the merger decision justified the Respondent's refusal to bargain with Local 83.²

We agree with the judge's findings, for the reasons stated in his decision, that there was substantial continuity of representation following the merger; that a question concerning representation was not raised by the merger; and that Local 83 succeeded to the bargaining rights of its predecessor, Local 1125.

We also agree with the judge that neither the lack of notice to the Respondent's unit employees that a merger was contemplated, nor their nonparticipation in the merger process, justified the Respondent's refusal to bargain with the Union. In *NLRB v. Financial Institution Employees (Seattle-First)*, 475 U.S. 192 (1986), the Supreme Court held that the Board exceeded its authority under the Act by requiring that nonmember employees be allowed to vote regarding a union affiliation/merger before it would order the employer to bargain with the affiliated/merged union. In *Avante' at Boca Raton, Inc.*,

¹ On March 21, 2001, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief; the General Counsel and Charging Party filed answering briefs; and the Respondent filed a reply brief.

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

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

² Before the merger, the Respondent refused to recognize Local 1125, contending that the bargaining unit it had been certified to represent in Case 3-RC-10559 was not appropriate. The parties agreed at the hearing that they were precluded from relitigating the unit issue in the unfair labor practice case. Thus, although the Respondent has raised the unit issue in exceptions in order to preserve the issue for appeal, it has not presented any argument in support of this exception. Accordingly, we need not reconsider the unit issue. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

334 NLRB 381 (2001), review denied 54 Fed. Appx. 502 (D.C. Cir. 2003),³ a case similar to this one, the Board held that the general lack of participation by nonmembers in union affiliation/merger decisions does not justify an employer's refusal to bargain.

As stated above, the Respondent's employees were not members of Local 1125 at the time of the merger. Because nonmembers do not have a right under the International Union's constitution or the Local's bylaws to participate in internal union matters such as a merger discussion or vote, they were not included in the merger process used by the locals and International Union. Under applicable precedent, however, their exclusion from that process furnishes the Respondent with no defense to the 8(a)(5) allegation. Thus, we agree with the judge that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with Local 83.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Deposit Telephone Company, Inc., Deposit, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.⁴

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 recognize and bargain collectively with Local 83, International Brotherhood of Electrical Workers, AFL-CIO, as the exclusive collective-

³ See also the cases cited therein.

⁴ We shall substitute a new notice in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enf'd. 354 F.3d 534 (6th Cir. 2004).

bargaining representative of the employees in the following appropriate bargaining unit:

All full-time and regular part-time technicians and field employees employed by us at our Deposit, New York facility, including customer service technicians—cable splicing/repair, customer service technicians—switching & data network, customer service technicians—installation and repair, customer service technicians—construction, maintenance, customer service technicians—supply, but excluding customer service representative, assistant-data processing, cashiers, senior accountants, account executives—business services, administrators—commercial markets, professional employees, guards, and supervisors as defined in the National Labor Relations Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, on request, bargain with Local 83, International Brotherhood of Electrical Workers, AFL–CIO, as the exclusive representative of the employees in the above-described appropriate unit and, if an understanding is reached, WE WILL embody the understanding in a signed agreement.

DEPOSIT TELEPHONE COMPANY, INC.

Robert A. Ellison, Esq., for the General Counsel.
Michael J. Flanagan, International Representative, and *John Humphrey*, President/Business Manager, for Local 83.
Victoria L. Bor, Esq. (Sherman, Dunn, Cohen, Leifer & Yellig, P.C.), of Washington, D.C. (on the brief), for Local 83.
Michael J. Westcott, Esq. (Axley Brynerson, LLP), of Madison, Wisconsin, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge filed on March 7, 2000, by International Brotherhood of Electrical Workers, Local 83, AFL–CIO (Local 83), a complaint was issued on May 30, 2000 against Deposit Telephone Company, Inc. (Respondent).

The complaint alleges essentially that Respondent has refused to bargain with Local 83. A Board election had been held among the employees of Respondent following which a different union, International Brotherhood of Electrical Workers, Local 1125, AFL–CIO (Local 1125) was certified.

Local 1125 and 7 other local unions of the International Brotherhood of Electrical Workers merged to become Local 83, and the complaint alleges that Local 83 is the successor to Local 1125 and has been the designated exclusive collective-bargaining representative of Respondent's unit employees. It is alleged that Respondent was obligated to recognize and bargain with Local 83.

Respondent's answer admits refusing to recognize and bar-

gain with Local 1125 on the ground that the election was conducted in an "erroneous and inappropriate bargaining unit." The answer denies that it had any duty to recognize or bargain with Local 83 since the "merger/affiliation was not accomplished with adequate procedural safeguards or due process and in that there is insufficient continuity of representation between Locals 1125 and 83, such that Local 83 is not a successor to Local 1125." The answer further denies that either Local 83 or 1125 was the exclusive collective-bargaining representative of the unit. On July 24, 2000 a hearing was held before me in Binghamton, New York.

Upon the evidence presented in this proceeding, and my observation of the demeanor of the witnesses, and after consideration of the briefs filed by all parties, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent, a New York corporation having its principal office and place of business at 87 Front Street, Deposit, New York, has been engaged in providing local and long distance telephone services and related communication services.

During the past year, a representative period, Respondent derived gross revenues in excess of \$500,000, and during the same period of time it purchased and received at its Deposit, New York facility, goods, materials and supplies valued in excess of \$50,000 directly from points located outside New York State.

Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

Respondent has denied knowledge or information concerning whether Locals 83 or 1125 have been or are labor organizations within the meaning of Section 2(5) of the Act.

The evidence establishes that until on or about September 1, 1999, Local 1125 was an organization in which employees of New York State Electric and Gas Company (NYSEG) were members, that it has had collective-bargaining agreements with that company, it had an office for the conduct of business, its members elected its officials, it had a charter, and had been certified by the Board as the exclusive collective-bargaining representative of Respondent's employees.

The evidence further establishes that on about September 1, 1999, Local 83 was formed by merger of 8 local electrical unions in the upstate New York area. Local 83 has approximately 1729 members, an office for the conduct of business, and a constitution and bylaws. In addition, the employers formerly under contract with the merged local unions, including NYSEG, have agreed to honor their collective-bargaining agreements with those unions.

Based upon the above, I find that Locals 1125 and 83 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*¹

1. The Representation Election

On May 20, 1997, Local 1125 filed a petition to represent Respondent's installation and service employees. The Acting Regional Director found that unit to be inappropriate and instead found appropriate a "wall to wall" unit urged by the Respondent. Local 1125 sought review and on July 27, 1999, the Board issued its Decision on Review and Direction of Election finding the unit sought in the petition to be appropriate. An election was held on August 26, 1999.² Thereafter, on September 3, 1999, Local 1125 was certified as the exclusive collective-bargaining representative in the following unit:

All full-time and regular part-time technicians, and field employees employed by the Employer at its Deposit, New York facility, including customer service technicians—cable splicing/repair, customer service technicians—switching & data network, customer service technicians—installation and repair, customer service technicians—construction, maintenance, customer service technicians—supply, but excluding customer service representative, assistant-data processing, cashiers, senior accountants, account executives—business services, administrators—commercial markets, professional employees, guards, and supervisors as defined in the Act.

At the close of the election on August 26, Michael Flanagan, the International Union's representative told William Hoeksema, Respondent's Director of Administration and Operations Support, that his normal procedure would be to send a proposed collective-bargaining agreement to the company. Hoeksema said that he did not have a "problem" with that suggestion.

Flanagan was in the process of preparing a contract when he received a letter dated September 15 from Hoeksema which stated that Respondent had received the Board's certification of representative which was issued to Local 1125, and that:

We anticipate that the Union will soon be requesting that Deposit bargain with it as the representative of these employees. This letter is to inform you that Deposit Telephone Company believes that the Board's Certification of the Union is improper because the representation election conducted on August 26, 1999 was held in what the Company has continued to maintain as an inappropriate bargaining unit. Accordingly, we intend on refusing to bargain in order to have the NLRB's bargaining unit decision reviewed.

Neither Local 1125 nor Local 83 responded to the letter, and other than the brief conversation following the election no requests to bargain or other communications concerning bargaining have taken place. Flanagan stopped preparing the proposed contract because he decided to respond to the letter by filing a

¹ The narrative presented here is based upon the exhibits and the uncontradicted testimony of the two witnesses, Michael Flanagan, the International Union's representative, and John Humphrey, the president/business manager of Local 83.

² The unit consists of 14 employees. Twelve employees voted in the election. Eight ballots were cast for Local 1125 and 4 were cast against the union.

charge alleging that Respondent unlawfully refused to bargain. He also believed that Respondent's letter clearly stated its refusal to bargain with Local 1125 making any formal or additional requests to bargain unnecessary. Local 83 has not made any independent requests to bargain with Respondent.

2. The Merger

Local 1125 was one of 11 local upstate New York unions which were part of System Council U-7. The 11 unions each operated in a different part of the state, and were all parties to one collective-bargaining agreement with NYSEG.

The possibility of a merger of the 11 local unions into one union was discussed beginning in the Spring of 1997. At that time, 8 of the 11 unions were most interested in considering a merger, but all 11 unions were invited to the discussions. The president/business manager of each of the 8 locals which eventually merged participated in meetings to discuss the matter. Toward the end of the merger discussions the officials of the other 3 unions attended the meetings. Those who were involved in the decision to merge were the presidents of the local unions and delegates to the System Council.

The reasons for the merger included obtaining better representation for the membership and improved "accountability"—the membership's voice would be heard regarding matters such as deregulation and diversification of the utility industry. Some of the locals had small memberships and all of them, with the exception of Local 1125, had part-time, unpaid officials.

It was believed that full-time paid representatives would have the financial ability to lobby for matters which were important to them and that as full-time delegates, they would have the time to devote to union matters and not have to ask for time off from work from their employers. The International Union was in favor of merger for these reasons.

Merger meetings were held about once per month with each of the locals' president/business managers discussing such issues as the creation of bylaws, finances and elections for the new union to be formed. The new union was to be known as Local 83.

At the same time that merger meetings were being held with the 8 locals, Local 1125 held its own regular meeting of members. Only IBEW members were eligible to attend Local 1125 meetings, and no employees of Respondent attended such meetings. No notices of Local 1125 meetings were sent to employees of Respondent.

During Local 1125's membership meetings in the period between 1997 and 1999, the possibility of a merger was discussed. Members gave their opinions as to whether they believed the merger was a good idea. Such expressions affected president/business manager John Humphrey's decision to agree to merge Local 1125. He stated at this hearing that he would not do anything that he believed a majority of the membership was against. He noted that if the membership passed a motion to reject the merger, he would be bound by that decision. However, the membership did not take such action notwithstanding it knew that dues would increase. Michael Flanagan, the IBEW's International Representative, was informed that the issue of merger was discussed at membership meetings of the 8 locals. Flanagan stated that during several merger meetings the

president/business managers brought in 1 or 2 local union members.

At the May 5, 1999 Local 1125 membership meeting, president/business manager John Humphrey stated that if the locals did not vote to merge, the International would require the merger which it was permitted to do under the International's constitution. At a Local 1125 membership meeting on June 2, Humphrey told the members that they had a right to vote on the merger and the International Union would prefer if the locals voted for such a merger, but the International would impose a merger if necessary as it had done with the Niagara-Mohawk locals. The minutes of that meeting reflect that the International said that there would be no vote, and Humphrey told those in attendance that if necessary he would remove their right to vote and decide himself, on behalf of the local, whether to merge. He explained that he would act as an elected politician who makes decisions for his constituents and if they did not approve of his actions they could remove him from office at the next election.

At the July 7 Local 1125 membership meeting, Humphrey reported that certain officials of the other local unions were concerned that they would be losing their "kingdom" because of the merger and became reluctant to agree to merge. They voiced the opinion that the International should direct that they be merged. However, the International was unwilling to do that because it was criticized by the Niagara-Mohawk memberships for forcing a merger previously.

In July and August, 1999, requests for the merger of the 8 locals into a new Local 83 were submitted to the office of the International President of the IBEW who approved the merger effective September 1, 1999. On that date, the 8 merged locals ceased to exist. The International President directed that the charters and all records, funds and property of the 8 locals be transferred to Local 83. Moneys from Local 1125 were transferred from its account to a Local 83 account in the same bank. Moneys from the other seven locals were put into the same account. All dues moneys of the eight merged locals have been commingled. The funds formerly held by Local 1125 are not maintained on a unit basis for Local 83, except if they request a specific sum. Otherwise all funds are kept by Local 83. Local 1125 was responsible for making cash disbursements to its officers. After the merger, Local 83 makes such disbursements. Final approval of the bylaws of Local 83 was received on October 17, 1999.

Prior to the merger, Local 1125 occupied a rented office in Johnson City and its meetings were held in a Veterans of Foreign Wars hall elsewhere. Following the merger, Local 83 occupied the office formerly used by Local 1125 and continued to hold meetings at the VFW hall. Local 1125 owned one vehicle before the merger, and following the merger it is owned by Local 83. Prior to the merger, the 7 local unions other than Local 1125 rented small offices. Following the merger, two of those merged locals retained their offices.

No employees of Respondent or members of any of the 11 local unions voted in the election to merge. No membership election was conducted regarding the merger. The decision to merge was not made by the members of the locals but by the president/business manager of each local. The decision was

made, not by vote, but by each of the president/business managers of each local expressing his opinion as to whether he wanted to merge.

No employees of Respondent took part in the discussions or meetings concerning the merger. Humphrey did not advise any employees of Respondent concerning the desires of Local 1125 to merge, or any reasons for the proposed merger. No meeting was held with Respondent's employees at which such employees could ask questions concerning the potential merger. However, Humphrey, who had been the president/business manager of Local 1125 prior to the merger, told one or two of Respondent employees, prior to the August 26 Board representation election, that Local 1125 was involved in a process which would merge 8 locals into one union. Humphrey did not advise those employees that they had an opportunity to have their voices heard in those merger discussions. Following the merger, Humphrey did not advise Respondent or its employees that Local 1125 ceased to exist. The results of the representation election were not communicated by Local 83 to Respondent's employees. When asked what the status of the matter was, Humphrey replied that "we're working on it."

Neither International Union representative Flanagan nor any other individual affiliated with the International Union had any conversations with any of Respondent's employees concerning the merger before the Board election. None of Respondent's employees had any input into the decision to merge or into any of the merger discussions before the filing of the petition for representation filed by Local 1125 or before the representation election. During the campaign prior to the Board election, the issue of the merger was not discussed with Respondent's employees. Nor was any such discussion held following the merger. To Flanagan's knowledge, none of Respondent's employees were aware of the merger meetings which were taking place at the time of the representation campaign, and Flanagan did not raise the subject with them. Flanagan believed that he had no duty to make Respondent's employees aware of the merger discussions because the union had no collective-bargaining agreement with the Respondent and they were not yet members of the union. No meetings have been held with Respondent's employees to discuss the bylaws or policies of Local 83, and no communication has been undertaken with them to discuss the benefits of membership in Local 83. However, either just prior to or after the representation election, Humphrey showed Respondent's employees copies of other collective-bargaining agreements with other telephone companies.

Following the merger, Local 83 did not advise Respondent's employees about upcoming elections for Local 83's officers. In any event, Respondent's employees were not eligible to vote in that election since they were not Union members. As set forth above, the merger was approved on September 1, 1999, and Local 1125 was certified two days later, on September 3.

There were no discussions between Humphrey, Flanagan and Respondent's officials or supervisors concerning the merger.

Following the merger, no request has been made of the Board to amend the certification issued to Local 1125 to substitute Local 83 as the employees' collective-bargaining representative.

Following the merger, a newsletter issued by Local 83 contained a letter from the International President approving the merger, and a letter from Humphrey explaining why the merger was necessary and which described the merger itself.

3. The Merged Locals and Local 83

The 11 local unions which comprised System Council U-7 all represented employees who were employed by NYSEG. Those eleven unions were signatory to the same collective-bargaining agreement with NYSEG which expired prior to the hearing in this matter. Following the merger, a successor contract was negotiated and signed by NYSEG, Local 83 and the 3 locals in the System Council that did not participate in the merger. Prior to the merger, Local 1125 was exclusively comprised of employees of NYSEG. Following the merger, Local 83 was comprised of NYSEG employees plus the 3 electrical cooperatives and AES.

The eight locals which participated in the merger and the number of their members are as follows:

- (a) Local 1125, Johnson City, NY - 598 members.
- (b) Local 945, Liberty, NY - 90 members.
- (c) Local 951, Plattsburgh, NY - 80 members.
- (d) Local 961, Ithaca, NY - 300 members.
- (e) Local 992, Oneonta, NY. This local, which has 250 members who are employed by NYSEG, also had separate contracts with the Delhi, Ostego and Oneida-Madison Rural Electric Cooperatives, having 25, 20 and 12 members, respectively.
- (f) Local 994, Brewster, NY - 110 members.
- (g) Local 1111, Elmira, NY - 200 members.
- (h) Local 1126, Hornell, NY - 90 members.

The three locals in the System Council which did not participate in the merger are Local 249, Auburn, NY, having 300 members, Local 966, Lancaster, NY, having 250 members, and Local 1143, Mechanicville, NY, having 70 members.

The total membership of the newly formed Local 83 was about 1,729.

Each of the 8 merged locals had the following elected officers and positions prior to the merger: President/business manager, vice president, recording secretary, treasurer, financial secretary and an executive board, all of whom were elected to three-year terms. The size of the executive board depended upon the size of the membership of the union. The majority of the locals had 7 board members. Some had as few as 3 and 5.

The duties of the officers of Local 1125 are representative of those of the other merged locals. Its president/business manager was the chief executive officer of the local. He conducts the business of the local including the processing of grievances, negotiation of collective-bargaining agreements, and is involved in other labor-management affairs and meetings. The vice-president substitutes for the president in his absence or when delegated by the president. The recording secretary records the minutes of the monthly meetings. The treasurer and financial secretary are responsible for the finances of the local, receiving dues from employers and depositing them into the local union's accounts. The executive board acts on the business of the local between its regular monthly meetings. Some

locals use the executive board to "screen" grievances.

Upon the merger becoming effective in September, 1999, the International's officers designated officers for the new Local 83, which was immediately followed by nominations and then an election which was conducted by mail in October, 1999. In contrast, Local 1125 had conducted its elections in person, by secret ballot.

The officers of Local 1125 prior to the merger were: John Humphrey, president/business manager; Paul Cornell, vice-president; Cathy Frain, financial secretary; Linda Lord, recording secretary; and Jim Demoski, treasurer.

Local 83's officers are John Humphrey, president/business manager/financial secretary. This is a full time, paid position. His duties include negotiation of collective-bargaining agreements, processing of grievances, arbitrations and other labor-management functions.

Humphrey was formerly the president/business manager of Local 1125 (thus the duties of financial secretary were added to the responsibilities of the president/business manager); Gary Bonker, vice-president. He was formerly the president/business manager of Local 992. He also serves as chairman of the executive board; Bonnie Binger, recording secretary. She was formerly a member of the Local 961 executive board; and Dan Baschman, treasurer. He was formerly the president/business manager of Local 1126. The rates of pay of the officers of Local 83 are set forth in that union's bylaws.

In addition, Local 83 has two full time, paid assistant business managers who were appointed by Humphrey. They are Dan Addy, the former Local 961 president, and Gary Tiso, the former Local 994 president. Their duties are as assigned by the business manager, usually involving the processing of grievances. Prior to the formation of Local 83 the position of assistant business managers did not exist in any of the merged locals.

Local 83 also has one full time paid secretary and 2 part-time paid secretaries. Prior to the merger, of the 8 merged local unions, only one, Local 1125, had a full time paid clerical employee, and because of the large number of members, that local also was the only one having a full-time paid president/business manager, who was Humphrey. No employees of Respondent hold a unit officer position, an executive board position or office with Local 83.³

The processing of grievances involving employees of NYSEG remains the same prior to and following the merger with respect to the first step which involved the employee and the immediate supervisor. However, prior to the merger, the second step involved the local union president/business manager, but after the merger one of the unit chairmen would act in behalf of Local 83 at the second step. For a grievance to be processed to the third step both prior to and after the merger the System Council had to give its approval. Humphrey, as the president of the System Council both before and after the merger presents the third step grievance in behalf of the union. Both prior to and after the merger, the System Council decides

³ As will be set forth fully below, the merged locals were re-established as eight "units" within Local 83, each of which has a chairman and other officers.

whether the matter should proceed to arbitration. Prior to the merger, the president/business manager of each of the local unions and Humphrey as president of the Council made the decision. The unit chairmen now make that decision with Humphrey. The chairman of the System Council and usually the Union's attorney present the case at arbitration.

AES is an independent power producer which purchased 6 generating plants owned by NYSEG. Following the merger, AES assumed the collective-bargaining agreement with the union. Following its purchase, AES demanded separate collective-bargaining agreements for the 6 locations and the union negotiated separate contracts for each facility. The president/business manager of each of the locations and International Representative Michael Flanagan conducted the negotiations. Four of the 6 plants are within the jurisdiction of Local 83. Humphrey assigned an assistant business manager to participate in the negotiations.

The grievance procedure conducted in behalf of AES employees is the same as that for NYSEG workers with the exception that since AES employees are not a part of the System Council, grievances are not considered by that entity. Processing of the grievances of AES employees has not changed from that in effect prior to the merger. For example, prior to the merger, a step 2 grievance involved the president/business manager of the local. Following the merger, the same individual, now acting as the executive board member of the unit involved would present the grievance. In addition, however, after the merger, Humphrey, as the president/business manager of the Local 83 would become involved if he wished. Humphrey would not have been involved in the grievance processing prior to the merger for those locals other than Local 1125. As to Local 1125, of course, since Humphrey was the president/business manager of that local, he would have been involved with the grievance.

The 3 electrical cooperatives fall within the jurisdiction of Local 992, one of the merged locals. Prior to the merger, the president/business manager of that local, Gary Bonker, and International Representative Flanagan did the collective-bargaining negotiations. Following the merger, Bonker became the vice-president of Local 83. Although there have been no negotiations following the merger, it is the intent that when such bargaining takes place it will be conducted with Bonker and Flanagan representing the union, and also Humphrey and an assistant business manager.

The process regarding grievances of employees of the cooperatives has not changed from the procedure before the merger. Prior to the merger, the president/business manager of the local and the executive board decide if the matter will go to arbitration. Following the merger, the executive board of Local 83 makes the decision.

The Local 83 bylaws provide for the establishment of eight "units" corresponding to the eight merged locals. They are designated 83.1 through 83.8, each being identified by geographic location consistent with the headquarters of each of the merged locals.⁴ Each unit has a chairman, vice chairman, re-

⁴ None of Respondent's employees have been advised that they are part of unit 83.1—the former Local 1125 unit.

order, and an executive committee consisting of the chairman and 4 elected officials. Unit officers are nominated at the regular meeting of each unit and elected by secret ballot by members of the unit. The duties of the unit officers are similar to those of Local 83, for example, the chairman's duties are similar to those of Local 83's president, which would include responsibility for second step grievance processing, the vice-chairman's duties are similar to those of the vice-president of Local 83, and the recorder's duties are similar to those of the recording secretary of Local 83. The duties of the unit officers may not conflict with the duties of Local 83's officers. Monthly meetings of the unit, which are required, are held in the same places as were held prior to the merger. Officers or representatives of Local 83 attend the monthly unit meetings. All units and unit officers are under the supervision of Local 83 and its executive board. The unit officers and committees report to Humphrey. If the unit wants to undertake some activity that Humphrey does not approve, the unit must get the approval of the Local 83 executive board. That procedure is the same as utilized under former Local 1125 where the local union's officials actions, if not approved by the local's business manager had to be approved by the local's executive board.

Each of the units has the right to run the business of the units but must report and "interact" with the Local 83 office routinely, either through the president/business manager or his assistants. For example, if the unit asks permission to expend money, the matter would be discussed and Humphrey would grant or deny the request. Further, if a member of the unit believed that he did not receive a proper meal allowance, the unit chairman would call Local 83 and would receive an opinion on the matter.

Unit officers are under the supervision of Local 83 and its executive board. The Local 83 unit officers may be suspended or removed by Local 83. In contrast such action against Local 1125 officers could only be taken by the International Union. Local 1125 could bring charges against the officers but could not suspend or remove them.

Prior to the merger, the president/business manager of the local union was responsible for the operation of the local. His expenditure of funds is approved by the membership at the local union's monthly meetings. That procedure remains the same following the merger with the unit chairman being responsible for the expenses of the individual unit.

Humphrey appoints the shop steward for Local 83 and he did the same with Local 1125. Each unit has at least one steward, all of whom report to Humphrey and are under his supervision and control.

The Local 83 executive board has nine members consisting of the chairman of each of the eight Local 83 units. Those individuals hold the combined office of executive board member and unit chairman. They are: Luis Rivera, former Local 1125 executive board chairman; Don Tuttle, former Local 992 vice-president; Tom Addy, former Local 1111 president; Stan Rock, former Local 951 president; Charlie Schadt, former Local 945 vice-president; John McDonald, who held no position in Local 1126 prior to his election as chairman of the Hornell unit. Al Mancil, former Local 961 vice-president; and Larry Gallagher, former Local 994 executive board member. The chairman of

the executive board is the vice president of Local 83 by virtue of his or her office without election. This differs from the procedure under Local 1125 where the chairman of the executive board was elected by the executive board.

The Local 83 executive board/unit chairmen are elected by members of each unit. Those eligible to vote in those elections are members from that unit's jurisdiction. Candidates for the positions are chosen from the unit involved.

All 11 local unions had a collective-bargaining relationship with NYSEG. The most recent negotiations ended in July, 2000. Those involved in negotiations included Local 83 president/business manager Humphrey, vice-president Bonker and International Representative Flanagan. Also present was a representative from each of the units.

Those negotiations were for a successor agreement to replace the contract which was expiring. The earlier negotiations, which took place in January, 1997, prior to the merger, involved the president/business manager of each of the 11 local unions and Flanagan. Following the merger, NYSEG and the rural cooperatives advised Local 83 that they would continue to honor the collective-bargaining agreements that they had with the merged locals and took a "neutral" position regarding the merger.

Regarding collective-bargaining procedures, both before and after the merger, each of the local unions solicited the membership for suggested contract proposals.

If Respondent is ordered to bargain with Local 83, those representing the union would include Humphrey as president/business manager, International Representative Flanagan, and 1 or 2 other employees of Respondent, appointed by Humphrey. Those same individuals would have represented Local 1125 in negotiations with the Respondent if bargaining occurred before the merger. Members of the former Local 1125 will be solicited for their opinions concerning proposed contractual terms. That procedure had been followed prior to the merger. Respondent's employees who are members of the union are eligible to vote for ratification of the contract. The policy concerning approval of collective-bargaining agreements remains the same before and after the merger. Prior to the merger, a contract negotiated and approved by the membership of the local union is sent to the International Union for approval by the International president pursuant to the International constitution of the International Union. Following the merger, the International's president's approval is also sought.

Contract ratification votes remain the same prior to and after the merger with each union member-employee of NYSEG eligible to vote upon ratification. The procedure for explaining the contract terms remains the same as before the merger. Thus, upon the completion of negotiations, the individual local union holds meetings at which the terms of the agreement are discussed, copies of the agreement are distributed, and ratification meetings are held. As to the NYSEG ratification, each local union conducts its own vote and the results are given to Humphrey. That procedure has not changed since the merger.

As to the employees of AES and the three electrical cooperatives, those employees vote only on the contracts covering them. Thus, the electrical cooperative employees do not vote on the NYSEG or AES contracts. That policy has not changed

since the merger.

Regarding strikes, both prior to and after the merger, the International Union must authorize strike action by any of the locals.

Regarding dues and initiation fees, prior to the merger, each of the eight locals had a different dues structure as set forth in the bylaws of each local. Thus, dues varied between \$4.50 per week and \$9.50 per week depending upon the local, with the dues for Local 1125 being \$9.50 per week. After the merger, the bylaws of Local 83 provides for dues of \$10.00 per week. The Local 83 bylaws provides that dues are raised automatically according to the per centage increase of any contractual raises. The Local 1125 bylaws contained no such provision.

Prior to the merger, the initiation fees were \$10.00 or \$20.00 depending upon the local union. After the merger, the members of the eight merged local unions were not required to pay an initiation fee to Local 83, which for new members is \$20.00. According to International Union policy, initiation fees for newly organized employees are waived. That policy applies to Respondent's employees.

With respect to the checkoff of union dues, prior to the merger, dues payments were sent by the employer to the individual union. Since the merger, the employer remits dues directly to the financial secretary of Local 83. Both before and after the merger, the local union financial secretary was responsible to remit per capita dues of \$8.00 per month per member to the International Union's secretary-treasurer.

Local 83 holds two union meetings per month in order to have all members become involved in the activities of the local. Each month, Local 83 holds one membership meeting in Binghamton, near its headquarters, and one at one of the other seven locations. The locations are designated by rotation. The two monthly meetings constitute one "complete" meeting under the Local 83 bylaws. The purpose of this arrangement was to permit members to be able to attend meetings of Local 83 without having to travel great distances. Pursuant to the bylaws, a member of any unit can attend any monthly meeting of Local 83, and can also attend the union meeting of any other unit.

Following the merger, there has been no change in the geographic area covered by the 8 local unions which merged into Local 83. However, the jurisdictional area of Local 83 itself is about 3 times the size of that covered by Local 1125. The membership of Local 1125 comprised 598 members whereas Local 83 has 1729.

The president/business manager of Local 83 automatically serves as the delegate to the International convention. That procedure was identical to that in effect for most of the merged locals except Local 1125 which elected delegates to that convention. The Local 1125 president/business manager automatically served as the delegate to the System Council as is the case under Local 83.

At Local 1125, all of the local officer positions were paid, however the rates of pay differed between the pay given to Local 1125 officers president/business manager; vice president and treasurer and Local 83's officials occupying those positions. Both Locals 83 and 1125 paid their officers for lost time at work due to taking care of union business.

III. ANALYSIS AND DISCUSSION

A. *The Request to Bargain*

The complaint alleges that Respondent unlawfully refused to bargain with Local 83. Respondent admits refusing to bargain with Local 1125 and further denies that it had an obligation to bargain with either union.

As set forth above, following the certification which was issued to Local 1125, Respondent notified that union that it would refuse to bargain in order to obtain review of the Board's bargaining unit decision.

I find that a proper request to bargain was made by Local 83.

Respondent cannot argue that Local 83 failed to make a proper request to bargain. The Board has held that a complaint which sets forth that one union succeeded to the bargaining rights of a certified union by virtue of a merger of the two, and that the respondent is obligated to bargain with the successor, establishes that the respondent could have no doubt that the successor union had made a bargaining request. *Santa Barbara Humane Society*, 302 NLRB 833, fn. 1 (1991). In addition, Respondent's letter refusing to bargain made it clear that any subsequent bargaining request would be futile. *University Park Living Center*, 328 NLRB 483 at fn. 2 (1999).

B. *The Positions of the Parties*

Respondent denies that it had any duty to recognize or bargain with Local 83 since the merger or affiliation was not accomplished with adequate procedural safeguards or due process and that there is insufficient continuity of representation between Locals 1125 and 83. It argues that inasmuch as no substantial continuity has been proven, a question concerning representation exists requiring that a Board election be conducted to determine whether Local 83 represents a majority of the unit employees. Respondent has the burden of proof in establishing those defenses. *CPS Chemical Co.*, 324 NLRB 1018, fn. 7 (1997).

The General Counsel and the Union argue that substantial continuity between Locals 1125 and 83 has been established and therefore no question concerning representation has been created.

They assert, moreover, that inasmuch as Local 1125 has been certified as the collective-bargaining representative of Respondent's employees, an irrebuttable presumption exists that that union enjoyed majority support during the certification year. They further argue that since Respondent refused to bargain with Local 1125 prior to its knowledge of the merger, the change in affiliation of Local 1125 may not now be argued as a justification for its initial refusal to bargain.

General Counsel and the Union contend that to the extent that due process in affording members of the Union the right to notice of the decision to merge unions or to vote on such merger must be considered, due process has been accorded to the unit members.

C. *Legal Principles*

1. Continuity of Representation

The complaint alleges that Respondent unlawfully refused to bargain with Local 83. Respondent, in refusing to bargain,

questions whether Local 83 represents a majority of Respondent's unit employees, asserting that it is being asked to bargain with a union which was not certified as the unit employees' representative.

Local 1125, the certified union, merged with other unions to form Local 83. Respondent asserts that the merger created an entirely different entity permitting it to refuse to bargain with Local 83.

The Supreme Court in *NLRB v. Financial Institution Employees, Seattle-First National Bank*, 475 U.S. 192 (1986), held that "if the organizational changes accompanying affiliation were substantial enough to create a different entity, the affiliation raised a 'question concerning representation' which could only be resolved through the Board's election procedure." 475 U.S. at 200. There must be substantial continuity between the pre and post affiliation union. If the changes in the affiliating organization are "sufficiently dramatic to alter the union's identity, affiliation may raise a question of representation, and the Board may then conduct a representation election." 475 U.S. at 206. The question is whether the certified union was the subject of dramatic change so as to raise a question concerning representation - whether the changes are so great that a new organization has come into being. *Western Commercial Transport*, 288 NLRB 214, 217 (1988).

In determining whether there has been substantial continuity in representation, the Board's "analysis, rather than being mechanistic and using a strict checklist, is directed at analyzing the totality of circumstances in order to give paramount effect to employees' desires." *Sullivan Bros. Printers*, 317 NLRB 561, 563 (1995). "Continuity is evidenced by the maintenance of traces of a preexisting identity and the retention of autonomy over the day-to-day administration of bargaining agreements." *Sioux City Foundry*, 323 NLRB 1071, 1083 (1997).

The Supreme Court noted that a union may seek to affiliate with a larger organization for many reasons: the larger organization may provide bargaining expertise or financial support, or may compensate for a lack of leadership within the local union. "Affiliation 'is but one of many ways in which labor organizations alter their structures and alignments in response to changing economic and political conditions. The Board has recognized that a union must remain largely unfettered in its organizational quest for financial stability and aid in the negotiating process.'" *Seattle-First*, 475 U.S. 192, 199 fn. 5. The unions here sought to affiliate for the same reasons—to obtain better representation for the membership with full-time delegates, and increased financial ability for lobbying for measures which would benefit the members.

As set forth above, 8 of 11 local unions, including Local 1125, decided to merge and form a new union known as Local 83.

The Board has stated that "the unit employees' ability to maintain a significant voice in labor relations affecting their own unit is a core element in assessing whether or not the affiliation significantly altered the identity of the [pre-affiliation union] such as to find that it substituted an entirely different union." *Mike Basil Chevrolet*, 331 NLRB No. 137, slip op. at 2 (2000).

The evidence establishes that the employees of Respondent

will maintain such a voice in collective-bargaining negotiations. Thus, prior to the merger, Local 1125 solicited the membership for suggested contract proposals. Although Respondent and Local 1125 have not engaged in contract negotiations it may be assumed that Local 1125 would have followed its customary procedure in soliciting Respondent's employees for their proposals, and Humphrey, as the president/business manager of Local 1125, would have conducted those negotiations with International Representative Flanagan and 1 or 2 employees of Respondent. Further, as set forth above, following the merger, Respondent's employees would be solicited for their demands and the same individuals who would have represented Local 1125 will represent Local 83 in collective-bargaining negotiations with Respondent.

With respect to contract ratification, the procedure remains the same prior to and following the merger. Each local union prior to the merger and each unit following the merger conducts sessions at which the terms of the proposed contract are explained to the members and each entity conducts its own ratification vote with those being eligible to vote for ratification being members of the collective-bargaining unit. Both before and after the merger, strikes must be authorized by the International Union.

Each of the former local unions has now become a defined unit in the new Local 83. Each of the unit chairmen who are the heads of each of the former locals are members of the Local 83 executive board. The fact that the Local 1125 executive board had 7 members and the Local 83 board has 9 and that some of the executive board members are different between the 2 organizations does not establish a lack of continuity. The chair for unit 83.1, which was formerly Local 1125, is Luis Rivera, the former Local 1125 executive board member. Significantly, the unit chairman for the former Local 1125 is elected by employees who are part of the 83.1 unit. Thus, the employees who were formerly members of Local 1125 have a direct voice in choosing their representative to the Local 83 executive board. See *CPS Chemical*, above, at 1022, where a pre-affiliation local president was retained as the group leader for that local within the post-affiliation larger organization.

This method of unit representation of the former local unions has permitted each of the former local unions to maintain its separate identity and have representation on the Local 83 executive board. Thus, each of the units represents a former merged local, and each has officials who are responsible for such duties as grievance processing. Monthly meetings of the unit are held at which officers or representatives of Local 83 attend. Thus, Local 83 takes an active interest in the affairs of the unit. Each unit member may attend any other unit meeting and also may attend the Local 83 meetings. The former local 1125 bargaining unit remains an intact and autonomous group within the same International and governed by the same International constitution and bylaws. *Sullivan Bros.*, above, at 565.

Respondent notes that the officers of Local 1125, aside from Humphrey, have not become officers of Local 83. However, the succession of Humphrey as the head of Local 1125 to the presidency of Local 83 insures that Local 83 will be acutely aware of any distinctive interests of the former Local 1125's members. *Toyota of Berkeley*, 306 NLRB 893, 904 (1992). In addi-

tion, the representation of a Local 1125 executive board member on the Local 83 executive board will further serve to represent the interests of the former Local 1125 members.

Thus, the interests of Respondent's employees will continue to be represented in Local 83 as was the case in *Mike Basil Chevrolet*, above, slip op. at 2, where the Board noted that the pre-affiliation union "continues to have a strong voice in the affairs of their union and will, after affiliation, continue to be in a strong position to influence the positions taken by *their* representative in dealings with *their* employer" (emphasis in original).

Following the merger, membership dues has risen minimally for members of Local 1125—from \$9.50 per week to \$10.00 per week. Although following the merger, dues have risen dramatically for members of other locals, from \$4.50 per week to \$10.00 per week, the greater financial commitment asked of some Local 83 members undoubtedly reflects the increased services and representation that full-time, paid officials and staff can offer to the members. Such an increase, therefore, is not evidence of discontinuity. *CPS Chemical*, above at 1022.

Regarding grievance handling, with respect to Respondent's employees, most aspects remain the same pre and post-merger. Thus, Humphrey continues to appoint the shop stewards, the first step of the grievance procedure is the same—in which the steward attempts to resolve the matter with the employee's immediate supervisor. The second step, however, changed following the merger. Prior to the merger, the business manager of the local union was involved in the second step. Following the merger, the unit chairman acts in behalf of Local 83. This minor change is not significant enough to establish discontinuity between the unions.

The third step remains the same both before and after the merger—with the System Council giving its approval to take the matter to arbitration.

Continuity of leadership, another factor the Board considers, is maintained here. *Sullivan Bros.*, above at 563. Thus, Humphrey, formerly the president/business manager of Local 1125 is the president/business manager of Local 83. His additional duties as financial secretary of Local 83 does not change the fact that he is the person in charge of each of the organizations.

Further evidence of continuity is apparent in the fact that the individual units hold monthly meetings at the same locations as were held prior to the merger.

Respondent argues that the increase of membership and geographical size of the newly formed Local 83 is evidence of no substantial continuity between Local 1125 and Local 83. Thus, the 598 members of Local 1125 became affiliated with the total of 1729 members of Local 83. As the Board stated, "the notion that an organization somehow loses its identity and becomes transformed into a new legal entity simply because it acquires more clout and becomes better able to do its job is an absurdity and one which flies squarely in the face of a clearly stated congressional objective in passing the National Labor Relations Act." *Insulfab Plastics*, 274 NLRB 817, 823 (1985).

The Board has noted that it has "rejected relative sizes of the two organizations as a basis for finding discontinuity." *Mike Basil Chevrolet*, above, slip op. at 1, where the fact that a 28 member local affiliated with a 1300 person organization was

found not to cause discontinuity. In addition, the effect of the affiliation of a local containing few members with a larger local is less dramatic where, as here, the two locals are part of the same international union, and have the same international constitution. *Sullivan Bros. Printing*, 317 NLRB 561, 565 (1995); *CPS Chemical Co.*, above at 1021.

In this respect, Respondent asserts other facts which in its view require a finding of lack of continuity. I do not agree. Thus, although prior to the merger, Local 1125 was comprised exclusively of employees of NYSEG, following the merger, Local 83 consists of employees of other companies. The increase in size of the membership of Local 83 brought with it an increase in the number of employers represented by the new union. Nevertheless, the unit designated as 83.1 which consists of the former Local 1125 unit employees who continue to be exclusively employed by NYSEG, will have a significant voice in the operation of Local 83, regardless of whether they have been joined by employees of other employers. Further, I find no material significance in the fact that the election of officers for Local 83 was conducted by mail and Local 1125 had conducted its elections in person, by secret ballot. Similarly, the changes in the rates of pay given to Local 1125 officers compared to those of Local 83 do not affect the issue of continuity.

While the merger of Local 1125 and the other local unions into Local 83 resulted in some changes, I believe that Local 1125 retained enough of its previous character to render those changes insufficiently dramatic so that the merger did not raise a question concerning representation. *Toyota of Berkeley*, above at 903.

Respondent also points to the fact that the funds in the treasury of Local 1125 were turned over to Local 83. The Board has stated that it gives "little weight" to that matter since the respondent has not shown that any of the assets were not available to the respondent's employees and accordingly it had not been shown that such workers had fewer resources which would be committed to their representational needs by the new organization than were available under the pre-existing local. *CPS Chemical Co.*, above at 1024 (1997).

I accordingly find and conclude that Respondent has not shown that there has been a change "sufficiently dramatic to alter the union's identity", and that therefore no question concerning representation has been raised.

2. The Irrebuttable Presumption of Majority Status

As set forth above, on September 3, 1999, Local 1125 was certified as the exclusive collective-bargaining representative of Respondent's unit employees. As the certified representative, an employer must recognize the union for the entire certification year even if it is presented with evidence of the union's loss of majority. *Brooks v. NLRB*, 348 U.S. 96 (1954).

Accordingly, Respondent was obligated to bargain with Local 1125. However, I have found above that there has been substantial continuity between Local 1125 and Local 83 and that Local 83 became the successor to Local 1125. I find that the bargaining obligation required of Respondent extended to Local 83.

I conclude that not only could no question concerning representation be raised because there has been continuity between

the two unions, but also because Local 83, as the successor to Local 1125 enjoyed an irrebuttable presumption that it represented a majority of Respondent's employees during the certification year.

Therefore, I find and conclude that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain with Local 83.

3. Due Process in the Decision to Merge

"The Board has traditionally required that two conditions be met before it will allow one union to be substituted for another. First the Board requires that the vote process occur under circumstances satisfying minimum due process standards, and, second that there be a substantial continuity between the pre and post-affiliation bargaining representative." *Paragon Paint Corp.*, 317 NLRB 747, 763 (1995).

However, the issue of due process in mergers of union locals has been the subject of contrary holdings in Board decisions. In *Insulfab Plastics*, 274 NLRB 817, 822 (1985), the judge stated that:

In invoking "due process" to justify asserting jurisdiction over the affiliation elections, the Board has been sensitive to the fact that it is skating on thin statutory ice. The application of this doctrine to affiliation elections has been halting, marked with internal differences, and subject to sharp reversals in attitude.

In deciding that the Board exceeded its authority under the Act in requiring that nonunion employees be allowed to vote for affiliation, the Supreme Court in *Seattle-First* noted that the Board has granted petitions to amend certifications to set forth the name of the new entity if the affiliation satisfied two conditions: that union members had an adequate opportunity to vote on affiliation and have been afforded adequate due process, such as receiving notice of the election and an opportunity to discuss it, and that there had been "substantial continuity" between the pre and post affiliation union.

The Court questioned the statutory ability of the Board to inquire into the process of affiliation. It noted that the Board's authority extended only to the issue of whether the affiliation raises a question of representation by virtue of the change in the certified union's relationship with the employees it represents. In other words, whether there has been a continuity of representation between the pre and post merger unions. The Court noted that "Congress has expressly declined to prescribe procedures for union decisionmaking in matters such as affiliation." 475 U.S. at 205, fn. 11. The Court stated that the Board "may not condone an employer's refusal to bargain in the absence of a question of representation, and has no authority to prescribe internal procedures for the union to follow in order to invoke the Act's protections." 475 U.S. at 207-208. The Court further stated:

The Act assumes that stable bargaining relationships are best maintained by allowing an affiliated union to continue representing a bargaining unit unless the Board finds that the affiliation raises a question of representation. The Board's rule contravenes this assumption, since an employer may invoke a perceived procedural defect to cease bargaining even though

the union succeeds the organization the employees chose, the employees have made no effort to decertify the union, and the employer presents no evidence to challenge the union's majority status.

....

To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to industrial peace. The Board's rule effectively gives the employer the power to veto an independent union's decision to affiliate, thereby allowing the employer to directly interfere with union decisionmaking Congress intended to insulate from outside interference. 475 U.S. at 209.

Although the Court decided that the Board could not require that non-union members vote in an affiliation election, the Court did not decide the issue of whether the Board could regulate union members' voting in such elections:

The union suggests that it may even be inappropriate for the Board to impose due process safeguards with respect to union members. While we note that the NLRA does not require unions to follow specified procedures in deciding matters such as affiliations, we need not assess the propriety of the Board's past procedures. 475 U.S. at 199, fn. 6.

In certain post-*Seattle-First* cases, the Board has declined to decide whether it may properly consider the due process issue. In *Sullivan Bros. Printers*, 317 NLRB 561, 562, fn. 2, (1995), the Board stated that "in light of our findings here that the Board's traditional due process requirements have been met in this case, we find it unnecessary to determine whether, in view of the Supreme Court's opinion in *Seattle-First*, the Board lacks authority to impose due process requirements." In *Paragon Paint Corp.*, 317 NLRB 747, 748 (1995), the Board noted that "the judge found that the merger election satisfied the Board's traditional due process criteria. Accordingly, we need not pass on what action the Board would take had the election not satisfied those standards." In *Western Commercial Transport*, 288 NLRB 214, 217 (1988), the Board stated that "under our traditional test, if either due process or continuity of representative is lacking, the Board refused to grant an amendment of certification, instead leaving the matter for resolution through a Board conducted election. Concededly, however, the Board has not been fully consistent in the weight it has given to the due process and continuity of representative elements of its analysis." But more recently the Board has stated that the existence of a question concerning representation depends upon whether or not there has been satisfaction of the "due process" and "continuity" tests. *Sioux City Foundry Co.*, above at 1081.

In *City Wide Insulation*, 307 NLRB 1 (1992), the Board denied an employer's request for review of a Regional Director's refusal to process the employer's RM petition. The Director's Decision noted that although there had been no vote held regarding the merger of unions, none was required since "such internal union procedures . . . are not subject to scrutiny of the Government where the continuity of representation continues." The Director noted that the international union's constitution permitted the international president to make such changes, which are not subject to vote. See *Knapp-Sherrill Co.*, 263

NLRB 396, 399 (1982), where the Board, in finding continuity of representation, held that a merger of the Meat Cutters International Union with the United Food and Commercial Workers Union was authorized by the Meat Cutters' constitution and a vote of the employees was not necessary since by their union membership they were bound to the terms of the Meat Cutters constitution which authorized such merger.

The Board has more recently considered affiliation voting procedures without commenting as to whether it has the authority to do so. *Mike Basil Chevrolet*, 331 NLRB 1044 (2000); *Defiance Hospital*, 330 NLRB 492 (2000). However, in *CPS Chemical Co.*, 324 NLRB 1018, 1020 (1997), the Board stated that "in the absence of substantial irregularities, which we do not find here, the Board normally will not concern itself with a union's internal voting procedures" citing *Insulfab Plastics*, 274 NLRB 817, 823 (1985).

In *Aurelia Osborn Fox Memorial Hospital*, 247 NLRB 356, 359 (1980), a pre-*Seattle First* case, the Board stated that:

An affiliation vote is basically an internal union matter, and we adhere to the Board's consistent policy of honoring the desires of the employees pursuant to Section 7 of the Act, which clearly grants them the 'right to bargain collectively through representatives of their own choosing.'

....

An employer has no right of choice, either affirmatively or negatively, as to who will sit on the opposite side of the bargaining table. There is no question here as to the true desires of the employees and there is no question that the affiliation effected no change in the day-to-day representation of Respondent's employees. Therefore in a case such as this, where complete continuity has been maintained, a separate vote by Respondent's employees is not required.

Here, no vote was held among the unit employees as to whether they desired Local 1125 to affiliate with a new union, Local 83. General Counsel and Local 83 contend that at least minimal due process has been achieved inasmuch as during the Local 1125 membership meetings, the possibility of a merger was discussed and members of the union voiced their opinions as to whether they believed the merger was beneficial. Local 83 points to Humphrey's testimony that he would not have pursued the merger if the membership passed a resolution to reject it. Further, 1 or 2 union members participated in several meetings of the presidents/business managers when the merger was discussed.

Respondent notes that no employees of Respondent or members of the 11 locals voted upon the decision to merge. Further, none of Respondent's employees participated in any discussions or meetings concerning the merger. Nor were they advised of Local 1125's desire to merge or any reasons for the proposed merger. However, Humphrey told 1 or 2 of Respondent's employees that Local 1125 was involved in a "process" that would result in the merger of 8 unions into one local.

In response to this argument, General Counsel and Local 83 contend that notification of Respondent's employees concerning the merger is irrelevant inasmuch as they were not members of any union at the time of the merger since no collective-

bargaining agreement had been reached between Respondent and Local 1125.

Under the traditional Board test, *Paragon Paint*, above, I find that not even minimal due process has been accorded to the employees in the affiliation decision. Thus, the decision to affiliate was made by the presidents/business managers of the locals themselves. Although there was notice to union members that the locals were considering an affiliation and the views of the members were made known, the members were told that even if the locals did not vote to merge, the International would “require the merger”. In this regard, however, it should be noted that 3 local unions decided not to join the merger and were apparently not required to do so.

However, I find that inasmuch as the International Union’s constitution permitted the affiliation by the means utilized here—decision by the International President without a vote by the employees involved, the decision to affiliate was an internal union matter into which the Board need not inquire. *Seattle-First; City Wide Insulation*, 307 NLRB 1, 4 (1992). In addition, the newly represented employees of Respondent were not yet members of the union. Non-members of the union were not permitted to vote in union elections. *Seattle-First* held that the Board could not require that nonmembers vote in affiliation elections. Moreover, the Board has held that “nonmembership of the employees and their lack of participation in a merger decision is not a basis for limiting or denying a bargaining order” *Potters’ Medical Center*, 289 NLRB 201, 202 (1988); *George Lithograph*, 305 NLRB 1090, 1091 (1992); *Aurelia Osborn Fox Memorial Hospital*, 247 NLRB 356, 359 (1980).

4. Conclusion

I find that there has been a substantial continuity between Local 1125 and Local 83.

Thus, no question concerning representation may be raised and accordingly, I find that Respondent unlawfully refused to recognize and bargain with Local 83. This finding is supported by two important facts: (a) Respondent had refused to bargain with Local 1125 even before it became aware that Local 1125 was considering merging with other locals to form Local 83 and (b) Respondent’s employees had expressed their desire to be represented by Local 1125 and the Board gave its imprimatur to their will by issuing a certification to Local 1125 requiring that Respondent bargain with their representative.

As the successor to Local 1125, Local 83 continued to enjoy the presumption of majority status. Respondent could not properly challenge whether the union represented a majority of its employees during the first year following certification during which the union enjoyed a conclusive presumption of majority status and during which year a question concerning representation could not be raised. The Board’s continuity analysis must give “paramount effect to employees’ desires.” *Sullivan Bros.*, above. Respondent’s employees’ desires have been clearly expressed in the vote of a majority in behalf of Local 1125. Their desires would be thwarted if their elected representative’s successor, Local 83, was not entitled to bargain in their behalf.

I also find that the Board cannot properly inquire into Local 1125’s procedure in deciding whether to affiliate into Local 83, particularly where the International Union’s constitution does

not require a vote of the membership and instead permits the International President to decide on questions of affiliation and merger. It would be improper to give the Respondent the “power to veto an independent union’s decision to affiliate” based upon an internal union action. *Seattle-First*, above.

Accordingly, notwithstanding that certain Board cases have required that minimal due process be accorded members in the affiliation process, I find that in view of the above no inquiry into due process need be made and none should be made.

CONCLUSIONS OF LAW

1. The Respondent, Deposit Telephone Company, Inc., is an employer within the meaning of Section 2(2), (6) and (7) of the Act.

2., International Brotherhood of Electrical Workers, Locals 83 and 1125, AFL–CIO, are labor organizations within the meaning of Section 2(5) of the Act.

3. Since September 1, 1999, Local 83, International Brotherhood of Electrical Workers, AFL–CIO, has been the successor to Local 1125, and since such time has been the designated exclusive collective-bargaining representative of the following appropriate collective-bargaining unit:

All full-time and regular part-time technicians, and field employees employed by the Employer at its Deposit, New York facility, including customer service technicians—cable splicing/repair, customer service technicians—switching & data network, customer service technicians—installation and repair, customer service technicians—construction, maintenance, customer service technicians—supply, but excluding customer service representative, assistant-data processing, cashiers, senior accountants, account executives—business services, administrators—commercial markets, professional employees, guards, and supervisors as defined in the Act.

4. The Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with Local 83 as the exclusive collective-bargaining representative of the employees in the unit described above.

5. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in 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. Respondent shall be ordered to recognize and bargain collectively with Local 83, International Brotherhood of Electrical Workers, AFL–CIO, as the exclusive collective-bargaining representative of the employees in the appropriate unit set forth above, and if an understanding is reached, embody the understanding in a signed agreement.

The complaint requests that an order be issued pursuant to *Mar-Jac Poultry*, 136 NLRB 785 (1962). In order to ensure that the employees are accorded the services of their selected bargaining agent, Local 1125, which has been succeeded by Local 83, the initial period of the certification shall be construed as beginning from the date that the Respondent begins to bargain

in good faith with Local 83. *Cleveland Construction*, 311 NLRB 1397, 1398 (1993).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, Deposit Telephone Company, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain collectively with Local 83, International Brotherhood of Electrical Workers, AFL-CIO, as the exclusive collective-bargaining representative of the employees in the unit described above.

(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 Local 83, International Brotherhood of Electrical Workers, AFL-CIO, as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time technicians, and field employees employed by the Employer at its Deposit, New York facility, including customer service technicians—cable splicing/repair, customer service technicians—switching & data

network, customer service technicians—installation and repair, customer service technicians—construction, maintenance, customer service technicians—supply, but excluding customer service representative, assistant-data processing, cashiers, senior accountants, account executives—business services, administrators—commercial markets, professional employees, guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Deposit, New York, copies of the attached notice marked “Appendix.”⁶ Copies of the notice, on forms provided by the Regional Director for Region 3, 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 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 September 15, 1999.

(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.

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁶ 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.”