

Nos. 08-1213, 08-1240

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

ALLIED MECHANICAL SERVICES, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**UNITED ASSOCIATION OF JOURNEYMEN AND
APPRENTICES OF THE PLUMBING AND PIPEFITTING
INDUSTRY OF THE UNITED STATES AND CANADA,
ALF-CIO, LOCAL UNION 357**

Intervenor

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF ORDERS OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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GLOSSARY

1. “A.” the Joint Appendix
2. “Add.” the addendum to the Board’s brief
3. “Allied” the Respondent, Allied Mechanical Services, Inc.
4. “*Allied-I*” a case involving Allied that resulted in the July 30, 1991 Regional Director-approved recognition/settlement agreement
5. “*Allied-II*” the Board’s Decision and Order in *Allied Mechanical Services*, 320 NLRB 32 (1995), *enforced*, 113 F.3d 623 (6th Cir. 1997)
6. “*Allied-III*” the Board’s Decision and Order in *Allied Mechanical Services*, 332 NLRB 1600 (2001)
7. “GC” the Board’s General Counsel
8. “Local 337” the local union that merged in 1998 with another union to form the Union-Intevenor in this case
9. “Local 357” the Intervenor, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Local Union 357
10. “the Act” The National Labor Relations Act
11. “the Board” The National Labor Relations Board
12. “the Union” the Intervenor, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Local Union 357

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**ON PETITION FOR REVIEW AND CROSS-APPLICATION
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THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This case is before the Court on the petition of Allied Mechanical Services, Inc. (“Allied”) to review, and on the cross-application of the National Labor Relations Board (“the Board”) to enforce, two Board Decisions and Orders issued against it. The Board’s Decision and Order issued on May 28, 2004, and is reported at 341 NLRB 1084 (A.59-101);¹ the Board’s Supplemental Decision and Order issued on September 28, 2007, and is reported at 351 NLRB No. 5 (A.107-16); and this was reaffirmed in a subsequent Order Denying Motion for Reconsideration, issued on May 30, 2008, and reported at 352 NLRB No. 83. (A.117-21.)

The Board had jurisdiction over the unfair labor practice proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Board’s Orders are final with respect to all parties under Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)). This Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f) of the Act.

¹ “A.” references are to the Joint Appendix. “Add.” references are to ten pages of the record that were inadvertently omitted from the Joint Appendix. Those missing pages are included in an addendum attached to this brief for the convenience of the Court. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

The petition for review and the cross-application for enforcement were timely filed on June 5, 2008 and July 14, 2008, respectively; the Act places no time limit on the institution of proceedings to review or enforce Board orders. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Local Union 357 (“the Union” or “Local 357”) has intervened on the side of the Board.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary enforcement of its uncontested findings that Allied violated Section 8(a)(3) and (1) of the Act by refusing to consider and hire 4 job applicants because of their union membership and by refusing to reinstate 10 strikers upon their unconditional offer to return to work.

2. Whether the Board reasonably found that Allied and Local 337 had a Section 9(a) bargaining relationship, so that Allied violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from, and refusing to furnish information to, the Union and unilaterally changing its job application procedure.

APPLICABLE STATUTES

Relevant statutory provisions are contained in the attached addendum.

STATEMENT OF THE CASE

This case, which has a complicated history spanning many years, in part highlights the fact that building-and-construction-industry employers and unions have different rights and responsibilities depending upon whether their relationship is governed by Section 8(f) or Section 9(a) of the Act (29 U.S.C. §158(f) or 159(a)).² In a nutshell, an 8(f) relationship imposes no enforceable duties under the Act in the absence of a collective-bargaining agreement, whereas an employer with a 9(a) relationship remains obligated to recognize, and bargain with, a union even absent a collective-bargaining agreement, unless the 9(a) employer rebuts the union's continuing presumption of majority status.

² Section 8(f) of the Act (29 U.S.C. §158(f)) provides in relevant part:

It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged . . . in the building and construction industry with a labor organization. . . because . . . the majority status of such labor organization has not been established . . . prior to the making of such agreement[.]

Section 9(a) of the Act (29 U.S.C. §159(a)) provides in relevant part:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment[.]

Based on unfair labor practice charges filed by the Union in 1998, the Board's General Counsel issued complaints against Allied alleging that it violated Section 8(a)(5) and (1) of the Act (29 U.S.C. §158(a)(5) and (1)) by, among other things, withdrawing recognition from the Union. The complaints also alleged that Allied violated Section 8(a)(3) and (1) of the Act (29 U.S.C. §158(a)(3) and (1)) by refusing to hire, and consider for hire, job applicants because of their union membership and by refusing to reinstate strikers upon their unconditional offers to return to work. (A.64; 366,367,368-73,377,378-83,391-96.)

After a hearing, an administrative law judge found that Allied was entitled to withdraw recognition from, and to refuse to bargain with, the Union for three separate reasons: (1) Allied had a Section 8(f)--rather than a Section 9(a)--relationship with UA Local 337 ("Local 337"), the local union that merged in 1998 with another local to form the Union-Intervenor in this case; (2) Local 337's members had never been given the opportunity to vote on the merger, and therefore the Union-Intervenor could not be said to have succeeded to Local 337's bargaining rights; and (3) Allied had bargained for a reasonable period of time. (A.71-74.) Accordingly, the judge recommended that the Section 8(a)(5) allegations be dismissed. (A.74.) On the other hand, the judge found that Allied violated Section 8(a)(3) and (1)

of the Act by refusing to reinstate 10 strikers and by failing to hire, and consider for hire, 10 union job applicants. (A.100.)

After the parties filed exceptions to the judge's decision, the Board issued its decision, finding that Allied violated the Act by refusing to reinstate 10 strikers and by refusing to hire, and consider for hire, 4 union applicants. (A.60.) The Board upheld the judge's dismissal of the Section 8(a)(5) allegations, but solely on the basis that the absence of a union membership vote on Local 337's merger meant that Local 357 could not be deemed to have succeeded to Local 337's bargaining rights. (A.59-60.)

Upon motions by the General Counsel and the Union, the Board reconsidered its dismissal of the Section 8(a)(5) allegations, and on September 28, 2007, the Board issued its Supplemental Decision and Order finding that Allied had in fact violated Section 8(a)(5) and (1) of the Act. (A.107-16.) Relying on its then-recently issued decision in *Raymond F. Kravis Center*, 351 NLRB No. 19 (2007), *enforced*, ____ F.3d ____, 2008 WL 5396806 (D.C. Cir. 2008), the Board found that the absence of a union membership vote on Local 337's merger did not privilege Allied to withdraw recognition from, and to refuse to bargain with, the Union. (A.107-08.)

The Board then considered Allied's additional defenses to the bargaining allegations. (A.108-16.) For two reasons, the Board rejected Allied's claim that it merely had a Section 8(f) relationship with the Union. First, the Board found that Allied had entered into a 1991 recognition/settlement agreement with Local 337 to resolve a complaint that sought a *Gissel* remedial bargaining order,³ and that the 1991 recognition/settlement agreement and the relevant extrinsic evidence together showed that the parties had established a 9(a) relationship, instead of an 8(f) relationship. (A.110-11,118-19.) Second, the Board found that its prior decision in *Allied Mechanical Services, Inc.*, 332 NLRB 1600 (2001) collaterally estopped Allied from making the argument that the parties merely had an 8(f) relationship, because that 2001 decision was necessarily premised on the existence of a 9(a) relationship between Allied and Local 337. (A.111-12, 118.) Turning to whether Allied permissibly withdrew recognition from this 9(a) bargaining relationship, the Board found that Allied had failed to carry its burden of showing that it had a good-faith doubt of the Union's majority status at the time it withdrew recognition. (A.112-13.)

³ See *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969) ("*Gissel*").

Allied then filed a motion for reconsideration of the Board's Supplemental Decision and Order, which the Board (Chairman Schaumber and Member Liebman) denied on May 30, 2008. (A.117-21.)⁴

At this late stage of the case, the areas remaining in dispute have narrowed considerably. Allied does not even address the Board's Section 8(a)(3) findings in its brief to this Court. While Allied does challenge the Board's Section 8(a)(5) findings, it no longer contends that it was entitled to withdraw recognition from, and refuse to furnish information to, the Union and make unilateral changes because it allegedly had a good-faith doubt of the Union's majority status. Nor does Allied seek to justify its actions on the ground that it had no duty to recognize the Union because the Union did not succeed to Local 337's bargaining rights. Instead, Allied merely claims that

⁴ The first two decisions and orders in this case were issued by three-member panels. The Board's order denying Allied's motion for reconsideration was issued by a properly constituted, *two*-member Board quorum within the meaning of Section 3(b) of the Act (29 U.S.C. §153(b)). (A.117n.5.) In 2003, the Board sought an opinion from the United States Department of Justice's Office of Legal Counsel ("the OLC") concerning the Board's authority to issue decisions when only two of its five seats were filled, if the two remaining members constitute a quorum of a three-member group within the meaning of Section 3(b) of the Act. The OLC concluded that the Board had the authority to issue decisions under those circumstances. See Quorum Requirements, Department of Justice, Office of Legal Counsel, 2003 WL 24166831 (O.L.C., Mar. 4, 2003). This issue is currently before this Court in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, Nos. 08-1162 & 08-1214, argued December 4, 2008, before Judges Sentelle, Tatel, and Williams.

it never had a 9(a) bargaining relationship with Local 337 and, therefore, none of its actions can be found to have violated Section 8(a)(5) and (1) of the Act.

STATEMENT OF THE FACTS

I. The Board's Findings of Fact

A. Background; in 1990, Local 337 Demands Recognition as the the Representative of Allied's Employees and Offers To Demonstrate Its Majority Status; the Regional Director Issues a Complaint in *Allied-I* Alleging that a Majority of Allied's Employees Had Designated Local 337 as Their Exclusive Collective-Bargaining Representative and Seeking a *Gissel* Bargaining Order; in 1991, Allied Resolves the Complaint by Entering into a Regional Director-Approved Settlement Agreement, Where It Agrees To Recognize, and Bargain with, Local 337 as the Exclusive Collective-Bargaining Representative of Its Employees

Allied fabricates and installs heating, plumbing, and air-conditioning systems in the construction industry in Michigan. (A.64; 378-79(¶2), 386(¶2).) In 1990, Local 337 began a drive to organize Allied's plumbers and pipefitters. On April 24, 1990, Local 337 demanded that Allied recognize it as the collective-bargaining representative of Allied's employees, and offered to demonstrate proof of its majority status to a mutually agreed upon third party. (A.65,108,110; 708.)

On December 13, 1990, the Board's General Counsel issued a complaint ("the 1990 complaint") in another case ("*Allied-I*") alleging that:

(a) Allied's plumbers, pipefitters, apprentices, and certain other employees constituted an appropriate collective-bargaining unit under the Act; (b) by April 24, 1990, a majority of Allied's unit employees had designated Local 337 as their exclusive collective-bargaining representative; and (c) Allied had committed such serious unfair labor practices that the possibility of conducting a fair election was slight and that the employees' sentiments regarding union representation, having been expressed through authorization cards, would be better protected by the entry of an order requiring Allied to recognize and bargain with Local 337 than by traditional remedies.

Accordingly, the complaint sought a remedial bargaining order. (A.65-66, 108; 405,407-09(¶¶ 8, 9,10-18),410.)

Allied's answer denied that a remedial bargaining order was appropriate. (A.66; 412,414(¶18.) As for the complaint's allegation that a majority of Allied's employees had designated Local 337 as their exclusive collective-bargaining representative, Allied answered that it "has no factual basis upon which to admit or deny the allegation, but demands that General Counsel submit specific proof that an uncoerced majority existed on such date." (A.413(¶9).)

On July 30, 1991, the Board's Regional Director approved an informal settlement agreement entered into by Allied and Local 337, which

resolved the *Allied-I* complaint. That settlement agreement, which contained a nonadmissions clause, required Allied to, among other things, recognize and, upon request, bargain in good faith with Local 337 as the exclusive collective-bargaining representative of Allied's unit employees and to embody any understanding that is reached in a signed collective-bargaining agreement. (A.66,108,110-11; 417-19.)

B. *Allied-II: Allied Refuses To Reinstate Employees Who Struck in 1992 and 1993 Despite Their Unconditional Offers To Return to Work*

On October 16, 1992, six Allied employees engaged in an economic strike. *Allied Mechanical Services, Inc.*, 320 NLRB 32, 32-34 (1995)(“*Allied-II*), *enforced*, 113 F.3d 623 (6th Cir. 1997). On June 24, 1993, four more Allied employees went on strike. *Ibid.* Although 9 of the 10 strikers made unconditional offers to return to work by July 6, 1993, Allied refused to reinstate them. *Id.* at 32-34, 37.

Based on Local 337's charges, the Regional Director issued a complaint in *Allied-II* alleging that Allied's refusal to reinstate the strikers was unlawful. *Id.* at 36. After a hearing, the Board found that Allied violated the Act by failing to reinstate nine economic strikers. *Id.* at 33-34, 40. Accordingly, the Board ordered Allied to, among other things, offer the nine strikers reinstatement and to make them whole for any loss of earnings

suffered as a result of Allied's discrimination against them. *Id* at 34. Allied then sought review of the Board's *Allied-II* decision in the Sixth Circuit.

C. *Allied-III*: In 1995, and 1996, Allied Commits Several 8(a)(5) Violations and Refuses To Reinstate Strikers; on December 26, 1996, Two Employees Strike To Protest Allied's Unfair Labor Practices

During 1995 and 1996, Allied implemented a new disability plan, changed its apprenticeship program, and granted merit raises without giving notice to, or bargaining with, Local 337. Allied also declined Local 337's request to bargain over changes it was proposing to its health insurance plan, and instead met directly with its employees regarding the proposed changes. *Allied Mechanical Services, Inc.*, 332 NLRB 1600, 1609-12 (2001) ("*Allied-III*" or "the 2001 case"). On various dates in 1995 and 1996, Local 337 asked Allied for information about a variety of matters, but Allied delayed providing, or outright refused to provide, some of the requested information. *Id.* at 1606, 1609-12. Allied also declined to respond to certain union bargaining requests. *Id.* at 1606, 1610, 1613-14. In addition, Allied stated that, if employees struck, it would assume they had quit; it informed its insurance company that certain strikers had quit; and it refused to reinstate six employees who had struck in the summer of 1996. *Id.* at 1605-09.

Based upon Local 337's unfair labor practice charges, the Regional Director on December 19, 1996, issued a consolidated complaint in *Allied-*

III, alleging that Local 337 was the Section 9(a) representative of Allied's unit employees, and that Allied had committed multiple violations of the Act by, among other things, engaging in the acts described in the preceding paragraph of this brief. (A.119; 515-24,Add.1.) Allied filed an answer denying that Local 337 was the 9(a) representative of its employees and that it had violated the Act. (A.119; 603,606(¶¶9,43,44),517,521(¶¶9,43,44).)

On December 23, 1996, Local 337 informed Allied that Jon Kinney and Tobin Rees were beginning a strike to protest Allied's unfair labor practices. (A.67; 725-26,727-28,813,822-24,Add.2.) When Allied asked which unfair labor practices, Local 337 pointed to Allied's continuing refusal to bargain in good faith and to the unfair labor practices contained in the recently issued *Allied-III* complaint. (A.67; 728-31, Add.3, Add.4.)

After a hearing, the Board found in *Allied-III* that Allied violated Section 8(a)(5) and (1) of the Act in 1995 and 1996 by, for example, failing to bargain in good faith with Local 337; unilaterally changing the employees' wages, benefits, and other terms and conditions of employment; refusing to furnish information to Local 337; and bypassing Local 337 and dealing directly with employees. *Allied-III*, 332 NLRB at 1600, 1614-15. The Board also found that Allied violated Section 8(a)(3) and (1) of the Act

by threatening to discharge, and discharging, strikers and by failing and refusing to reinstate six strikers upon their unconditional offers to return to work. *Id* at 1614.

D. The Instant Case: In 1997, the Sixth Circuit Enforces the Board's Order in *Allied-II* Requiring Allied To Offer Nine Strikers Reinstatement and To Make Them Whole; Although Allied Offers Reinstatement to Those Strikers, It Fails To Pay Them Backpay at that Time and Continues To Refuse To Reinstatement the Summer-of-1996 Strikers; Employees Complain to Local 337 About Allied's Misconduct, and in Late July 1997, Eight Employees Strike

On May 16, 1997, the Sixth Circuit enforced the Board's 1995 order in *Allied-II*, which required Allied to offer the nine *Allied-II* strikers reinstatement and to make them whole for their losses. *See Allied Mechanical Services, Inc. v. NLRB*, 113 F.3d 623. Allied then offered reinstatement to the nine strikers named in the Sixth Circuit's decision. Eight of the nine strikers accepted and returned to work at Allied on July 9, 1997. However, Allied at that time did not pay them any backpay for their losses. (A.67; 731-32,854,970.)

When the strikers returned to work, they discovered that Allied had implemented a mileage-reimbursement policy dated April 15, 1997. (A.67; 555,738-39,849-51,967,969.) Allied had never proposed that policy to Local 337 during their bargaining sessions, and Allied had instituted the policy without notice to Local 337. (A.67; 738-39,969.)

On July 22, 1997, Local 337 renewed earlier requests it had made for a comprehensive list of all employees Allied had hired, or was in the process of hiring, and their respective dates of hire. Local 337 explained that the list Allied had previously furnished was incomplete. (A.67-68; 546-54,740-45.)

The eight reinstated strikers and Local 337 then discussed Allied's conduct, including Allied's failure to pay them backpay under the Sixth Circuit's decree, Allied's continuing failure to reinstate the six summer-of-1996 strikers, Allied's mistreatment of certain employees, and Allied's failure to furnish information to Local 337. (A.67-68; 544,732-35,845-47,852-55,866-69,895-97,915,966-67.) By letter dated July 23, 1997, Local 337 informed Allied that Jim Bronkhorst, Ken Falk, Ted Fuller, Grant Maichele, Marty Preston, Max Roggow, Brian Rowden, and Steve Titus--the eight strikers who had returned to work on July 9, 1997, pursuant to the Sixth Circuit's May 16, 1997 decree--would begin an unfair labor practice strike on July 25. (A.67; 544,732-33.)

On July 25, 1997, the eight employees mentioned in the Union's letter went out on strike carrying signs that stated: "Allied . . . has committed unfair labor practices in violation of federal law." (A.68; 545,732,733, 736,737,785,855,866-67,869,876,895-96,949.) The eight strikers stopped

picketing a week later, but did not offer to return to work until March 2, 1998. (A.67-68; 736,847-48,968,Add.5.)

E. On March 1, 1998, the UA Consolidates Local 337 with Local 513 To Create Local 357; on March 2, 1998, the Union Makes an Unconditional Offer To Return To Work on Behalf of the Eight Summer-of-1997 Strikers and Two Employees Who Had Struck in December 1996; Allied Refuses To Reinstate Those Strikers

On March 1, 1998, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO merged Local 337 with Local 513 to create a new local union named Local 357, and members of Local 337 automatically became members of Local 357. (A.59,109; 563-69,802-03,804,811.) The union members were not afforded an opportunity to vote on the merger. (A.68; 769,812.)

Local 337 Business Manager Robert Williams, who had administered Local 337's collective-bargaining agreement and handled Local 337's grievances before the merger, became the business manager of Local 357 after the merger and continued to administer Local 337's collective-bargaining agreement and grievances. (A.68; 801,808-09.) By letter dated March 2, 1998, Local 357 Business Manager Williams notified Local 337's members that the local union office would continue to operate in much the same manner as before. (A.68; 570.) Local 337's collective-bargaining

agreement with signatory employers remained in effect after the merger, and Local 357's dues structure remained the same as Local 337's. (A.805,807.)

On March 2, 1998, the Union made an unconditional offer to return to work on behalf of several strikers, including the eight employees who had gone out on strike in the summer of 1997 and the two employees who had struck in December 1996. (A.69,70; 786-87,Add.5.) When Allied did not respond, the Union repeated its unconditional offer to return to work twice more that same month. (A.748,Add.6,Add.7.) Allied never offered those strikers reinstatement. (A.69,70; 379-80 (¶¶10, 12,13), 387-88(¶¶10,12,13).)

F. Union Members Calhoun, Conroy, Hill, and Kiss Apply for Jobs with Allied; Allied Does Not Even Consider Them, and Instead Hires Nonunion Applicants

Union members Scott Calhoun, Terri Jo Conroy, Harold Hill and Jeff Kiss, applied for plumbing and pipefitting jobs with Allied between July 28 and July 30, 1998, listing union organizers as references. (A.60-61; 420-23,430,440,441,457-58,467-68,623,751-53,784,799-800,838-39,916,917, 939,940,979-81.) Hill and Kiss had previously worked for Allied, and Hill had previously participated in a union strike against Allied. (A.61; 836-37,840, *Allied-II*, 320 NLRB at 32.)

In mid-July 1998, Allied began interviewing applicants because it had a number of jobs scheduled to start in August. (A.61,78; 918-20.) Between

August 5 and August 31, 1998, Allied hired, or made job offers to, six nonunion plumber and pipefitter applicants. (A.61; 573-75,576-77,582,586, 587,588,591-92,620-62, 983-85,993-94,995-96,998-99.) Although Allied's hiring policy stated that Allied will consider *all* current applications when hiring and that applications are considered "current" for 30 days, Allied did not consider union applicants Calhoun, Conroy, Hill, and Kiss for those or any other positions. (A.61,77; 618,628,629,757,800,839,919-20,971-74, 997,1002,Add.9.) Nor did Allied consider or hire them, or any of the other 17 union applicants who applied for jobs in 1998, even though it hired, or made job offers to, 22 of 24 nonunion plumbing and pipefitting applicants between the first week of August 1998 and early 1999. (A.61,78,84,85,93; 420-514,576-77,578-94,620-27,918-20,921-23,924-25,926,933-38,943-46,982,983-85,986-87,988-99,997,1000-01,1002,1003.)

On August 1, 1998, Allied, without notice to, or bargaining with, the Union, revised its job application procedure to require applicants to apply in person at its office in Kalamazoo, Michigan, rather than permit them to fax or mail their applications. (A70,109; 381(¶¶19,21),389(¶¶19,21),628,

917,927.) Prior to that time, union members had been faxing or mailing job applications to Allied. (A.751-52,916,917,927,932,941,942,991-92.)

G. On June 29, 1998, the Union Requests Information from Allied; Allied Fails To Furnish Some of the Requested Information; on July 22, 1998, Allied Withdraws Recognition from the Union

After Local 337 merged with Local 513 to create Local 357, Allied held nine bargaining sessions with the Union. (A.69,109; 809-10.) By letter dated June 29, 1998, the Union requested information so that it could “carry on constructive negotiations and . . . properly represent” Allied’s employees. (A.69; 556.) The Union’s letter requested, among other things, a list of Allied’s licensed plumbers within the State of Michigan and their current wage rates; a list of Allied’s welders who were carbon-steel certified; and a list of Allied’s welders who were stainless- steel certified. (A.69,109; 556,557(¶¶15,16,17).) Allied did not furnish the Union with that information. (A.109n.9; 559-62,1073-74.)

By letter dated July 22, 1998, Allied claimed that it had bargained in good faith with the Union pursuant to the 1991 recognition/settlement agreement in *Allied-I*, but that the Union had not. (A.69; 571-72.) Allied then announced that it was withdrawing recognition from the Union and that it would not bargain any more with the Union because, among other reasons: (1) the bargaining process created by the settlement agreement was a

voluntary 8(f) relationship that Allied was free to unilaterally terminate at any time; (2) even if it was a Section 9(a) relationship, Allied currently had a good-faith doubt of the Union's majority status; and (3) Allied had no legal obligation to bargain with the newly created Local 357. (A.69,109; 380(¶16),389(¶16),571-72.)

II. THE BOARD'S CONCLUSIONS AND ORDERS

The Board (Chairman Battista and Members Schaumber and Meisburg) found that Allied violated Section 8(a)(3) and (1) of the Act (29 U.S.C. §158(a)(3) and (1)) by refusing to reinstate 10 strikers (Jim Bronkhorst, Ken Falk, Ted Fuller, Jon Kinney, Grant Maichele, Marty Preston, Tobin Rees, Max Roggow, Brian Rowden, and Steve Titus) upon their unconditional offers to return to work and by refusing to consider for employment, and refusing to hire, Scott Calhoun, Terri Jo Conroy, Harold Hill, and Jeff Kiss because of their union membership. (A.60.)

In its Supplemental Decision and Order, the Board (Chairman Battista and Members Schaumber and Walsh) further found that Allied violated Section 8(a)(5) and (1) of the Act (29 U.S.C. §158(a)(5) and (1)) by withdrawing recognition from the Union, refusing to furnish the Union with relevant information, and unilaterally revising its job application procedure to require applicants to apply in person at its Kalamazoo office. (A.113.)

The Board's Orders require that Allied cease and desist from the unfair labor practices found, and from in any other manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. (A.62-63,114-16.) Affirmatively, the first Board Order requires Allied to offer Bronkhorst, Falk, Fuller, Kinney, Maichele, Preston, Rees, Roggow, Rowden, and Titus full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions; to offer employment to Calhoun, Conroy, Hill, and Kiss; and to make the discriminatees whole for their losses. (A.63.)

The Board's Supplemental Order requires Allied to recognize and, on request, bargain collectively with the Union as the exclusive bargaining representative of the unit employees and to embody any understanding that is reached in a signed agreement; to furnish the Union in a timely manner the information that the Union requested on June 29, 1998; and to rescind its unilaterally instituted requirement that applicants apply in person at Allied's Kalamazoo, Michigan office and to notify the Union and employees in writing that this has been done. (A.115.) The Board's Orders also require Allied to post appropriate notices. (A.63-64,115-16.)

SUMMARY OF ARGUMENT

The Board is entitled to summary enforcement of its findings that Allied violated the Act by refusing to consider and hire 4 union job applicants and by refusing to reinstate 10 strikers, because Allied does not contest those unfair labor practice findings in its brief to this Court.

For two reasons, the Board reasonably found that Allied had a Section 9(a) bargaining relationship with Local 337 rather than a Section 8(f) relationship, so that Allied violated the Act when it admittedly withdrew recognition from, and refused to furnish information to, the Union and unilaterally changed its application procedure.

First, the Board found that Allied's recognition/settlement agreement with Local 337 and the relevant extrinsic evidence together demonstrated that Allied recognized Local 337 as the 9(a) representative of its employees. Allied recognized Local 337 as part of a Regional Director-approved settlement agreement that resolved a *Gissel* bargaining order complaint. Although Allied claims that it merely recognized Local 337 as the 8(f) representative of its employees, Allied's recognition agreement replicated the language of the complaint, which unquestionably sought the establishment of a 9(a) relationship, and the recognition agreement also used the language contained in Board Orders remedying Section 9(a) withdrawal-

of-recognition violations, rather than the more limited remedial language used in Section 8(f) cases.

Second, the Board reasonably found that one of its prior decisions involving Allied collaterally estopped Allied from arguing that the parties did not have a 9(a) relationship, because that prior decision was necessarily premised on the existence of a 9(a) relationship between Allied and Local 337.

Contrary to Allied's claim, this Court's decision in *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (2003), does not preclude enforcement of the Board's decision here. Although Allied claims that *Nova Plumbing* stands for the broad proposition that an employer's agreement to recognize a union as the 9(a) representative of its employees is void and unenforceable unless there has been an actual showing of majority support among those employees, *Nova Plumbing*, by its terms, merely stands for the more limited proposition that "standing alone . . . contract language and intent [to form a 9(a) relationship] cannot be dispositive *at least where . . . the record contains strong indications that the parties had only a section 8(f) relationship.*" *Id.* at 537 (emphasis added). The record in the instant case does *not* contain "strong indications" that Local 337 lacked majority support.

Allied's attack on the Board's use of collateral estoppel is equally unavailing. The Board was free to apply collateral estoppel sua sponte, and all the prerequisites for applying collateral estoppel are satisfied here.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS THAT ALLIED VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY REFUSING TO CONSIDER AND HIRE 4 JOB APPLICANTS BECAUSE OF THEIR UNION MEMBERSHIP AND BY REFUSING TO REINSTATE 10 STRIKERS UPON THEIR UNCONDITIONAL OFFER TO RETURN TO WORK

As shown, the Board found that Allied violated Section 8(a)(3) and (1) of the Act (29 U.S.C. §158(a)(3) and (1)) by refusing to consider and hire four job applicants because of their union membership. (A.60,107.)⁵ As also shown, the Board further found that Allied violated Section 8(a)(3) and (1) of the Act by refusing to reinstate 10 strikers upon their unconditional

⁵ See *Progressive Electric, Inc. v. NLRB*, 453 F.3d 538, 546 (D.C. Cir. 2006) (employer violates Section 8(a)(3) and (1) by refusing to hire, or consider for hire, applicants because of their union affiliation); *The 3E Company, Inc.*, 322 NLRB 1058, 1061-62 (1997)(refusal to consider), *enforced mem.*, 132 F.3d 1482 (D.C.Cir. 1997).

offers to return to work.⁶ (A.60.) In its brief, Allied does not seek review of those unfair labor practice findings. Accordingly, the Board is entitled to summary enforcement of the portions of its orders relating to those unfair labor practice findings. *See Grondorf, Field, Black & Co., Inc. v. NLRB*, 107 F.3d 882, 885 (D.C. Cir. 1997); *Int'l Union of Petroleum & Indus. Workers v. NLRB*, 980 F.2d 774, 778 n.1 (D.C. Cir. 1992).

⁶ *See NLRB v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 378 (1967) (employer violates Section 8(a)(3) and (1) of the Act by refusing to reinstate strikers, absent a legitimate and substantial business justification); *Gibson Greetings, Inc. v. NLRB*, 53 F.3d 385, 389 (D.C. Cir. 1995)(same).

II. THE BOARD REASONABLY FOUND THAT ALLIED AND LOCAL 337 HAD A SECTION 9(a) BARGAINING RELATIONSHIP, SO THAT ALLIED VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY WITHDRAWING RECOGNITION FROM, AND REFUSING TO FURNISH INFORMATION TO, THE UNION AND UNILATERALLY CHANGING ITS JOB APPLICATION PROCEDURE

A. Standard of Review

The Board’s factual findings are “conclusive” if they are supported by substantial evidence on the record as a whole. 29 U.S.C. §160(e). A reviewing court may not displace the Board’s choice between two fairly conflicting views of the facts, even if the court “would justifiably have made a different choice had the matter been before it *de novo*.” *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951). This Court gives “substantial deference” to the inferences that the Board draws from the facts. *Halle Enterprises, Inc. v. NLRB*, 247 F.3d 268, 271 (D.C. Cir. 2001). The Board’s construction of the Act is entitled to affirmance if it is “reasonably defensible,” even if the Court would have preferred another view of the statute. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496-97 (1979). The Board’s application of the law to the facts, even in areas outside its expertise, is reviewed under the substantial evidence standard. *NLRB v. United Insurance Co.*, 390 U.S. 254, 260 (1968).

B. Overview of Uncontested and Contested Issues

Section 8(a)(5) of the Act (29 U.S.C. §158(a)(5)) makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representative[] of [its] employees,” if it has a Section 9(a) relationship with its employees’ exclusive representative. Accordingly, it is well settled that an employer that has a 9(a) relationship with a union violates the Act if it withdraws recognition from, and refuses to bargain with, the union, makes unilateral changes in mandatory subjects of bargaining, and refuses to furnish relevant information to the union. *See generally NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778 (1980); *NLRB v. Katz*, 369 U.S. 736, 742-43 (1962); *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1188, 1191-92 (D.C. Cir. 2000); *NLRB v. Southwest Security Equipment Corp.*, 736 F.2d 1332, 1337-38 (9th Cir. 1984); *Sheeran v. American Commercial Lines, Inc.*, 683 F.2d 970, 977 (6th Cir. 1982).

In the present case, Allied does not dispute that it has withdrawn recognition from, and refused to furnish relevant information to, the Union and unilaterally changed its job application procedure. Allied defends its actions by claiming that it was free to repudiate its collective-bargaining relationship with the Union any time it wanted, because it merely had a Section 8(f) relationship with the Union. As we now show, Allied’s

contention lacks merit; the Board reasonably found that Allied had a 9(a) relationship.

C. General Principles Governing 9(a) Collective-Bargaining Relationships

An employer can lawfully incur a 9(a) bargaining obligation, i.e., a bargaining obligation with a majority union, in different ways. For example, an employer becomes obligated to recognize and bargain with a union that has won a Board-conducted election. *Gissel*, 395 U.S. at 596. Although an employer that has not committed unfair labor practices has the right to insist on a Board election, the employer may waive that right and voluntarily recognize a union that bases its claim to representative status on the possession of union authorization cards. *Id.* at 579, 597.⁷

⁷ Outside the construction industry, it is an unfair labor practice for an employer to recognize and enter into a collective-bargaining agreement with a minority union, i.e., a union that actually lacks majority support. *Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 732, 737-38 (1961). Where a union requests 9(a) recognition from a nonconstruction industry employer, the employer may either demand an actual showing of majority support or choose to accept the union's claim of majority support and recognize the union. When the employer recognizes the union as the 9(a) representative of its employees based on the union's assertion of majority status without verifying its majority, the employer may not repudiate the relationship on the ground that the union did not have majority support when the employer recognized it, unless the employer raises that defense within six months of the grant of recognition. *See Staunton Fuel & Material, Inc.*, 335 NLRB 717, 719 nn.10,14 (2001); *Oklahoma Installation Co.*, 325 NLRB 741, 742 (1988), *enforcement denied on other grounds*, 219 F.3d 1160 (10th Cir. 2000); *Moisi & Son Trucking, Inc.*, 197 NLRB 198,

Moreover, an unwilling employer can incur a 9(a) bargaining obligation as a result of unfair labor practice proceedings. Thus, in *Gissel*, 395 U.S. at 610, 614-15, the Supreme Court held that the Board has authority to order an employer to bargain with a union as a remedy for the employer's unfair labor practices if (1) a majority of the employees in an appropriate unit once supported the union and (2) "the Board finds that the possibility of erasing the effects of [the employer's] past [unfair labor] practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through [union authorization] cards would, on balance, be better protected by a bargaining order"

Once a union has achieved 9(a) status as a bargaining representative, it enjoys a presumption of majority status. That presumption is ordinarily irrebuttable for one year following recognition or during the term of a collective-bargaining agreement of three years or less; thereafter the presumption becomes rebuttable. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786 (1996); *NLRB v. Creative Food Design*, 852 F.2d 1295, 1300 (D.C. Cir. 1988). At the time of the events in question, an employer in a

198 n.2, 199-200, 203-04 (1972); *Morse Shoe, Inc.*, 227 NLRB 391, 392-95 (1976), *enforced*, 591 F.2d 542 (9th Cir. 1979).

9(a) relationship could rebut the presumption of majority status--and thereby lawfully withdraw recognition from the union--by showing either that (1) the union did not in fact enjoy majority support, or (2) it had a good-faith doubt of the union's majority status. Absent such a showing, an employer's withdrawal of recognition and refusal to bargain were unlawful. *See NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778, 785 (1990).⁸

D. Construction Industry Employers Can Have 9(a) Relationships or Can Enter Into Collective-Bargaining Agreements with Unions that Do Not Enjoy Majority Status

Unions and construction industry employers may also have 9(a) relationships and enter into 9(a) collective-bargaining agreements. *See, for example, NLRB v. Triple C Maintenance, Inc.*, 219 F.3d 1147, 1152-56 (10th Cir. 2000) ("*Triple C Maintenance*"). This is because unions do not have less favored status with respect to construction industry employers than they possess with respect to employers outside the construction industry. *John Deklewa & Sons*, 282 NLRB 1375, 1387 n.53 (1987), *enforced sub. nom.*, 843 F.2d 770 (3d Cir. 1988) ("*Deklewa*").

⁸ In *Levitz Furniture Co.*, 333 NLRB 717, 717 (2001), the Board eliminated the good-faith doubt defense for an employer's withdrawal of recognition from an incumbent union. The Board also held, however, that it would apply its decision only prospectively (*Id.* at 729), and so *Levitz* is not applicable here.

However, because of the construction industry's unique nature, Congress granted construction industry employers and unions a right not enjoyed by their nonconstruction industry counterparts. Thus, Section 8(f), by its terms, permits, but does not require, a construction industry employer to enter into a collective-bargaining agreement ("an 8(f) agreement") with a union that does not enjoy majority status. 29 U.S.C. §158(f).

An 8(f) collective-bargaining agreement is enforceable during its term. *Deklewa*, 282 NLRB at 1377-78, 1385. However, a construction industry employer merely incurs *limited* Section 8(a)(5) obligations by entering into an 8(f) collective-bargaining agreement. *Id.* at 1387. Because it is not an unfair labor practice for a construction industry employer to enter into a collective-bargaining agreement with a minority union, a union enjoys *no* presumption of majority status once its 8(f) agreement expires. *Id.* at 1377-78, 1386-87. Accordingly, as soon as its 8(f) agreement expires, an 8(f) employer may withdraw recognition from, and refuse to bargain with, the union. *Ibid.* Moreover, because an 8(f) union does not enjoy a presumption of majority status even during the term of an 8(f) agreement, employees may vote to oust the union even during the term of an 8(f) agreement, thereby voiding the agreement and the bargaining relationship. *Id.* at 1377, 1385-1387. In sum, absent a current collective-bargaining

agreement between the parties, an 8(f) employer is free to withdraw recognition from, and refuse to bargain with, the union, whereas a 9(a) employer remains obligated to recognize, and bargain with, the union, unless the 9(a) employer rebuts the presumption of majority status. *Id.*, at 1386 n.48, 1387; *Triple C Maintenance*, 219 F.3d at 1152.

It is thus not surprising that, as the Board explained here (A.111,118-19&n.10), the language customarily contained in Board orders remedying 9(a) withdrawal-of-recognition violations “differs significantly” from the language contained in Board orders remedying 8(f) withdrawal-of-recognition violations. When an employer with a 9(a) relationship breaches its bargaining obligations, by, for example, unlawfully withdrawing recognition from a union, the Board requires the employer to recognize, and upon request, bargain with the union as the exclusive representative of employees in an appropriate unit with respect to wages, hours, and working conditions and to embody any understanding in a signed agreement. (A.110-11 & n.18.) *See, for example, Flying Foods Group, Inc.*, 345 NLRB 101, 111(¶2(a)), *enforced*, 471 F.3d 178 (D.C. Cir. 2006).

By contrast, as the Board noted (A.111,119n.10), when an employer with an 8(f) relationship breaches its obligations by withdrawing recognition and repudiating an 8(f) collective-bargaining agreement during its term, the

Board issues a much narrower order than it does in Section 9(a) cases in recognition of the “more circumscribed obligations imposed by an 8(f) relationship.” Thus, as the Board noted (A.111 & n.18), the customary remedial order for the 8(f) withdrawal of recognition violation merely requires the employer to cease and desist from withdrawing recognition from the union as the limited exclusive collective-bargaining representative of the unit employees during the term of the collective-bargaining agreement, to “recognize the [u]nion as the *limited* exclusive collective-bargaining representative,” and to comply with the collective-bargaining agreement and any automatic renewal or extension thereof. *See, for example, Willis Roof Consulting, Inc.*, 349 NLRB No. 24, 2007 WL 324556 *3, *4 (¶¶1(a),2(a)) (Jan. 31, 2007)(emphasis added).⁹

⁹ Similarly, the Board did not order the employer in *Deklewa* to affirmatively recognize the union to remedy the employer’s unlawful withdrawal of recognition during the term of its 8(f) collective-bargaining agreement, because, as the Board explained, an 8(f) employer has no obligation to continue recognizing and bargaining with a union once its 8(f) agreement expires, and the employer’s 8(f) agreement had expired by the time the Board issued its decision in *Deklewa*. *See Deklewa*, 282 NLRB at 1389, 1390. Instead, the Board merely ordered the employer to cease and desist from “withdrawing recognition *during the term of a collective bargaining agreement*” and to make whole the unit employees for any losses they may have suffered as a result of the employer’s failure to adhere to its collective-bargaining agreement “*until it expired.*” *Id.* at 1390 (emphasis added).

A bargaining relationship in the construction industry is presumed to be an 8(f) relationship, and the party asserting the existence of a 9(a) relationship has the burden of proving it. *Deklewa*, 282 NLRB at 1385 n.41. To establish that a construction industry employer has recognized a union as the 9(a) representative of its employees, there must be unequivocal evidence that the union requested recognition as the majority or 9(a) representative of the employer's employees; that the employer recognized the union as the majority or 9(a) representative of its employees; and that the employer's recognition was based on the union's having shown, or having offered to show, evidence of its majority status. *See Staunton Fuel & Material, Inc.*, 335 NLRB 717, 717, 719-20 (2001); *Decorative Floors, Inc.*, 315 NLRB 188, 188-89 (1994); *Triple C Maintenance*, 219 F.3d at 1152-56 (citing cases); *Sheet Metal Workers Int'l Ass'n Local 19 v. Herre Bros., Inc.*, 201 F.3d 231, 241-42 (3d Cir. 1999). An explicit reference to Section 9(a) in the recognition agreement is not required so long as the remainder of the recognition language establishes that the parties intended 9(a) to apply. *Triple C Maintenance*, 219 F.3d at 1155-56 n.3; *Sheet Metal Workers' Int'l Ass'n Local 19 v. Herre Bros., Inc.*, 201 F.3d at 242.

E. The Board Reasonably Found that Allied Had a Section 9(a) Relationship with the Union

The Board found that Allied had a 9(a) relationship with Local 337 based on two independent grounds. (A.118.) First, the Board found that the 1991 recognition/settlement agreement and the relevant extrinsic evidence demonstrated that the parties had established a 9(a) relationship. (A.110-11,118-19.) Second, the Board found that its prior decision in *Allied Mechanical Services, Inc.*, 332 NLRB 1600 (2001) collaterally estopped Allied from making the argument that the parties merely had an 8(f) relationship, because that 2001 decision was necessarily premised on the existence of a 9(a) relationship. (A.118,119-21,111-12.) We discuss each of those rationales and Allied's responses thereto in turn.

1a. The 1991 settlement agreement in *Allied-I*, which resolved a complaint seeking a *Gissel* remedial bargaining order, demonstrates that Allied recognized Local 337 as the 9(a) representative

The Board reasonably found (A.110) that the 1991 recognition/settlement agreement and the relevant extrinsic evidence together demonstrate that the parties “intended to establish, and did establish, a 9(a) relationship.” The fact that the settlement agreement’s recognition-and-bargaining-provisions were “identical, in all relevant respects, [to] the complaint’s request for relief” constitutes powerful

evidence that Allied recognized Local 337 as the 9(a) representative of its employees, because the complaint's language "clearly contemplated a 9(a) relationship, as it was designed to bestow on [Local 337] the same status it would have enjoyed following an election victory and to require [Allied] to bargain toward a collective-bargaining agreement." (A.118-19.)¹⁰

¹⁰ Thus, as the Board noted (A.119; 417,419), Allied agreed in the Settlement Agreement to:

recognize and, upon request, bargain in good faith with Plumbers and Pipefitters Local 337, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, as the exclusive collective bargaining representative of the [unit] employees ..., with respect to rates of pay, wages, hours, and other terms and conditions of [employment], and if an understanding is reached, embody it in a signed collective bargaining agreement[.]

Similarly, the complaint--that the recognition/settlement agreement resolved--had stated (A.118-19; 409-10):

WHEREFORE, it is prayed that Respondent be ordered to:

* * *

2. Take the following affirmative action:

* * *

(f) Recognize and, upon request, bargain in good faith with the Charging Union as the exclusive collective bargaining representative of the employees in the Unit respecting rates of pay, wages, hours, and other terms and conditions of employment; and if an understanding is reached, embody it in a signed agreement.

The Board's finding that Allied granted 9(a) recognition to Local 337 is buttressed by the fact that Allied's recognition/settlement agreement contains the language that is used in Board orders remedying withdrawal-of-recognition violations in Section 9(a) cases--rather than the more limited language contained in Board orders remedying withdrawal-of-recognition violations in Section 8(f) cases. (A.110-11.) Thus, as shown, when remedying violations in Section 9(a) cases, the Board orders an employer to recognize, and, upon request, bargain with, the union as the exclusive collective-bargaining representative of the unit employees with respect to wages, hours, and other terms and conditions of employment and to embody any understanding that is reached in a signed agreement. That is precisely the language Allied agreed to in the recognition/settlement agreement. Allied's recognition/settlement agreement certainly does not contain the more limited language used in Board orders remedying violations in Section 8(f) cases. (A.119n.10, 111.)

The circumstances surrounding Allied's grant of recognition provide additional support for the Board's finding that Allied recognized Local 337 as the majority or 9(a) representative of its employees. Allied does not contest the Board's findings (A.110; 407,409-10(¶¶9,18. and pp.5-6),417-19,708) that it recognized, and agreed to bargain with, Local 337 to settle a

Gissel complaint after Local 337 requested recognition as the majority representative of Allied's employees and offered to demonstrate proof of its majority status. As the Board explained (A.110), "the bargaining relationship established by settlement of the complaint logically would be premised on the notion that Local 337 represented a majority of unit employees" given Local 337's claim of majority status, the complaint's allegation that a majority of the unit employees had designated Local 337 as their collective-bargaining representative, and the complaint's seeking a *Gissel* bargaining order to remedy Allied's unfair labor practices.¹¹ Indeed,

¹¹ Thus, the *Allied-I* complaint stated:

9. By on or about April 24, 1990, a majority of the employees in the Unit had designated the Charging Union as their exclusive representative for the purposes of bargaining collectively with [Allied] concerning rates of pay, wages, hours, and other terms and conditions of employment.

18. The acts described above [i.e. the unfair labor practices] are so serious and substantial in character that the possibility of erasing the effects of these unfair labor practices and of conducting a fair election after the use of traditional remedies is slight and the employees' sentiments regarding representation, having been expressed through authorization cards, would, on balance, be better protected by the entry of a remedial order, requiring Respondent [Allied] as of April 24, 1990, to recognize and bargain with the Charging Union as the exclusive collective bargaining representative of its employees in the Unit described above . . . than by traditional remedies.

as the Board noted (A.110), “a settlement agreement establishing only an 8(f) relationship would make little sense, as it would bear no relationship to the allegations of the complaint” it settled.

1b. This Court’s *Nova Plumbing* decision does not preclude enforcement of the Board’s decision here

Allied argues at length (Br 15-16, 24-35) that the Board’s order is unenforceable under this Court’s decision in *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (2003) (“*Nova Plumbing*”), because, according to Allied (Br.15), *Nova Plumbing* stands for the proposition that an employer’s agreement to recognize a union as the majority or 9(a) representative “is

* * *

WHEREFORE, it is prayed that Respondent be ordered to:

* * *

2. Take the following affirmative action

* * *

(f) Recognize and, upon request, bargain in good faith with the Charging Union as the exclusive collective bargaining representative of the employees in the Unit respecting rates of pay, wages, hours, and other terms and conditions of employment; and if an understanding is reached, embody it in a signed agreement.

(A.407,409,410.)

void and unenforceable unless there has been an actual showing of majority support among the unit employees.”¹²

However, *Nova Plumbing*, by its terms, merely stands for the more limited proposition that, “[s]tanding alone, . . . contract language and intent [to form a 9(a) relationship] cannot be dispositive [in determining whether a construction industry employer has a 9(a) relationship with a union] *at least where, as here, the record contains strong indications that the parties had only a section 8(f) relationship.*” *Nova Plumbing*, 330 F.3d at 537

(emphasis added).¹³ The “strong indications” that the parties had only a

¹² Allied complains (Br.27) that it has never seen actual proof that Local 337 enjoyed majority support, though it does not, and cannot, deny that Local 337 offered to demonstrate proof of its majority status when it demanded recognition. As shown (pp.28-29 n.7), however, a nonconstruction industry employer may recognize a union based on the union’s assertion of majority support without extrinsic proof of the union’s majority status. The Board has explained that a rule that a construction industry employer may not lawfully recognize a union as the 9(a) representative of its employees unless the union makes an actual showing of majority support “would contravene *Deklewa*’s admonition that unions in the construction industry should not be treated less favorably than those outside the construction industry.” *Oklahoma Installation Co.*, 325 NLRB at 742. Thus, a construction industry employer *may* be deemed to have granted 9(a) recognition “without extrinsic proof of majority status.” *Triple C Maintenance*, 219 F.3d at 1153-56, 1157-60.

¹³ As the *Nova Plumbing* Court explained in the introductory paragraph of its opinion, “Because the Board relied solely on a contract provision suggesting that the company and the union intended a 9(a) relationship *despite strong record evidence that the union may not have*

Section 8(f) relationship--and that the union lacked majority support--included employee, union, and employer testimony to that effect and the apparent failure of the Board to clearly contend that the union actually had majority support. *Id.* at 537-38.

Put simply, *Nova Plumbing* does not preclude enforcement of the Board's decision here, because there are *not* "strong indications" that Local 337 lacked majority support. Unlike *Nova Plumbing*, there is absolutely no employee, union, or employer testimony to the effect that employees did not support Local 337 at the relevant time. In fact, unlike *Nova Plumbing*, the Allied official who signed the settlement agreement recognizing Local 337 did *not* testify in this case that he did not believe that a majority of his employees supported Local 337 when that union demanded recognition and when he signed the recognition settlement agreement. Unlike *Nova Plumbing*, there also is no evidence that the purported 9(a) recognition hinged on an event that had never actually occurred. And, unlike *Nova Plumbing*, it certainly cannot be said here that the Board has failed to contend that Local 337 enjoyed majority support. Thus, as shown, the

enjoyed majority support as required by section 9(a), we hold that the Board failed to protect the employees' section 7 rights 'to bargain collectively through representatives of their own choosing.'" *Id.* at 533 (emphasis added).

Allied-I complaint, which the 1991 Regional Director-approved recognition/settlement agreement resolved, explicitly asserted that a majority of Allied's employees *had* designated Local 337 as their exclusive collective-bargaining representative. (A.407(¶9).)

To be sure, the *Nova Plumbing* Court also expressed broader concerns about the possibility for employer-union collusion under *Staunton Fuel's* doctrinal framework. *Nova Plumbing*, 330 F.3d at 536-37. Thus, the *Nova Plumbing* Court voiced the concern that if contract language and intent “standing alone” could establish a Section 9(a) relationship, then construction industry employers and unions would be able to “collud[e] at the expense of employees and rival unions” by entering into contracts under 9(a) that would foist minority unions on employees. *Id.* The Court also pointed out that such 9(a) collective-bargaining agreements would also prevent the employees (and other parties) from ridding themselves of the unwanted minority unions that had unfairly been foisted upon them, because the 9(a) agreements would “trigger the three-year ‘contract bar’” rule that precludes employees (and other parties) from decertifying a union during the term of a contract of three years or less. *Id.* at 537.

Whatever the merits of the *Nova Plumbing* Court's views about the possibility for collusion under the Board's doctrinal framework when, as in

Nova Plumbing, an employer recognizes a union and enters into a 9(a) collective-bargaining agreement in the absence of a *Gissel* complaint, such concerns are entirely unwarranted when, as in this case, an employer grants the 9(a) recognition as part of a Regional Director-approved settlement agreement that resolves a *Gissel* complaint. For starters, an employer named as the respondent in a complaint seeking a *Gissel* bargaining order, by definition, is alleged to have committed unfair labor practices in an effort to keep his employees *unrepresented* and the union *out* of his establishment.¹⁴ Accordingly, it would be illogical to conclude that there is any serious possibility that such an antiunion employer would “collude with” a minority union to foist that union on his employees as their 9(a) representative.

The fact that 9(a) recognition is extended only after the issuance of a *Gissel* complaint makes it even more unlikely that the grant of 9(a) recognition will be the result of collusion between the employer and a minority union. As this Court has recognized, the General Counsel does not

¹⁴ Thus, for example, the *Allied-I* complaint alleged, among other things, that Allied had told job applicants that they would have to resign union membership to obtain employment with it, threatened employees with job loss and closure of the business if they chose to be represented by Local 337, and laid off union supporters. (A.408-09.) As part of the settlement resolving the complaint, Allied promised not to do those things and to pay some \$5,000 in backpay to employees named in the complaint. (A.417-19.)

issue a complaint seeking relief unless he first determines that the unfair labor practice charge appears to have merit and that relief is appropriate, and that determination is made only after he conducts an investigation to ascertain, analyze, and apply relevant facts and law. *See Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1179 (D.C. Cir. 1993). Prior to the events at issue, the Board had acknowledged that it lacked authority to impose a *Gissel* bargaining order on behalf of a minority union. *See Gourmet Foods, Inc.*, 270 NLRB 578, 585 (1984). Accordingly, the General Counsel (via the Regional Director) would not have alleged (A.407,409-10(¶¶9,18 & pp.5-6) that a majority of Allied's unit employees had designated Local 337 as their exclusive collective-bargaining representative through authorization cards and that a *Gissel* bargaining order was warranted without first investigating Local 337's claim of majority status and satisfying himself that a *Gissel* bargaining order was appropriate under Board law.¹⁵

The fact that the employer's grant of 9(a) recognition occurs as part of a Regional Director-approved settlement--rather than pursuant to a private

¹⁵ Any claim that the Regional Directors merely engage in perfunctory investigations of unfair labor practice charges is belied by the small percentage of charges they find to have merit. For example, only 38.7 percent of the unfair labor practice charges filed during fiscal year 2007 were found to have merit. *See* 72d NLRB Ann.Rep. 7 (2007).

agreement between just the employer and union--makes it still more unlikely that the grant of 9(a) recognition will be the result of collusion between an employer and a minority union at the expense of employees. Thus, the courts have repeatedly recognized that a Regional Director's approval of an informal settlement agreement "clearly manifests an administrative determination by the Board that . . . remedial action is necessary to safeguard the public interests intended to be protected by the . . . Act." *Mammoth of California, Inc., v. NLRB*, 673 F.2d 1091, 1094 (9th Cir. 1982) (quoting *Poole Foundry & Machine Co. v. NLRB*, 192 F.2d 740, 741, 743 (4th Cir. 1951) (finding that regional director's approval of settlement agreement manifests same administrative determination even when a complaint had not issued). Allied's recognition of Local 337 was not the result of a private settlement between just those two parties. Rather, the Regional Director *approved* the settlement agreement that contained the grant of majority recognition. (A.417.)

Finally, the *Nova Plumbing* Court's concern about the possibility of employees being barred from filing a decertification petition is absent here

because the grant of recognition was not contained in a collective-bargaining agreement.¹⁶

In sum, this Court's *Nova Plumbing* decision does not preclude enforcement of the Board's decision. Rather, this Court's enforcement of the Board's decision would merely stand for the limited proposition that, even absent the production of authorization cards at a hearing, the Board may find--based on the language of a recognition agreement contained in a Regional Director-approved settlement agreement that resolved a *Gissel* complaint--that a construction industry employer has granted 9(a) or majority recognition to the union that demanded such recognition and offered to prove its majority status, at least where, as here, there are no strong indications that the union lacked majority support.

¹⁶ In *M&M Backhoe Service, Inc. v. NLRB*, 469 F.3d 1047, 1050 (D.C. Cir. 2006), a case where a union claimed that it had converted an admitted 8(f) relationship to a 9(a) relationship, a different panel of this Court characterized *Nova Plumbing*'s holding in much more expansive terms, ignoring *Nova Plumbing*'s limiting language quoted above. The *M&M Backhoe Service* Court's characterization of *Nova Plumbing* was clearly dicta, however, because the evidence showed that all of the employer's employees had signed cards the week that the union demanded recognition as the 9(a) representative. The *M&M Backhoe Service* Court certainly was not faced with the peculiar factual scenario presented in this case.

1c. Allied's remaining attacks on the Board's 9(a) finding lack merit

Alternatively, Allied appears to contend that it cannot be deemed to have recognized Local 337 as the 9(a) representative even under extant Board law. Allied claims (Br.30,32) that the Board failed to recognize that it was able to resolve the *Allied-I Gissel* complaint by exercising its option, as a construction industry employer, to enter into a Section 8(f) relationship with Local 337. Thus, Allied's attack on the Board's finding amounts to a claim that Local 337 settled for something less (i.e., an 8(f) relationship) than the Regional Director was seeking in the complaint, and that the Regional Director approved such a settlement.

Allied's claim is unconvincing and not just because such a settlement "would bear no relation to the allegations of the complaint" it settled. (A.110.) Thus, Allied's claim is undermined by the additional fact that, as shown, the language in the recognition/settlement agreement actually tracks the language in the complaint. As the Board noted (A.119 & n.10), the parties certainly would have used very different language from the language set forth in the complaint if they had intended to establish an 8(f) relationship, because the complaint "unquestionably sought establishment of a 9(a) relationship."

Allied's claim that the recognition/settlement agreement merely established an 8(f) agreement is further undermined by the fact that, as the Board noted (A.111), the recognition/settlement language "imposed obligations on [Allied] beyond those of an 8(f) relationship." Thus, the recognition/settlement agreement does not require Allied to recognize Local 337 "as the limited collective-bargaining representative." Instead, as shown, it contains the open-ended obligation contained in Board orders in 9(a) cases, namely, to recognize, and upon request, bargain with Local 337 and to embody any understanding in a signed agreement.

Contrary to Allied's additional claim (Br 33-34), the Board was hardly precluded from finding that Allied recognized the Union as the 9(a) representative in 1991 merely because *four years later* Local 337 made a bargaining proposal containing an 8(f) recognition clause. As the Board noted (A.111n.19), that 1995 contract proposal "sheds little light on the nature of the relationship created under the [1991] settlement agreement, as the record does not reveal Local 337's reasons for offering this proposal, and parties routinely offer concessions in negotiations to obtain other desired benefits." As the Board also noted (A.111n.19), any probative value of that

proposal “is largely negated by the fact that Local 337 also made a request, albeit orally, for 9(a) recognition during negotiations.”¹⁷

Equally unavailing is Allied’s complaint (Br 34-35) that Local 337’s April 1990 demand letter making the required offer to demonstrate majority support was not contemporaneous with Allied’s July 1991 grant of recognition. The Board acknowledged (A.119) that, in cases where the parties simply contest whether they have a 9(a) or 8(f) relationship under an arguably ambiguous collective-bargaining agreement, a union’s failure to offer to show majority support when the agreement was made may be important in determining the nature of the parties’ relationship. But, as the Board explained (A.119), “it would be illogical” in this case to require Local 337 to demonstrate majority support when Allied granted recognition by entering into the settlement agreement, because Allied’s grant of recognition settled a complaint that sought a *Gissel* bargaining order. As shown, the very premise of a *Gissel* bargaining order is that, because of the employer’s unfair labor practices, it is likely that the union will *not* be able to show that it has *maintained* its majority at the time the Board’s remedies are

¹⁷ Similarly, Allied’s claim (Br.6,15-16,A.1006-07) that Local 337 had lost an election in 1986 or 1987, some four or five years *before* Allied recognized the Union, hardly undermines the Board’s conclusion that Allied recognized Local 337 as the majority representative of its employees in the 1991 settlement agreement.

implemented. For, if the union were able to maintain its support, then employees could freely exercise their rights to determine whether they desire representation in an election, and a remedial bargaining order would be unnecessary. *See Gissel*, 395 U.S. at 610, 612-14.

Allied also insists (Br.7,32-33) that the complaint's allegation of Local 337's majority status is "irrelevant," because it denied the complaint allegations. However, Allied did *not* specifically deny the allegation that a majority of its employees had designated Local 337 as their exclusive collective-bargaining representative. Paragraph 9 of the *Allied-I* complaint stated (A.407(¶9)):

9. By on or about April 24, 1990, a majority of the employees in the Unit had designated the Charging Union as their exclusive representative for the purposes of bargaining collectively with Respondent concerning rates of pay, wages, hours, and other terms and conditions of employment.

Unlike its responses to 11 other paragraphs of the complaint, however, Allied did not specifically deny paragraph 9's allegation of majority status as being untrue. Instead, Allied answered paragraph 9 as follows:

9. Respondent [Allied] has no factual basis upon which to admit or deny the allegation but demands that General Counsel submit specific proof that an uncoerced majority existed on such date.

(Compare A.407(¶9) with A.413(¶9),414.)

Contrary to Allied's additional claim (Br.32), the fact that the settlement agreement contains a nonadmissions clause hardly renders the complaint irrelevant. Thus, paragraph 9 of the complaint--alleging that a majority of Allied's employees had designated Local 337 as their collective bargaining representative--does *not* allege an unfair labor practice.

Accordingly, this case is entirely different from *BPH & Company, Inc. v. NLRB*, 333 F.3d 213, 222 (D.C. Cir. 2003), where this Court held that the Board could not rely on a settlement agreement in another case *to establish that the employer had committed unfair labor practices* because the settlement agreement contained a clause stating that the employer did not admit to having violated the Act. Moreover, it is settled that "[a]n entire structure or course of future labor relationships may ... be bottomed upon the binding effect of a status fixed by the terms of a settlement agreement." *Poole Foundry & Machine Co. v. NLRB*, 192 F.2d 740, 743 (4th Cir. 1951). Accordingly, the Board did not err in relying on the language of the recognition/settlement agreement in finding that Allied had a 9(a) relationship with Local 337.

2a. The Board’s decision in *Allied-III* precludes Allied from arguing that it merely had an 8(f) relationship with Local 337

The Board also reasonably concluded (A.111-12,118) that its 2001 decision in *Allied-III*, 332 NLRB 1600, collaterally estopped Allied from arguing that it had a Section 8(f) relationship with Local 337, because *Allied-III* “was necessarily premised on the existence of a 9(a) relationship.” Under the doctrine of collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction or by an agency acting in a judicial capacity, that determination is conclusive in subsequent litigation involving parties to the first litigation. *Marlene Industries Corp. v. NLRB*, 712 F.2d 1011, 1015 (6th Cir. 1983); *National Post Office Mail Handlers et al v. APWU*, 907 F.2d 190, 192 (D.C. Cir. 1990)(“*Mail Handlers*”); 18 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Fed. Prac. & Proc. Juris. 2d* §§4402 pp.8-9 (“*Fed. Prac. & Proc. Juris.2d*”); 18B *Fed. Prac. & Proc. Juris.2d* §4475 pp.468-80; 32 Charles Alan Wright & Charles H. Koch, Jr., *Fed. Prac. & Proc. Judicial Review* §8255 pp.447-48, 451. Accordingly, collateral estoppel “bars a party from relitigating an issue of fact or law that was actually litigated and necessarily decided by a final disposition on the merits in a previous litigation between the same parties.” *Mail Handlers*, 907 F.2d at 192.

Contrary to Allied's claim (Br.16-17,35-49), all of the requirements for applying collateral estoppel are satisfied. The Board was acting in a judicial capacity when it decided *Allied-III*. The parties in the instant litigation are the same as in *Allied-III*. Moreover, the issue sought to be precluded--the nature of Allied's collective-bargaining relationship with Local 337--is also the same as in the prior proceeding.

That issue was also actually litigated in *Allied-III* because, as the Board noted (A.119,120), the *Allied-III* complaint alleged that Local 337 was the 9(a) representative of Allied's unit employees, Allied's answer denied that Local 337 was the 9(a) representative of its employees, and the parties never withdrew that issue. *See 18 Fed. Prac. & Proc. Juris.2d* §4419 p.500 (actual litigation requirement satisfied as to "any issue framed by the pleadings and not withdrawn, even though it has not been raised at trial in any way"); *Spawr Optical Research, Inc. v. Baldrige*, 649 F.Supp. 1366, 1372-73 (D.D.C. 1986); *In Re Keaty*, 397 F.3d 264, 272 (5th Cir. 2005).

Finally, the nature of Allied's relationship with Local 337 was determined by the Board in *Allied-III* and was essential to the judgment in *Allied III*, because, as the Board noted (A.119-20,111), Allied could not have been found to have violated Section 8(a)(5) by bargaining in bad faith, bypassing the union, making unilateral changes, and refusing to furnish

information in *Allied-III* unless it had a 9(a) relationship with Local 337. Accordingly, there is no merit to Allied's claim (Br. 42-43) that *Allied-III* did not actually determine that Local 337 was the 9(a) representative simply because the term "9(a)" does not appear in the decision. *See Securities Industries Ass'n v. Board of Governors of the Federal Reserve System*, 900 F.2d 360, 364-65 (D.C. Cir. 1990)(even when an opinion is silent on a particular issue, issue preclusion is applicable if resolution of issue was necessary to the judgment); *Hoult v. Hoult*, 157 F.3d 29, 32 (1st Cir. 1998) ("an issue may be 'actually' decided for collateral estoppel purposes even if it [was] not *explicitly* decided, for it may have constituted, logically or practically, a necessary component of the decision reached")(citation omitted).

2b. There is no merit to Allied's claims that the Board improperly invoked collateral estoppel

Allied launches (Br. 35-49) a barrage of misguided attacks on the Board's conclusion that its decision in *Allied-III* precludes Allied from arguing that it merely had an 8(f) relationship with Local 337. For example, Allied argues (Br.39,48) that the Board was not entitled to apply collateral estoppel because the General Counsel and Union did not raise the issue of collateral estoppel. However, because tribunals themselves share interests in repose and avoiding burdensome relitigation and are concerned as well with

avoiding inconsistent decisions, it is settled that tribunals “retain the power to consider such doctrines sua sponte.” *Consolidated Edison Co. of NY, Inc. v. Bodman*, 445 F.3d 438, 451 (D.C.Cir. 2006). *Accord* 18 *Fed. Prac. & Proc. Juris.2d* §4405 pp.85-86 (noting that “it has become increasingly common to raise the question of preclusion on the court’s own motion”).

And because res judicata doctrines may be invoked by tribunals sua sponte, the *parties’* positions as to whether res judicata requirements have been satisfied obviously cannot be binding on the *tribunal*. Accordingly, in arguing (Br. 40-41) that Local 337’s 9(a) status was not actually litigated in *Allied III*, Allied places (Br. 40-41) entirely too much weight on the General Counsel’s statement in an answering brief to Allied’s motion for reconsideration--to the effect that Allied “*may well be correct*” in arguing that the issue was never actually litigated in *Allied III*--and on Local 337’s apparent concession that parties had not litigated the issue. Indeed, Allied merely argued to the Board in *Allied-III* that “the parties did not litigate whether the Union was the *certified* bargaining representative of AMS’ employees.” (A.214,221) (emphasis added). As the Board noted (A.120), whether Allied recognized Local 337 as the 9(a) representative of its employees is a different issue from whether Local 337 was the certified

representative of Allied's employees.

Thus, as shown above, the Board reasonably found (A.120) that, notwithstanding the statements referenced by Allied, the issue of whether Local 337 was the 9(a) representative *was* actually litigated, because the issue of Local 337's representational status was framed by the pleadings and not withdrawn. *See 18 Fed. Prac. & Proc. Juris.2d* §4419 p.500 (actual litigation requirement satisfied as to "any issue framed by the pleadings and not withdrawn, even though it has not been raised at trial in any way"); *Spawr Optical Research, Inc. v. Baldrige*, 649 F.Supp. 1366, 1372-73 (D.D.C. 1986). Allied concedes (Br.36) that "the General Counsel [in *Allied-III*] alleged that the [u]nion was a Section 9(a) representative based on the 1991 settlement agreement," and that Allied "denied" that the union was the 9(a) representative. And the parties certainly never withdrew the issue of the union's status.¹⁸

¹⁸ Thus, Local 337's brief to the Board in *Allied-III*--the same brief that contains the statement relied on by Allied to show that the issue was not litigated--argued that Local 337 *was* the 9(a) representative as the result of the recognition agreement that settled the *Allied-I* complaint that sought a *Gissel* remedial bargaining order. (*See* A.265,277-79.) And Allied argued to the Board in that case that the Settlement Agreement "fails to provide the basis for finding a 9(a) relationship." (*See* A.214,223 & n.3.)

Allied also mistakenly contends (Br.44-47) that it was not necessary for the Board to find in *Allied-III* that Allied had a 9(a) relationship with Local 337, and therefore collateral estoppel is inappropriate here. As shown, the Board found in *Allied-III* that Allied violated Section 8(a)(5) of the Act by, among other things, failing to bargain in good faith, making unilateral changes, bypassing Local 337 and dealing directly with employees, and refusing to furnish information. According to Allied (Br. 44), “Board law establishes that all four of [those] Section 8(a)(5) violations “can be supported when an employer takes these actions . . . in violation of a Section 8(f) agreement.” (underlining in original). In other words, Allied argues that it was not necessary for the Board to find a 9(a) relationship in *Allied-III*, because the Board would have found that Allied violated Section 8(a)(5) of the Act by engaging in those actions even if Allied merely had a Section 8(f) relationship with Local 337.

Allied’s argument can be swiftly rejected because, as the Board explained (A.111), “[A]n 8(f) relationship imposes no enforceable duties in the absence of a collective-bargaining agreement,” and Allied never had a collective-bargaining agreement with Local 337. Thus, absent Allied’s having a 9(a) relationship with Local 337, the Board could not have found

that Allied violated Section 8(a)(5) in *Allied-III* by failing to bargain in good faith, making unilateral changes, bypassing the union and dealing directly with employees, and refusing to furnish information. Accordingly, “the Board necessarily determined [in *Allied-III*] that the bargaining relationship between [Allied] and Local 337 was governed by Section 9(a).”

(A.120,111.)

The cases relied on by Allied (Br.44-45) are not to the contrary. Thus, each of the six cases cited by Allied (Br. 44-45) is readily distinguishable because the employer in each of those cases either engaged in the impermissible 8(a)(5) conduct *during the term of a collective-bargaining agreement* to which the employer was legally bound or refused to execute a collective-bargaining agreement to which it had agreed. *See HCL, Inc.*, 343 NLRB 981, 982-83 (2004)(Board found that employer violated Act by engaging in direct dealing during the term of its 8(f) collective-bargaining agreement with union); *Coulter’s Carpet Service, Inc.*, 338 NLRB 732, 733 (2002)(unilateral changes during the term of an 8(f) collective-bargaining agreement violate the Act); *Gary’s Electrical Service Co.*, 326 NLRB 1136, 1136 (1998)(failure to provide relevant information to Section 8(f) bargaining representative during term of 8(f) collective-bargaining agreement violates Section 8(a)(5)); *Glens Falls Contractors Ass’n*, 341

NLRB 448, 448 n.2 (2004) (employers were not free to repudiate their relationship with carpenters union and recognize another union during the term of their collective-bargaining agreement with the carpenters union); *Cedar Valley Corp.*, 302 NLRB 823, 823 (1991) (employer violated the Act by failing to adhere to a collective-bargaining agreement to which it was bound), *enforced*, 977 F.2d 1211 (8th Cir. 1992); *Clarence Spight Equipment Leasing Co.*, 312 NLRB 147, 148 (1993) (employer violated Section 8(a)(5) by failing to execute a collective-bargaining agreement to which it had agreed to be bound).¹⁹

Allied claims (Br. 46-47), however, that the Board mistakenly concluded here that only collective-bargaining agreements qualify as “8(f) agreements” that impose Section 8(a)(5) enforceable obligations. According to Allied, other kinds of agreements between employers and unions, such as the settlement agreement here, also constitute “8(f) agreements.” In support of its claim, Allied points out (Br.46-47) that while the word “agreement”

¹⁹ Even when an employer has agreed to a provision in an 8(f) collective-bargaining agreement that provides that it will negotiate a renewal agreement, courts have emphasized that the obligation to negotiate the renewal arises from the collective-bargaining agreement, not from the National Labor Relations Act. *See, e.g., Sheet Metal Workers’ Int’l Ass’n, Local Union No. 2 v. McElroy’s, Inc.*, 500 F.3d 1093, 1097 (10th Cir. 2007) (although an employer is under no statutory obligation to negotiate a renewal agreement, the terms of the prehire collective-bargaining agreement it agreed to created a contractual obligation to do so).

appears in the text of Section 8(f), the term “collective-bargaining agreement” does not.

However, Allied cites no authority for its novel proposition that Section 8(f) was enacted to permit employers and unions to enter into agreements other than collective-bargaining agreements. To the contrary, Section 8(f)’s legislative history shows that the term “agreement” in Section 8(f) was just a shorthand reference to collective-bargaining agreement.²⁰

Allied’s 1991 settlement agreement certainly does not constitute a

²⁰ For example, in analyzing the need for prehire collective-bargaining agreements in the construction industry, two of the proponents of what would become 8(f) indicated (emphasis added): “*Collective-bargaining agreements* must be negotiated in the construction industry before the employees are hired” because “contractors need to know what [their] wage rates and conditions of employment will be before submitting their [job] bids;” many projects “involve work of such duration that the work would be completed long before a *collective-bargaining agreement* could be signed;” it is manifestly inefficient to negotiate a separate contract for every project; and the “legal validity of [construction industry employers’] *collective-bargaining agreements* will remain questionable until Congress acts.” 105 Cong. Rec. 14204-05(daily ed. Aug.11, 1959) (analysis by Representatives Thompson and Udall) , reprinted in II NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act, 1959 pp. 1577-78 (1959). Critics of the proposal likewise recognized that 8(f) concerned collective-bargaining agreements. For example, Senator Goldwater complained that the prehire amendment “permits employers and unions in [the building construction] industry to sign *collective bargaining agreements* even though the union does not represent a majority of the employees in the unit.” 105 Cong Rec. 9117 (daily ed. June 8, 1959) (statement of Senator Goldwater), reprinted in III Legislative History of the Labor-Management Reporting and Disclosure Act, 1959 at 1289 (1959).

collective-bargaining agreement, because it does not provide terms and conditions of employment for its employees. (A.120n.12.) It is thus not surprising that Allied's current position is diametrically opposed to the position Allied took before the Board. Thus, Allied argued to the Board in the instant case that it could *not* have an obligation to bargain at the time of Local 337's 1998 merger *absent a collective-bargaining agreement* with that union.²¹

Allied also skates on thin ice in claiming (Br. 48-49) that *Allied-III* cannot preclude it from arguing that it merely had a Section 8(f) relationship because its belated appeal of that decision is pending and because *Allied-III* would be unenforceable under this Court's *Nova Plumbing* decision. However, the general rule is that "a judgment is entitled to preclusive effect even though an appeal is pending." 18 *Fed. Prac. & Proc. Juris.2d* §4404 p.58. *Accord Mail Handlers*, 907 F.2d at 192. Moreover, as shown above,

²¹ Thus, Allied argued to the Board that, even if the absence of a union membership vote on Local 337's merger did not privilege its withdrawal of recognition, an 8(a)(5) finding would still be inappropriate because "AMS was plainly an 8(f) contractor and had no continuing obligation to recognize the Union *outside the bounds of a collective bargaining agreement.*" (See A.359,364) (emphasis added).

this Court's decision in *Nova Plumbing* does not preclude the Court from finding that Allied had a 9(a) relationship with Local 337.

Finally, Allied complains (Br. 39-40) that the Board has used collateral estoppel to deny Allied's employees their Section 7 right to choose whether they wished to be represented by a union. Allied's attempt to serve as the vicarious champion of its employees organizational freedom is particularly awkward given its repeated violations of its employees' Section 7 rights, some of which violations occurred in the teeth of the Sixth Circuit's decision in *Allied-II*, and its 1991 agreement to recognize Local 337 without an election.

In any event, it simply cannot fairly be said that the Board's decision "extinguish[es]" (Br.39) the ability of Allied's employees to choose whether they wish union representation. At bottom, the Board's finding that the Union is the 9(a) representative merely means that the Union enjoys a rebuttable presumption of majority status. Allied has never attempted to show that at the time it withdrew recognition the Union did not in fact enjoy majority support, and it does not even claim before this Court that it had a good-faith doubt of the Union's majority status. As the Supreme Court has repeatedly emphasized in a variety of contexts, the presumption of majority status furthers the public policy of industrial peace "by 'promot[ing] stability

in collective-bargaining relationships, *without impairing* the free choice of employees.’’ See, for example, *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38 (1987)(citation omitted)(emphasis added). Thus, once Allied remedies its unfair labor practices, the employees may, if they so choose, petition for a decertification election.²²

²² Contrary to Allied’s suggestion (Br.39-40), the Board’s application of collateral estoppel here is not inconsistent with the Board’s decision to refrain from applying collateral estoppel in *Fayette Electrical Cooperative, Inc.*, 316 NLRB 1118 (1995). In that case, there had been an intervening change in Board law after the Board decided in the first case that the employer was exempt from Board jurisdiction. *Id* at 1118-19. Under the new Board test, the Board would be able to assert jurisdiction over the employer. *Id*. 1119-21. As the Board noted, a necessary consequence of the first decision was that the employer’s employees could be deterred from exercising their Section 7 rights to engage in protected concerted activities even though they were not parties to the first case. In the circumstances, the Board concluded that there was no reason to “delay reconsideration of the Employer’s jurisdictional status . . .until the issue was presented by a litigant that was not party to the prior case.” *Id* at 1119-20. Plainly, no comparable circumstances are present here.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Court should enter a judgment denying the petition for review, and enforcing the Board's orders in full.

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Respondent/Cross-Petitioner)
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and)
)
UNITED ASSOCIATION OF JOURNEYMEN)
AND APPRENTICES OF THE PLUMBING AND)
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STATES AND CANADA, AFL-CIO, LOCAL)
UNION 357)
Intervenor)

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 13,693 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date hand delivered to the Clerk of the Court the required number of copies of the Board's final brief in the above-captioned case, and has served two copies of the brief by first-class mail upon the following counsel at the addresses listed below:

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