JD-56-09
Omaha, NE

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CEDAR CONSTRUCTION

and Case 17-CA-24530

INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 571,
Affiliated with INTERNATIONAL UNION OF
OPERATING ENGINEERS

McARDLE GRADING CO.

and Case 17-CA-24532

INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 571,
affiliated with INTERNATIONAL UNION OF
OPERATING ENGINEERS

Susan Wade-Wilhoit, Esq.
for the General Counsel
Patrick J. Barrett, Esq.
(Fraser Stryker PC LLO),
of Omaha, Nebraska for the Respondents

DECISION

STATEMENT OF THE CASE

MARK CARISSIMI, Administrative Law Judge. These cases were tried in Omaha, Nebraska on September 17, 2009. The charge was filed in Case 17-CA-25430 on June 1, 2009, and the complaint was issued on August 18, 2009. The charge was filed in Case 17-CA--24532 on June 1, 2009, and the complaint issued on August 18, 2009. On August 19, 2009, the Regional Director for Region 17 issued an order consolidating both cases for hearing.

Both complaints allege that the Respondents violated Section 8 (a)(5) and (1) of the Act since on or about April 27, 2009, by failing and refusing to provide the Union with information

that is necessary for and relevant to the Union's responsibility as the exclusive bargaining representative of the Respondents' unit employees.

On the entire record, including my observation of the demeanor of the witness, and after considering the briefs filed by the General Counsel and the Respondents, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent Cedar, a corporation, with an office and place of business in Omaha, Nebraska, (Respondent Cedar's facility), has been engaged in the construction industry as a heavy highway contractor. Annually, Respondent Cedar, in conducting its business operations described above, performs services valued in excess of $50,000 in states other than State of Nebraska.

At all times material, Respondent McArdle, a corporation, with an office and place of business in Elkhorn, Nebraska, (Respondent McArdles's facility), has been engaged in the construction industry as a heavy highway contractor. Annually, Respondent McArdle, in conducting its business operations described above, purchased and received at its facility goods valued in excess of $50,000 directly from points outside the State of Nebraska.

At all material times, Respondent Cedar and Respondent McArdle have been employers engaged in commerce within the meaning of Section 2 (2), (6) and (7) of the Act.

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

II. THE ALLEGED UNFAIR LABOR PRACTICES

Respondent Cedar

Respondent Cedar and the Union were parties to a series of collective-bargaining agreements entered into pursuant to Section 8(f) of the Act since at least the early 1990s. Pursuant to a Board- conducted election, on March 27, 2006, the Union was certified as the exclusive collective-bargaining representative of the employees in the following unit:

> All journeymen and apprentice operating engineers and mechanics including working foreman employed by the Employer at its 13901 "L" Street, Omaha, Nebraska, facility, but excluding all office clerical employees, confidential employees, professional employees, shop employees, truck drivers, guards and supervisors as defined in the Act, and all other employees.

Rod Marshall, the Union's business manager, testified that at the time of the Union's certification there were approximately 25 unit employees. [1]The first bargaining session between the parties was held on September 27, 2006. They also met on November 15, 2006, January

[1] Marshall was the only witness at the trial. Based on the detailed nature of his testimony and his demeanor, I found him to be a credible witness. At the hearing the parties entered into several factual stipulations. The facts set forth are based upon the credited testimony of Marshall, his bargaining notes, the parties' stipulations and the exhibits.

11, 2007, February 26, 2007 and March 12 2007. Marshall was the principal negotiator for the Union. The principal negotiators for Respondent Cedar were Roger Stueckrath and its attorney Patrick Barrett. (Tr. 16-18 and GC Exh.3.)

At the September 27, 2006, meeting the Union proposed that Respondent Cedar become signatory to the Union's standard heavy highway agreement.[2] This proposal was effective by its terms from June 1 2006 to May 31, 2008 (GC Exh. 3). The parties reached tentative agreement on several of the articles contained in the Union's proposed agreement in the first two bargaining sessions.

At the meeting held on January 11, 2007, Respondent Cedar made a written counterproposal regarding several sections of the Union's proposed agreement. Marshall's notes of that meeting reflect that the parties reached a tentative agreement on Article XVI- Contractor Managerial Rights; Section 5.04 MultipleShifts; and Article VI.- Apprenticeship Program. The parties did not reach agreement regarding Respondent Cedar's proposed Section 4.07- Overtime Rights; Section 5.01-Work Day and Work Week; and Respondent Cedar's proposed Article XVIII-Employee Benefits.

Section 18.01 of the Union's proposed agreement sought to have Respondent Cedar continue to contribute to the Contractors, Laborers, Teamsters, and Engineers Health and Welfare Trust Fund and Section 18.02 sought to have it continue to contribute to the Contractors, Laborers, Teamsters and Engineers Pension Trust Fund. Respondent Cedar's proposal of January 11, 2007 offered health care coverage through its individual group insurance health care plan and also reserved the right to change providers during the term of the agreement. With respect to pensions, Respondent Cedar proposed a 401 (k) program.

At the meeting held on February 26, 2007, neither party changed its position regarding Section 4.07; Section 5.01; and Article 18. At the meeting held on March 12, 2007, neither party was willing to modify its position on the issues in dispute (GC Exh. 3). Marshall testified that the major issue separating the parties was Respondent Cedar's unwillingness to participate in the Union's health and welfare and pension funds (Tr. 19). Marshall's bargaining notes of that meeting establish that Respondent Cedar indicated it intended to implement its last offer on April 1, 2007, since the parties were at an impasse (GC Exh. 3). The parties stipulated that an impasse was reached primarily because of Respondent Cedar's proposal regarding group health insurance and retirement benefits (Tr. 12).

On April 1, 2007, Respondent Cedar implemented its final proposal (Tr. 12). As noted above, the Union's proposed agreement was effective by its terms from June 1, 2006, to May 31, 2008.[3]

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[2] Marshall testified that the standard agreement was negotiated with a group of employers. The Union would then attempt to have other employers sign that agreement as individual signatories. (Tr. 18.)

[3] Article XIX - Contract Renewal of the Union's proposed agreement contains the following language : "Either party desiring a change in the provisions of this Agreement shall notify the other party in writing at least sixty (60) days prior to the first day of June 2008 . This Agreement shall then be open for discussion relative to such changes desired by either party. It is specifically agreed that in the event either party has served notice of a desire to change the Agreement and an agreement is reached by May 31, 2008, this Agreement terminates as of May 31, 2008." Marshall's notes from the January 11, 2008, meeting between the parties indicate that there was tentative agreement on the Union's contract proposals

Continued

There were no further meetings between the parties after Respondent Cedar's implementation of its final offer through May 31, 2008. The parties further stipulated that there has been no bargaining since May 31, 2008, and that there has been no contact between Union officials and representatives of Respondent Cedar until the information request that gave rise to the instant case.

The record establishes that the Union has had some contact with employees of Respondent Cedar since the final offer was implemented. Marshal testified that the Union attempts to have four to six visits a year with the employees of each signatory employer (Tr. 46). Marshall testified that Business Agent Chris Ries is assigned to the Cedar unit and that Reis and Business Agent Eldon Worshel had visited an unspecified number of Cedar jobsites since April 2007 (Tr. 63). Marshal testified that he personally visited two Cedar jobsites in Valley, Nebraska in the fall of 2008 speaking to one employee at one site and two employees at the other (Tr. 57-58).

The parties stipulated that Nebraska is a right-to-work state. Marshal testified that there is no dues-checkoff provision in the implemented agreement (Tr. 47) and that employee members would stop at the union office to pay dues and to discuss working conditions (Tr 60 - 61). Marshall testified that at least one Cedar employee was a member of the Union. No employee has been designated as a steward by the Union in the Cedar unit.

In early 2009 an employee informed the Union that Respondent Cedar had changed the wages from those set forth in the implemented offer of April 2007. (Tr. 23) Based on this information, on April 27, 2009, Marshall sent the following letter to Roger Stueckrath of Respondent Cedar:

> As you are aware we are the certified bargaining agent for the Operating Engineer employees of your company as of the NLRB election on March 17, 2006. We are requesting the following information to verify your compliance with the last and final offer of our negotiations. Please provide for all operating engineer classification employees;
>
> contact information (including first and last name, home mailing address, and any phone numbers),
> payroll from January 1, 2008 to December 31, 2008 for these employees, and Health Insurance information
> Premium amounts paid by each; the employer & employee
> Coverage
> Eligibility
> Retirement benefits information.
> Eligibility
> Amount contributed by each; the employee and employer
> Account Fees paid by the employee
>
> We are requesting to have this information 15 days from receipt of this letter.
>
> If you should have any questions please call me at (402) 733-1600." (GC Exhibit 4)

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except for the then open issues regarding Respondent Cedar's proposals regarding pension and insurance, and Section 4.07 , Section 5.01 and Art. 16. Accordingly, it appears that the implemented final offer contains the termination language quoted above.

On May 11, 2009 Patrick Barrett, the attorney representing both McArdle and Cedar,[4] sent the following letter to Marshall:

> As you know, this Firm represents McArdle Grading Co. and Cedar Construction. Both companies have received a letter from you dated April 27, 2009 requesting certain information. In connection therewith, please let me know the basis of your request and right to this information. As you know, the Union did not respond to the Companies' last and final offers. In the interim, on several occasions, the Company has informed your Union of changes in terms and conditions of employment. To date, we have not heard from your Union. We have serious doubts as to whether the union remains a certified bargaining agent for any bargaining unit of McArdle Grading Co. or Cedar Construction. Can you please advise us as to the legal basis for your claim that you continue to be a certified bargaining agent for the operating engineer employees of McArdle Grading Co. and Cedar Construction. (GC Exh. 5).

Marshall did not respond directly to Barrett's letter but rather filed the charge in Case 17-CA-25430 on June 1, 2009.

Respondent McArdle

Respondent McArdle and the Union were parties to a series of agreements entered into pursuant to Section 8 (f) of the Act since at least the early 1990s. Pursuant to a Board-conducted election, on April 3, 2006, the Union was certified as the exclusive collective-bargaining representative of the employees in the following unit:

> All journeymen and apprentice operating engineers, all mechanics and truck drivers including working foreman, employed by the Employer at its 112 Railroad Avenue, Elkhorn, Nebraska facility, but excluding confidential employees, office clerical employees, solely shop employees, guards and supervisors as defined in the Act, and all other employees.

Marshall testified that at the time of the Union's certification there were approximately 60 employees in the unit. At the time of the certification the parties were signatory to the terms of the then existing standard heavy highway agreement pursuant to Section 8 (f) of the Act. This agreement was effective by its terms until April 30, 2006 (Tr. 27).

Marshall's bargaining notes establish that he met with representatives of several employers including Respondent McArdle on April 7, 2006, to begin discussing the Union's proposals (GC Exh. 13). Meetings were held on July 12, 2006, and September 13, 2006, between Union and Respondent McArdle. When the parties met on September 25, 2006, the Union proposed that Respondent McArdle become signatory to the standard heavy highway agreement that was effective by its terms from June 1, 2006, through May 31, 2008. (GC Exh. 13.) Respondent McArdle was unwilling to become signatory to that agreement and offered several written counterproposals. The parties reached a number of tentative agreements and agreed to schedule another bargaining meeting. On October 25, 2006, the parties met again. At this meeting Respondent McArdle presented a detailed proposal regarding Article XVIII-

[4] The parties stipulated that Barrett is an agent of both Respondents within the meaning of Section 2(13) of the Act.

Employee Benefits, providing for an employer group health insurance plan and a 401(k) retirement program (GC Exh. 13). The parties did not reach agreement as the Union continued to insist that Respondent McArdle continue to participate in the Union health and welfare and pension funds.

During the course of these negotiations, Respondent McArdle continued to apply the terms of the expired 8(f) agreement. On November 20, 2006, the Union filed grievances on behalf of three named employees claiming that each employee had been paid less than the contractual wage rate and that benefit contributions were not made on their behalf (GC Exhs.7, 8 and 9). Respondent McArdle denied the grievances claiming that since the 8 (f) agreement had expired it had no obligation to process the grievances.

On December 6, 2006, Marshall sent a letter to Respondent McArdle requesting all payroll records for employees working within the jurisdiction of the collective-bargaining agreement from May 1, 2006, until the date of his letter (GC Exh. 10). On December 11, 2006, the Union filed a charge in Case 17-CA-23755 alleging that since May 1, 2006, Respondent McArdle had unilaterally changed the wage rates of certain bargaining unit employees and had ceased contributions to the health and welfare, pension and training funds. The charge further alleged that since December 7, 2006, Respondent McArdle had refused to provide wage information to determine the amounts of underpayments of wages and fringe benefits (GC Exh. 11).

On July 2, 2007, Respondent McArdle executed a settlement agreement and release which constituted a non-Board resolution of the above-noted unfair labor practice charge. Pursuant to the terms of this agreement, Respondent McArdle paid backpay to 11 employees, including the 3 employees who were the subject of the above-noted grievances. Respondent McArdle also agreed to pay an aggregate amount of $21,176.11 to the respective trust funds (GC Exh. 12).

The parties stipulated that the Union and Respondent McArdle continued to bargain until March 2007, when an impasse was reached primarily because of the Employer's proposals regarding the group health insurance plan and retirement plan. On April 1, 2007, Respondent implemented its final offer (Tr. 14).[5]

On August 6, 2007, Marshall sent the following letter to Respondent McArdle:

> Due to irregularities in payroll that we are finding in some employees, we are requesting all pay records for employees working in the jurisdiction of the Collective Bargaining Agreement between your company and Local 571 for the time period of January 1, 2007 to the present. We are requesting to have these records within (10) days of receipt of this letter (GC Exh. 14).

On August 30, 2007, Barrett sent the following letter in response to Marshall:

> I am in receipt of your recent letter to McArdle Grading requesting certain information. I have also talked to Tom Dowd regarding same.[6] Tom indicated to

[5] The contract-renewal provision is the same as that contained in the standard agreement proffered to Respondent Cedar. Marshall's notes reflect that on September 13, 2006, the parties reached a tentative agreement on the contract renewal provision (GC Exh. 13).

[6] The record establishes that Dowd is an attorney who represents the Union.

> me that some of the bargaining unit employees have come to you and claimed that the Company was not living up to the terms of the Collective Bargaining Agreement, which your Union did not agree to and which was implemented. All matters between the parties were settled as of the Settlement Agreement, as specifically provided for in Paragraph 6. However, please let me know what information you are requesting and what provisions of the implemented Collective Bargaining Agreement you do not believe are being followed. Once you have identified what information is being requested the Company will provide to you any requested relevant information (GC Exhibit 15).

On September 7, 2007, Union filed a charge in Case 17-CA-23959 alleging that Respondent McArdle violated Section 8 (a)(5) and (1) of the Act by refusing to provide wage information in order for the Union to determine whether it was paying wages consistent with its implemented offer (GC Exh. 16).

On October 30, 2007, Marshall sent another letter to Respondent McArdle requesting payroll records for all unit employees for the period from July 1, 2007, to the date of his letter (GC Exh. 20).

On November 30, 2007, the Regional Director for Region 17 approved a bilateral informal settlement agreement resolving Case 17-CA-23959. The affirmative portion of the Notice required Respondent McArdle to furnish the Union with the payroll records it had requested in its August 7, 2007 letter (GC Exh. 17).

Marshall testified that at some point in 2008 the Union received notice from Respondent McArdle that it was changing its health insurance plan or pension plan and that he did not respond to the notification. He explained that, since those were the issues that the Union could not reach agreement on with Respondent McArdle, the Union determined that there was nothing it could do; therefore he did not respond (Tr. 42).

The parties stipulated that the Union had not requested bargaining with Respondent McArdle as of May 31, 2008 (Tr. 14). The record establishes that Marshall had no further communication with representatives of Respondent McArdle until the April 2009 information request which is the subject of the instant case.

The Union has had contact with employees in the McArdle unit since Respondent McArdle implemented its final proposal in April 2007. In this connection, Marshall testified that representatives of the Union attempt to visit McArdle jobsites 4 to 6 times a year. Chris Reis is the business agent assigned to the McArdle unit and reported to Marshall regarding visits he had made to jobsites. (Tr. 46, 59.) Marshal testified that in late 2007 or early 2008 he personally visited a McArdle jobsite located at Highway 31 and Q St. in Omaha, Nebraska, and spoke to four or five employees regarding working conditions. Marshall testified there was no dues-checkoff provision in Respondent McArdle's implemented offer (Tr. 47). He also indicated that since April 2007 employees in the McArdle unit have come to the union hall to pay dues and discuss working conditions (Tr. 60). No employee has been designated as a steward in the McArdle unit.

In early 2009 employees in the McArdle unit told the Union that it appeared that wage rates had changed. Accordingly, on April 27, 2009 Marshal sent a letter to Respondent McArdle (GC Exh. 18) requesting information that was identical in substance to the information requested in the letter he had submitted to Respondent Cedar above in General Counsel Exhibit 4. After receiving the response from Barrett noted above (GC Exh. 5) the Union filed the charge

in Case 17-CA 25432 against Respondent McArdle.

At the hearing the parties stipulated that neither McArdle nor Cedar have withdrawn recognition from the Union (Tr. 69-70).

III. ANALYSIS AND CONCLUSIONS

It is clearly established that an employer is obligated to provide the collective-bargaining representative of its employees, on request, with information that is necessary and relevant to the union's function as the collective-bargaining representative. This obligation exists not only for the purpose of contract negotiations but also for the purpose of administering a collective-bargaining agreement. Relevancy is determined by a broad discovery type standard and it is necessary only to establish the probability that the information sought would be useful to the union in carrying out its statutory duties. *NLRB v. Acme Industrial Co.,* 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.,* 351 U.S. 149 (1965); *North Star Steel Co.,* 347 NLRB 1364, 1368 *(2006);* and *American Broadcasting Co.,* 290 NLRB 86 (1988).

The Board has long held that information concerning unit employees' terms and conditions of employment, including wages and pension information, is deemed to be presumptively relevant to a union's duty to represent the employees. *Pavilion and Forrestal Nursing & Rehabilitation,* 346 NLRB 458, 463 (2006); *Atlanta Hilton & Tower,* 271 NLRB 1600, 1602 (1984); *Crane Co.,* 244 NLRB 103, 111 (1979); *Cowles Communication Inc.*, 172 NLRB 1909 (1968) and *Curtis-Wright Corp., Wright Aeronautical Division*, 145 NLRB 152 (1963), enfd. 347 F. 2d 61 (3rd Cir. 1965).

The information sought by the Union from both Respondents is exactly the type of information that the Board has determined must be furnished upon request. Although the Union is not obligated to do so, it specifically indicated that it desired the requested information in order to verify the Respondents' compliance with their implemented offers. The information sought by the Union is clearly relevant and necessary to its function as the collective-bargaining representative of the employees in each unit under the cases set forth above. Indeed, the evidence establishes that the Union has in the past utilized such information in policing Respondent McArdle's obligations to adhere to legally required terms and conditions of employment.

The Respondents do not seriously challenge the legal principles stated above in defending this case. Rather, the Respondents contend that they have no obligation to provide information since they had no duty to bargain at the time the requests were made. The Respondents contend, in essence, that the Union has, in fact, lost majority support in each unit. Alternatively, the Respondents argue that, by its conduct, the Union has lost the presumption of majority support that it was entitled to by virtue of its certification.

For the reasons expressed below, I do not agree with the Respondents' position and find that they violated Section 8 (a)(5) and (1) of the Act by refusing to provide the requested information.

As set forth above, the Union was certified as the collective-bargaining representative of the employees in the Cedar and McArdle units on March 27, 2006, and April 3, 2006, respectively. As such, the Union enjoyed an irrebuttable resumption of majority status for the year following its certification. *Ray Brooks v. NLRB*, 348 U. S. 96 (1954); *Levitz Furniture Co. of the Pacific, Inc*., 333 NLRB 717, 720 (2001). After the certification year, in the absence of a collective- bargaining agreement, the presumption of majority status continues but is rebuttable.

NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775, 777-778 (1990), and cases cited therein.[7]

In the instant cases, the Union's certification year has expired and there is no contract in effect in either unit. Therefore, the Union is entitled to continuing presumption of majority status. *Levitz*, supra at 720. In *Levitz* the Board held that an employer may rebut the continuing presumption of an incumbent union's majority status, and withdraw recognition, if it shows that the union has, in fact, lost the support of a majority of the employees in the bargaining unit. In *Levitz* the Board overruled its prior decision in *Celanese Corp*., 95 NLRB 664 (1951) and its progeny insofar as they held that an employer was entitled to lawfully withdraw recognition on the basis of a good-faith doubt (uncertainty or disbelief) as to a union's continued majority status. *Levitz* supra at 725.

The Respondents' claim that the Union has in fact lost majority support in both units is based on the fact that in the Cedar unit one employee is a member of the Union, while in the McArdle unit there are four to five members at the present time. In *Trans-Lux Midwest Corp*., 335 N.L.R.B. 231, 232 (2001) the Board held that: "The issue of majority support turns on whether most unit employees wish to have union representation, not on whether most unit employees are members of particular union. See, e. g., *Manna Pro Partners*, 304 NLRB 782, 783 (1991), enfd. 986 F. 2d 1346 (10th Cir. 1993). Similarly, the number of members or financial supporters of an incumbent union is not necessarily the same as the number of employees continuing to support union representation, *R. J. B. Knits*, 309 NLRB, 205 (1992)." The Board further noted in *Trans-Lux* that the principles expressed above are particularly applicable in a right- to- work state. In *R.J.B. Knits*, supra at 205, the Board stated the rationale for this policy is that "[no] one can know with certainty how many employees who favor union representation do not become or remain members of the Union." (Citations omitted) Thus, Board does law clearly does not support the Respondent's claim that lack of membership in the Union equates to a loss of majority support. This is particularly so in a right-to-work state such as Nebraska.

In the instant cases, there is no objective evidence of the type contemplated by *Levitz*, such as a petition signed by a majority of the employees in the bargaining unit, that establishes a loss of majority support in either unit. In fact, this record contains no evidence whatsoever of direct expressions of disaffection for the Union from employees of either unit.

*Port Printing & Ad Specialties, I*nc., 344 NLRB 354 (2005), enfd. sub nom mem. *NLRB v. Seaport Printing Ad Specialties, Inc*., 192 Fed. Appx. 290 (5th Cir. 2006), supports my conclusion that the Respondents have not established loss of majority support among unit employees. In *Port Printing*, the Board, applying the *Levitz* standards, found the employer violated Section 8 (a) (5) and (1) of the Act by withdrawing recognition from the union. At the time the employer withdrew recognition there were eight bargaining unit employees, and the employer knew that only one of the employees was remitting dues pursuant to a dues-checkoff provision. The employer also relied on statements by four employees who allegedly stated they did not want the union to represent them. The employer also claimed that the union was dormant as there been no negotiations for 4 years. Finally, the employer relied on the fact that the Union did not replace its secretary /treasurer who had resigned from the union. The Board found that this evidence did not establish, at the time the employer withdrew recognition, that

[7] An employer may not withdraw recognition while a collective-bargaining agreement is in effect for period of up to 3 years, because an incumbent union enjoys a conclusive presumption of majority status during the life of the contract. *Auciello Iron Works v. NLRB*, 517 U.S. 781, 786 (1996); *Levitz Furniture*, supra at fn. 17.

the union had lost majority support. In finding that the lack of negotiations did not indicate dormancy, the Board noted that the contract renewed itself annually, in the absence of a request for negotiations, and the respondent itself had never requested negotiations.

In the instant cases, it is clear that the Respondents have not established that the Union has lost majority support in either unit pursuant to the *Levitz* standard. *See, e.g.,Highlands Regional Medical Center,* 347 NLRB. 1404 (2006) and *Parkwood Developmental Center, Inc.* 347 NLRB 974 (2006). I find that the Respondents' reliance on *Wisconsin Porcelain Co*., 349 NLRB 151 (2007), in support of its argument that the Union has lost majority support, to be misplaced. In the first instance, *Wisconsin Porcelain* involves the issue of whether the employer violated Section 8(a) (1) of the Act by polling its employees to determine whether they wished continued representation by the union. In *Wisconsin Porcelain* the Board noted that an employer may poll its employees only if the employer has a good-faith doubt, based on objective considerations, as to the union's majority status. *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998). The instant case does not involve the different and lesser standard of proof necessary to justify an employer poll. Moreover, in *Wisconsin Porcelain*, the Board found that, even under that lesser standard, the fact that a minority of the unit was composed of union members and that dues-checkoff had declined from 43 percent to 28 percent was entitled to relatively little weight.

The Respondent also argues that the Union should not be entitled to a continuing presumption of majority support because it has abandoned its representative status through inaction since the implementation of the final offers in April 2007. In effect, Respondents argue that the Union has waived its bargaining rights.

The waiver of a statutory right, including bargaining rights, must be established by clear and unmistakable evidence. *Metropolitan Edison Co. v. NLRB*, 460 US 693, 708 (1983); *E. R. Stuebner, Inc*., 313 NLRB 459 (1993). The Board has considered whether alleged union inaction has resulted in loss of bargaining rights in a number of cases. As noted above, after *Levitz*, the Board in *Port Printing*, supra, considered whether a union's alleged dormancy supported the employer's claim that the union had lost majority status. The Board found that a lack of negotiations for 4 years and the failure to fill a union officer vacancy was not persuasive in that regard.

In a number of other cases decided before *Levitz*, the Board has held that union inactivity, even for significant periods of time, has not justified a refusal to bargain. In *Hospital Kentucky River Medical Center*, 340 NLRB 536, 543 (203) a 4-month delay was not considered an abandonment of the union's right to bargain. In *Spillman Company*, 311 NLRB 95 (1993) the same conclusion was reached regarding a 6-month bargaining hiatus. In *Stanford Realty*, 306 NLRB 1061, 1065 (1992) a delay of 5 months was not considered a waiver of bargaining rights, while in *Kelly's Private Car Service*, 289 NLRB 30, 44-45 (1998), a delay of two and a half years was not found to constitute a waiver. In *Pioneer Inn* & *Casino*, 228 NLRB 1263, 1265 (1977), enfd, 578 F.2d 835 (9th Cir.1978) a hiatus in bargaining for 4 years did not constitute a waiver of bargaining rights. In addition, the Board has held that a reassertion of bargaining rights after a period of inactivity negates any inference to be drawn from the period of inactivity. *Kentucky River Medical Center*, supra at 543 and *Pioneer Inn & Casino*, supra at 1266.

Applying these principles to the instant case, I find that the Union has not waived its bargaining rights and remains the bargaining representative of the Respondents' employees. The record is replete with evidence of the Union's action insuring the Section 7 rights of the employees in the larger McArdle unit. In this regard, in late 2006 Union filed three grievances and a request for information with regard to a claim refusal to abide by the wage and benefit

provisions of the expired 8(f) agreement. Faced with Respondent McArdle's refusal to provide the information or process the grievances, the Union filed a charge in Case 17- CA-23755 which was resolved by a non--Board settlement dated June 28, 2007 (GC Exh. 12). The settlement resulted in the payment of backpay to a number of unit employees. After the implementation of Respondent McArdle's final offer in April 2007, the Union sought information from it in order to determine whether it was paying employees in accordance with the terms of its final offer. After Respondent McArdle again refused to provide the information, the Union filed another charge in Case 17-CA-23959 (GC Exh. 16). This case resulted in an informal settlement that was approved by the Regional Director of Region 17 on November 30, 2008 (GC Exh. 17). There is no record evidence to indicate that it was necessary for the Union to take action to enforce its rights in the Cedar unit until the request for information made in 2009, which is the subject of the instant case.

The Union has also maintained periodic contacts with employees of each unit from the time of the implement offers in 2007 until the date of the hearing. In this connection, Union representatives have visited jobsites of each Respondent four to six times a year Unit employees have contacted the Union regarding working conditions, including making reports of wage rates that were different from those contained in the implement offers. These reports underlie the requests for information that precipitated the instant cases. Under these circumstances, I find the lack of stewards in each unit to be inconsequential.

The fact that the Union has not requested bargaining since the final offers were implemented also does not negate its bargaining rights. It is clear that an impasse is only a temporary deadlock or hiatus in negotiations and is not a " rupture of the bargaining relationship which leaves the parties free to go their own ways." *Flex Plastics, Inc*. 262 NLRB 651, 656 (1982) enfd. 726 F.2d 272 (6th Cir. 1984); citing *Charles D. Bonanno Linen Service v. NLRB* 454 US 44 (1982). The Board made it clear in *Flex Plastics* that a hiatus in bargaining after an impasse does not in any way privilege an employer to take action amounting to a withdrawal of recognition of the union.

Marshall explained at the hearing that he has not requested bargaining for new agreement since April 2007 because, given the present economic conditions, he did not foresee the Respondents raising wage rates. Therefore, the Union was content to let the terms of the final offers implemented in 2007 continue. He also explained that he did not respond to the notice he received from Respondent McArdle in 2008 regarding a change in its insurance plan because Respondent McArdle's insistence that have its own insurance plan was the issue that created an impasse in negotiations. He concluded therefore that there was "nothing to bargain about" (Tr. 63) and did not respond to the notice. I find that the Union's position that it was willing to stand pat in difficult economic times and not seek enhanced terms and conditions of employment is a reasonable position. It certainly does not constitute a clear and unmistakable waiver of its bargaining rights.

I do not agree with Respondent's contention that the Board's decision in *Southern Wipers, Inc*., 192 NLRB 816 (1971), privileges its refusal to provide the requested information to the Union. In the first instance, *Southern Wipers* is a pre-*Levitz* withdrawal of recognition case. Thus, the legal standard applied by the Board was whether, under all the circumstances, the employer had a reasonable good-faith doubt of the union's majority status. In *Southern Wipers* there was a hiatus in bargaining between the parties for approximately 7 months. During this period the union had no contact with employees and several employees expressed to the employer that they no longer supported the union. In addition, the employer had experienced heavy turnover. The Board considered the evidence in its entirety established a good-faith doubt of the union's majority status based upon objective considerations. In a later case, *Spillman Co*.

the Board distinguished *Southern Wipers* in holding that a bargaining hiatus and the union's failure to have meetings with employees was not sufficient objective evidence to establish a good faith-doubt of the union's majority status. The Board in *Stillman* noted that no employees had expressed a desire to no longer be represented by the union and this factor was a critical distinction from *Southern Wipers*. As noted above, in the instant cases there is no evidence of expressions by employees of lack of support for the Union.

The Respondents claim that the instant case is distinguishable from *Pioneer Inn Associates*, supra, because in *Pioneer Inn* there was a contract in effect between the parties when the employer withdrew recognition. I find that to be a distinction without a difference. As discussed above, in the instant cases, since there is no contract in effect the Union is presumed to be the majority representative. There is simply no evidence under existing Board law to rebut that presumption.

Since the Union continues to be the representative of Respondents' employees they had an obligation to provide the presumptively relevant information requested by the Union. Their failure to do so violates Section 8 (a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent Cedar and Respondent McArdle violated Section 8 (a)(5) and (1) of the Act in Case 17-CA-24530 and Case 17-CA-24532, respectively, by failing and refusing to provide the following information requested by the Union that is necessary and relevant to its obligation to bargain on behalf of the employees it represents: For all operating engineer employees: contact information (including first and last name, home mailing address, and any phone numbers); payroll records from January 1, to December 31, 2008; health insurance information, including the premium amounts paid by the Employer and the employee, coverage and eligibility; and retirement benefits information, including eligibility, the amount contributed by the Employer and the employee and account fees paid by the employee.

2. The above violations are unfair labor practices affecting commerce within the meaning of the Act.

REMEDY

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

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

ORDER

A. The Respondent, Cedar Construction, Omaha, Nebraska, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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

> All journeymen and apprentice operating engineers and mechanics including working foreman employed by Respondent Cedar at its 13901 "L" Street, Omaha, Nebraska, facility, but excluding all office clerical employees, confidential employees, professional employees, shop employees, truck drivers, guards and supervisors as defined in the Act, and all other employees.

(b) Refusing to provide the following information requested by the Union that is necessary and relevant to its obligation to bargain on behalf of the employees it represents: For all operating engineer employees: contact information (including first and last name, home mailing address, and any phone numbers); payroll records from January 1, to December 31, 2008; health insurance information, including the premium amounts paid by the Employer and the employee, coverage and eligibility; and retirement benefits information, including eligibility, the amount contributed by the Employer and the employee and account fees paid by the employee.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Furnish to the Union in a timely manner the following information requested by it; For all operating engineer employees: contact information (including first and last name, home mailing address, and any phone numbers); payroll records from January 1, to December 31, 2008; health insurance information, including the premium amounts paid by the Employer and the employee, coverage and eligibility; and retirement benefits information, including eligibility, the amount contributed by the Employer and the employee and account fees paid by the employee.

(b) Within 14 days after service by the Region, post at its facility in Omaha, Nebraska copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these

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

proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 27, 2009.

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

B. The Respondent, McArdle Grading Co., Elkhorn, Nebraska, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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

> All journeymen and apprentice operating engineers, all mechanics and truck drivers including working foreman employed by Respondent McArdle at its 112 Railroad Avenue, Elkhorn, Nebraska facility, but excluding confidential employees, office clerical employees, solely shop employees, guards and supervisors as defined in the Act, and all other employees.

(b) Refusing to provide the following information requested by the Union that is necessary and relevant to its obligation to bargain on behalf of the employees it represents: For all operating engineer employees: contact information (including first and last name, home mailing address, and any phone numbers); payroll records from January 1, to December 31, 2008; health insurance information, including the premium amounts paid by the Employer and the employee, coverage and eligibility; and retirement benefits information, including eligibility, the amount contributed by the Employer and the employee and account fees paid by the employee.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Furnish to the Union in a timely manner the following information requested by it; For operating engineer employees: contact information (including first and last name, home mailing address, and any phone numbers); payroll records from January 1, to December 31, 2008; health insurance information, including the premium amounts paid by the Employer and the employee, coverage and eligibility; and retirement benefits information, including eligibility, the amount contributed by the Employer and the employee and account fees paid by the employee

.

(b) Within 14 days after service by the Region, post at its facility in Elkhorn Nebraska, copies of the attached notice marked “Appendix.”[10] Copies of the notice, on forms provided by

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

the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 27, 2009.

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

Dated, Washington, D.C., November 24, 2009

_____
Mark Carissimi
Administrative Law Judge

JD-56-09
Omaha, NE

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to recognize or bargain with the Union as the exclusive bargaining representative of the employees in the following described unit:

All journeymen and apprentice operating engineers and mechanics including working foreman employed by Cedar Construction at its 13 90 "L" Street, Omaha, Nebraska, facility, but excluding all office clerical employees, confidential employees, professional employees, shop employees, truck drivers, guards and supervisors as defined in the act, and all other employees

WE WILL NOT refuse to provide the following information requested by the Union that is necessary and relevant to its obligation to bargain on behalf of the employees it represents: For all operating engineer employees: contact information (including first and last name, home mailing address, and any phone numbers); payroll records from January 1, 2008 to December 31, 2008; health insurance information, including the premium amounts paid by the Employer and the employee, coverage and eligibility; and retirement benefits information, including eligibility, the amount contributed by the Employer and the employee and account fees paid by the employee.

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

WE WILL furnish to the Union in a timely manner the following information requested by it: : For all operating engineer employees: contact information (including first and last name, home mailing address, and any phone numbers); payroll records from January 1, 2008 to December 31, 2008; health insurance information, including the premium amounts paid by the Employer and the employee, coverage and eligibility; and retirement benefits information, including

eligibility, the amount contributed by the Employer and the employee and account fees paid by the employee.

Cedar Construction
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

8600 Farley Street, Suite 100
Overland Park, Kansas 66212-4677
Hours: 8:15 a.m. to 4:45 p.m.
913-967-3000.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 913-967-3005.

JD-56-09
Omaha, NE

APPENDIX

NOTICE TO EMPLOYEES

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National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT refuse to recognize or bargain with the Union as the exclusive bargaining representative of the employees in the following described unit:

All journeymen and apprentice operating engineers, all mechanics and truck drivers including working foreman employed by McArdle Grading Co. at its 112 Railroad Avenue, Elkhorn, Nebraska facility, but excluding confidential employees, office clerical employees, solely shop employees, guards and supervisors as defined in the Act, and all other employees.

WE WILL NOT refuse to provide the following information requested by the Union that is necessary and relevant to its obligation to bargain on behalf of the employees it represents: For all operating engineer employees: contact information (including first and last name, home mailing address, and any phone numbers); payroll records from January 1, 2008 to December 31, 2008; health insurance information, including the premium amounts paid by the Employer and the employee, coverage and eligibility; and retirement benefits information, including eligibility, the amount contributed by the Employer and the employee and account fees paid by the employee.

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eligibility, the amount contributed by the Employer and the employee and account fees paid by the employee.

McArdle Grading Co.
(Employer)

Dated _____ By _____
(Representative) (Title)

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