

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
WASHINGTON, D.C.**

**McCARTHY CONSTRUCTION COMPANY  
Respondent**

**and**

**Cases 7-CA-51474  
7-CA-51647**

**CEMENT MASONS LOCAL 1,  
INTERNATIONAL UNION OF BRICKLAYERS  
AND ALLIED CRAFTWORKERS (BAC), AFL-CIO  
Charging Union**

**COUNSEL FOR THE GENERAL COUNSEL'S  
BRIEF ANSWERING RESPONDENT'S EXCEPTIONS**

The issues raised by Respondent's exceptions to the decision of the Administrative Law Judge are: (1) was Respondent dilatory in providing information to the Charging Union at the commencement of the parties' bargaining relationship; (2) did Respondent engage in bad faith bargaining when it cancelled scheduled meetings without just cause and without offering alternative dates to the Charging Union, and (3) is the proposed 12-month extension of the certification year with a 24-hour per month bargaining schedule an appropriate remedy. Additionally, the Charging Union excepted to the Administrative Law Judge's recommendation of dismissal of the 8(a)(5) allegation related to Respondent's refusal to furnish information regarding Kensington Construction. Counsel for the General Counsel agrees with the Charging Union's position with regard to their

entitlement to the information in Respondent's possession with regard to Kensington Construction.

**I. RESPONDENT'S DILATORY RESPONSE TO THE CHARGING UNION'S INITIAL REQUEST FOR INFORMATION.**

The Charging Union was certified as the exclusive collective-bargaining representative of certain of Respondent's employees on March 26, 2008<sup>1</sup>. After one bargaining session that was held on April 14, the Charging Union sent a letter to Respondent on June 17, requesting additional meeting dates and, more importantly, requesting that Respondent furnish it with:

“the payroll records, employment records and other documents which show the name, address, last day worked, notice of layoffs, date of hire, rate of pay, benefits and hours of work for all employees working on construction and building projects from January 1, 2008 to the present. Also, please provide a list of each job currently underway or awarded to the Company with a description of the work and the scheduled or estimated start time.”  
[GC Ex 2]<sup>2</sup>

It was not until August 8, 51 days later, that the Charging Union obtained some of the information requested, even though some of the information was available on July 31. [Tr 27 – 28, and GC Ex 4]. During the period June 17 to July 31 Respondent made no effort to contact the Charging Union to advise them of the status of their information request. [Tr 27]. Respondent did not call the Charging Union to let them know it assertedly had to go to a third party to obtain the information and that it would take

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<sup>1</sup> All dates hereinafter are in 2008, unless otherwise noted.

<sup>2</sup> References to the transcript will be designated as Tr \_\_\_\_, references to General Counsel exhibits will be designated as GC Ex \_\_\_\_, references to Respondent's exhibits will be designated as R Ex. \_\_\_\_, and references to the Charging Union's exhibits will be designated as CP Ex \_\_\_\_.

awhile. There was no communication whatsoever. Nothing was said until July 31, when Respondent's attorney, Dennis Devaney, informed the Charging Union that he had in his possession some CD-Roms with the requested information, hardly a burdensome volume of information, but that he wanted to review the information over the weekend and would supply it to the Charging Union on the following Monday. [Tr 27]. Notwithstanding the promise to provide the information by August 3, it was not until August 8 that the CD-Roms containing the information were delivered to the Charging Union's offices. [GC Ex 4]. Once the files on the CDs were opened and inspected, it was discovered that the information provided was inadequate. On August 20, the Charging Union notified Respondent that the information provided only the name, rate of pay, and hours worked for each listed employee. The Charging Union requested that all of the information requested on June 17 be provided by August 22. [GC Ex 5]. On August 22, Respondent did hand deliver some of the additional information to the Charging Union's offices. [GC Ex 6]. However, it was not until September 16, three months after the initial request and after the Charging Union filed an unfair labor practice charge in Case 7-CA-51474 on August 29 [GC Ex 1(a)], that Respondent provided the Charging Union the rest of the information it had requested. [Tr 30 and GC Ex 9].

Respondent contends that the Administrative Law Judge failed to consider that its bookkeeper was its keeper of the records and had been fired for embezzlement and that the information requested was in the hands of its third-party payroll service and that it was dependent on that payroll service to gather and provide the information. However, a review of the Charging Union's request reveals that the Charging Union was asking for

information that should have been in Respondent's possession all along, and known to its principals. Respondent clearly knew the names and addresses of the employees whom it hired, their rates of pay and benefits, and the jobs on which Respondent was working or had been awarded as of June 17. Yet it took three months for Respondent to gather and provide that information to the Charging Union, and the Charging Union was never informed as to why it was taking so long to gather and provide the information.

It is well settled that an employer has a duty to furnish information promptly as long as the union has made a proper demand. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). The unreasonable delay in providing requested information may constitute an unfair labor practice. *Interstate Food Processing*, 283 NLRB 303, 306 (1987). See also, *Shaw's Supermarkets, Inc.*, 339 NLRB 871 (2003).

When a union is entitled to requested information, it is entitled to it without unreasonable delay, in a timely manner, or "as promptly as circumstances allow." *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989); *Decker Coal Co.*, 301 NLRB 729, 740 (1991); *Providence Hospital*, 320 NLRB 790, 794 (1996). In *Beverly California Corp.*, 326 NLRB 153, 157 (1998), the Board stated:

"It is well established that when a union makes a request for relevant information, the employer has a duty to supply the information in a timely fashion or to adequately explain why the information was not furnished. The Respondent, however, never gave an explanation for its failure to comply with the Charging Union's request for two months."

In determining timeliness, the Board has stated: "It is appropriate to consider whether the nature of information is conducive to rapid response, and whether the information is readily obtainable in the employer's files in assessing whether the

employer's delay is great enough to violate its duty." *Capitol Steel & Iron Co. v. NLRB*, 89 F.3d 692, 698 (10<sup>th</sup> Cir. 1996). Further, if the Employer cannot supply the information in a timely fashion it must explain why the information is delayed. *Beverly California Corp.*, 326 NLRB 153, 157 (1998).

In the instant case, Counsel for the General Counsel submits that all of the information requested by the Charging Union was readily available to Respondent on June 17, whether or not it utilized a third-party payroll provider. Surely Respondent was at least aware of the names and addresses of its employees, their rates of pay and benefits, and the jobs they were currently working on or had been awarded. And, at no time did Respondent advise the Charging Union that additional time was needed to gather the information before providing it. With knowledge of the requested information (the identity of the employees in the bargaining unit, their rates of pay, their addresses, and the work Respondent was currently performing and/or was awarded) the Charging Union was prejudiced in its ability to communicate with the bargaining unit and/or formulate contract proposals. The three month delay in providing the requested information, along with the delays resulting from Respondent's cancelling bargaining sessions (discussed below) was extremely prejudicial to the Union's ability to bargain in good faith with Respondent.

Based on the above, Counsel for the General Counsel requests that the Board uphold the Administrative Law Judge's finding that Respondent violated Section 8(a)(5) by its dilatory response to the Charging Union request for information.

**II. RESPONDENT’S DILATORY BARGAINING TACTICS**

**A. The Bargaining History**

Scrutiny of the reasons Respondent gave for cancelling, or as Respondent claims, “postponing” or “rescheduling,” scheduled bargaining sessions viewed in the context of the parties’ collective-bargaining history demonstrates that Respondent bargained in bad faith by *cancelling* the scheduled meetings.

As noted above, the Charging Union was certified on March 26. Below are the dates of all scheduled bargaining sessions, whether or not the parties met, and parenthetical notations as to any reason given by Respondent for any scheduled meeting that was not held:

<b>SCHEDULED MEETINGS</b>	<b>RESULTS</b>
April 9, 2008.....	Rescheduled by Employer (No reason given)
April 15, 2008.....	Held
April 28, 2008.....	Postponed by Employer (No reason to meet)
May 13, 2008.....	Postponed by Employer (Interviewing Attorneys)
July 17, 2008 .....	Cancelled by Charging Union (Conflict in dates)
July 31, 2008 .....	Held
September 26 .....	Held
October 6, 2008 .....	Cancelled by Employer/Rescheduled (Personal)
October 21, 2008 .....	Held
October 23, 2008 .....	Cancelled (To gather information requested by Charging Union)
October 27, 2008 .....	Held
November 5, 2008 .....	Postponed by Employer (Needed to file Answer)
November 10, 2008 .....	Held
December 4, 2008.....	Postponed by Employer (Information request)
March 10, 2009.....	Held

After certification, The Charging Union’s Business Agent Paul Dunford contacted Respondent and scheduled the first bargaining session for April 9. However, prior to that April 9 meeting, Michael McCarthy’s secretary contacted Dunford and advised him that

McCarthy was not available on April 9 and that Dunford would have to call later to reschedule. [Tr 23]. Eventually the parties agreed to meet, and did meet on April 15. [Tr 24]. At the April 15 meeting, the parties agreed to meet again on April 29. However, when Dunford called Respondent to confirm the date, McCarthy asked Dunford if the Charging Union was able to obtain either a statewide agreement or a non-association agreement that McCarthy requested on April 9. When Dunford responded that he had not been able to obtain them, McCarthy replied that there was no need to meet at that time. [Tr 24]. The next bargaining session was not scheduled at that time.

The parties subsequently arranged to meet next on May 13. [Tr 24 – 25]. However, when Dunford called McCarthy to confirm the May 13 meeting, McCarthy once again cancelled the meeting, stating that he was in the process of interviewing law firms to represent Respondent in negotiations and, as a result, there was no need to meet yet. No further sessions were scheduled at that time. [Tr 25].

On June 17, the Charging Union sent a letter to Respondent stating that it was very important to schedule as many meetings as necessary to conclude negotiations. The Charging Union offered ten dates from June 19 through July 14 as possible bargaining dates. [GC Ex 2].

It was not until June 27 that Respondent obtained legal counsel, Mr. Devaney. Devaney called Dunford to introduce himself and suggested July 16 as a possible bargaining date. In his letter to the Charging Union, Devaney stated that “I have bargaining already scheduled during the first two weeks of July on behalf of one of my other clients. In light of that pre-existing commitment, I propose ... July 16.” [GC Ex 3].

In an exchange of e-mails, the Charging Union's attorney agreed to July 17; however, he did so in error and the Charging Union cancelled that meeting because of prior commitments. [Tr 26]. The next bargaining session was conducted on July 31. [Tr 26].

The next bargaining session that was scheduled and held occurred almost two months later, on September 26. During this session, the parties agreed to meet again on October 6. However, this October 6 meeting was cancelled by Respondent an hour prior to its scheduled time because Denise McCarthy, one of Respondent's two negotiators (the other being Devaney) had sick children to attend to. [Tr 32]. The Charging Union attempted to slot in another session to make up for the October 6 date that was cancelled but was unsuccessful in doing so. [Tr 32]. However, the parties had earlier agreed to several dates into the future including October 21, and 23. [Tr 32]. The parties did meet and bargain on October 21. It was during this meeting that the Charging Union requested information regarding Kensington Construction. [Tr 32]. In response, Devaney informed the Charging Union that he wished to confer with his client regarding Kensington before responding. [Tr 33].

However, Devaney cancelled the October 23, stating that he was gathering the information that the Charging Union had requested. [Tr 33]. Notwithstanding Devaney's assertion that he was cancelling the meeting to gather requested information, Devaney later took the position that: (1) Respondent had no information in its possession regarding Kensington; and (2) the Charging Union was not entitled to the information because Respondent and Kensington were not alter egos.

The next bargaining session conducted was October 27 during which Devaney advised Dunford and Canzano that the matter of the Charging Union's request for information regarding Kensington was still being looked into. [Tr 34]. The next session was scheduled for November 5.

However, on the morning of November 5, Respondent cancelled the meeting scheduled for 1:00 p.m. that afternoon ostensibly so that Devaney could file an answer to the outstanding Complaint alleging that Respondent was dilatory in providing the earlier requested information. In cancelling the November 5 meeting, Devaney sent an e-mail to the Charging Union's attorney Canzano in which he said "In light of the Board's decision to go to Complaint and my responsibility to answer on behalf of McCarthy, my client and I will not be able to meet at 1:00 this afternoon at BAC." [GC Ex 10] Devaney testified that he was only retained by Respondent to represent it in the unfair labor practice matter after the Complaint was issued, and he needed time to review the matter and file an answer in a timely manner. However, Counsel for the General Counsel submits that Respondent's asserted reason for cancelling the November 5 afternoon meeting is specious for several reasons. First, Devaney, according to his own testimony, is well versed in labor law, having specialized in labor and employment law for 33 years and also having served as a member of the National Labor Relations Board from 1988 to 1994. [Tr 146 – 147]. As a result, he knew, or should have known, that having recently been retained by Respondent in the unfair labor practice matter, he could have easily requested, and would have been granted, an extension of time to file the answer. There was no real need to cancel a scheduled 1:00 p.m. meeting at 9:44 a.m., [GC Ex 10]

especially when Respondent's answer was e-filed with the Region at 11:36 a.m. [GC Ex 13], faxed to the Region at 11:31 a.m. [GC Ex 12] and e-mailed to the Charging Union's attorney at 11:35 a.m. [GC Ex 11]. Devaney admitted on cross-examination that he could have requested an extension of time to file the answer. But there were other motives behind his cancelling the November 5 session.

A. Sure, I mean, I guess. I've practiced long enough I know I could have asked for a delay if I—

Q. Why didn't you and still have the bargaining session?

A. Because I wanted to talk to the client about the more substantive ongoing things because it was-- you had already issued a complaint. [Tr 189, lines 5 – 10].

Further, Devaney was not specific in his testimony as to exactly when he was retained by Respondent to represent it regarding the unfair labor practice charge and how much or how little time he had to review the Complaint and file a very simple and straight-forward answer. [GC Ex 12]. However, Devaney acknowledged that, at least by October 14, when the amended charge in 7-CA-51474 was filed, he had been retained by Respondent to represent it in the unfair labor practice matter. [Tr 168 – 169]. The Complaint in that case issued on October 22 and Respondent had 14 days to file its answer. Notwithstanding that Devaney had already been retained and was aware the Complaint issued, it was not until the last minute that he decided that he needed to cancel a scheduled bargaining session later that afternoon and then filed his answer that morning. Counsel for the General Counsel submits that by asserting a need to cancel the meeting to file an answer, Respondent was simply evading its responsibility to bargain

with the Charging Union, particularly when it would have been rather easy to obtain an extension of time to do so and the extension would have allowed Respondent to meet its commitment to bargain in good faith.

The parties had previously scheduled a session for November 10, which Devaney mentioned when he cancelled the November 5 session. [GC Ex 10]. Respondent was normally represented by Denise McCarthy and Devaney at the bargaining table. On November 10, Jeff Wilson, another attorney from Devaney's law firm, appeared instead [Tr 39] to hold the date because neither Denise McCarthy nor Devaney were available. [Tr 39, 171 – 172, 188]. During this session, Wilson presented the Charging Union with a counter-proposal drafted by Devaney [Tr 172] but, according to Dunford, Wilson was not familiar with the issues at the bargaining table and could only listen to the Charging Union's questions and take them back to Respondent for future reply. [Tr 41]. While the allegation regarding Respondent sending a representative to the bargaining table without authority was dismissed, and the dismissal was subsequently upheld by the Office of Appeals, Counsel for the General Counsel submits sending Wilson to "hold the date" of a previously scheduled meeting was just another tactic to delay the entire negotiations. If Respondent were truly bargaining in good faith, Denise McCarthy would have accompanied Wilson to the table so that someone who could answer questions and truly participate in the give and take of negotiations would be present. Devaney testified that he was "the principal spokesman for the client ..." [Tr 172, lines 8 – 9] so his absence clearly did not help in furthering the bargaining process to meet Respondent's obligations under Section 8(d) of the Act.

On November 21, the Charging Union filed an unfair labor practice charge in Case 7-CA-51647 alleging that Respondent failed and refused to provide relevant information requested by the Charging Union in collective bargaining. [GC Ex 1(h)]. There had not been any bargaining sessions between the parties since November 10 nor had there been any exchange between them either telephonically, by e-mail, or by letter, wherein the Charging Union had made new requests for information. Any information requests by the union had been made either at or before the November 10 bargaining session. As a result, by December 1 Respondent knew, or should have known, what the Charging Union had requested. Nevertheless, on December 1, a full seven days after being informed that the charge had been filed, Devaney, wrote a letter to the Charging Union's attorney, John Canzano, [GC Ex 14] requesting "a listing of the information that you claim you have requested and that has not been provided to you or your client by McCarthy Construction Company." At no time after November 24, when he admits knew the Charging Union claimed they did not get all the information they requested, did Devaney pick up the phone or send an e-mail to ask Canzano what information is it that the Charging Union needed and did not receive. Nor did he ask Canzano or Dunford prior to the scheduled December 4 bargaining session whether they needed the information or could they continue bargaining until the information was provided. Instead of doing any or all of that, Devaney unilaterally determined to cancel the December 4 bargaining session pending receipt of the specific listing of the Charging Union's information request. Instead of asking the Charging Union what it wanted as soon as he was aware of the charge on November 24, Devaney waited until almost the last minute to ask the Charging

Union to put it in writing and cancel a meeting three days hence. It is interesting to note that by then Devaney had read the Federal District Court decision involving the fringe benefit funds and had already determined that the Charging Union was not entitled to, nor would Respondent provide, the information regarding Kensington. [Tr 174].

On December 3, Canzano, by letter, replied to Devaney stating that the Charging Union was very disappointed that he had decided to postpone the December 4 bargaining session and requested that Respondent provide the Charging Union with additional dates when it was available for bargaining. [GC Ex 15]. Canzano also set forth all outstanding information requests<sup>3</sup> and closed by stating “I look forward to receiving your list of additional dates on which McCarthy is available for bargaining.”

Devaney did not respond to Canzano’s December 3 request for available dates for bargaining until February 18, 2009, and then, he proposed two dates, either March 2 or March 10, 2009. Devaney stated that since the Charging Union did not pursue the issue of scheduling bargaining dates, he was not all that concerned himself. [Tr 181 – 182]. However, he conveniently ignores that on December 9 the Charging Union filed an amended charge in Case 7-CA-51474 alleging, in part, that Respondent had engaged in a pattern of bad faith bargaining by repeatedly cancelling bargaining sessions without justification and by other dilatory conduct. [GC Ex 1(1)]. The filing of the charge containing those allegations put Respondent on notice that the Charging Union was

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<sup>3</sup> As an aside, it is interesting to note that of two outstanding information requests on December 1, a list of jobs Respondent is currently bidding or planning to bid and information on Kensington, Respondent had already determined that it was not going to provide that information to the Union, and that is why the unfair labor practice charge was filed.

serious about continued bargaining. It was clearly Respondent who had no sense of urgency to get to the bargaining table in early 2009.

In early December Devaney unilaterally concluded that no more bargaining sessions could be scheduled until at least March. Devaney testified:

“... we were already in December, the holidays were coming. I had a very heavy trial schedule in January. I had arbitrations, and I had some other things for other clients, and so, no, the only thing I got was that one line about, you know, do you have any other dates. I had no calls. I had no e-mails. I didn't-- you know, we didn't hear anything from them. And frankly, from my perspective, both for the union and for McCarthy, I mean, this is a really small unit. This is eight people in this unit.” [Tr 182, lines 8 – 17]

Clearly, Devaney had other interests in mind when he waited a full-week, from November 24 to December 1, to write the letter to the Charging Union about the unfair labor practice charge and the information request, then unilaterally cancelled the December 4 meeting.

“I had scheduled a meeting with the Department of Labor in Washington, D.C., on the 4th. And, in fact, I also knew that the oral argument in the Laurel Bay case, which is as you and I well know, is precedential with respect to the two-member boards and relevant to our client, was also going on in D.C. on the 4th. I had booked a flight and had decided that I would do this meeting for another client with DOL and actually attended the oral argument just to get a flavor of where the D.C. Circuit was going to be on the two-member issue.” [Tr 175, line 23 through 176, line 8].

In an attempt to place the blame on the Charging Union for the delay between the cancelled December 4 meeting and Devaney's February 18, 2009, letter to Canzano [Er Ex. 11] seeking not to schedule a meeting until March, Wilson asked Devaney “Did you receive any verbal request from Mr. Canzano for [any] bargaining session that you did

not respond to?” Devaney responded “No, I did not.” [Tr 181, lines 15 – 18]. However, that carefully worded question ignores the fact that Canzano twice requested additional dates in his December 3 letter and then filed an unfair labor practice charge alleging, among other things, Respondent’s cancelling meetings and engaging in other dilatory bargaining tactics. When asked on cross-examination why he did not contact the Charging Union after December 3 and advise them of his availability or unavailability Devaney flippantly replied:

Q. By Mr. Czubaj: You didn't even call-- did you even call the union and say, look, I can't meet until February. Let's wait until after the holidays. I'm booked in January. Is it okay if we meet in February?

A. They didn't call me. I didn't call them. [Tr 199, line 21 – 25].

As a result of Devaney’s decision, no further bargaining took place until March 10, 2009, just prior to the opening of the instant trial.

**B. The actions of Respondent in cancelling or postponing meetings at the last minute and without offering alternative dates violate the Act**

Section 8(d) of the National Labor Relations Act, 29 U.S.C. § 151, §158(d), states, in part:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to *meet at reasonable times* and to confer in good faith with respect to wages, hours, and other terms and conditions of employment...(Emphasis added).

“Dilatory and delaying tactics that undermine the process of collective bargaining are indicative of bad faith bargaining.” *Calex Corp. v. NLRB*, 144 F.3d 904, 909 (6th Cir. 1998). An employer has a duty to make its authorized representative available for

negotiations at reasonable times and for reasonable durations. The standard for reasonableness is a question of fact in each case. *Crane Company*, 244 NLRB 103, 111 (1979). In *J. H. Rutter-Rex Mfg. Co.*, 86 NLRB 470, 506 (1949), the Board stated that the obligation to bargain “encompasses the affirmative duty to make expeditious and prompt arrangements, within reason, for meeting and conferring. Agreement is stifled at its source if opportunity is not accorded for discussion or so delayed as to invite or prolong unrest or suspicion. It is not unreasonable to expect of a party to collective bargaining that he display a degree of diligence and promptness in arranging for collective-bargaining sessions when they are requested, and in the elimination of obstacles thereto, comparable to that which he would display in his other business affairs of importance.” See, *People Care Incorporated*, 327 NLRB 814 (1999). “[T]he negotiation of a collective-bargaining agreement is as important as any business transaction,” the Board wrote in *Reed & Prince Mfg. Co.*, 96 NLRB 850, 852 (1951), *enfd.* 205 F.2d 131 (1st Cir. 1953), when faced with an employer's delay of an initial bargaining session for 6 weeks. “[T]he Respondent's good faith in the present instance may be tested by considering whether it would have acted in a similar manner in the usual conduct of its business negotiations.” The Board found a violation, questioning whether the employer “would have delayed, for such a relatively long period of time, negotiations for a business contract or a bank loan it was desirous of concluding.” *Ibid.*

An employer’s good-faith obligation includes a statutory duty to make its authorized representative available for negotiations at reasonable times and places, *Crane Co.*, *supra* at 111, and an employer acts at its peril when it chooses as its agent for

bargaining someone who is encumbered by conflicts that impede such availability. *Caribe Staple Co.*, 313 NLRB 877, 893 (1994); *O & F Machine Products Co.*, 239 NLRB 1013, 1019 (1978); *Imperial Tile Co.*, 227 NLRB 1751, 1754 (1977). While a party is clearly free to select whomever they please as their bargaining representative, the designation must not collide with the party's obligation under Section 8(d) to meet and confer at reasonable times. *Caribe Staple*, supra. Having selected Devaney as its collective bargaining representative, Respondent bears the consequences of Devaney's inability to represent it at the scheduled negotiations. See *NLRB v. Exchange Parts Co.*, 339 F.2d 829, 832 (5th Cir. 1965).

In a case where Respondent met six times during a period of 20 weeks and committed other unfair labor practices, the Board found that Respondent violated section 8(a)(5) of the Act, because the Respondent refused more frequent meetings. *Crispus Attuck Children's Center*, 299 NLRB 815, 838 (1990). In another case, where the union has asked for meetings more frequently than once every 14 days, the Board also found a violation. *Cable Vision*, 249 NLRB 412 (1980); enfd. 660 F.2d 1 (1<sup>st</sup> Cir. 1981). And where, as here, a negotiator cancelled several meetings resulting in only eleven meetings over an eight month period, the Board's finding of a violation was affirmed, *Radisson Plaza Minneapolis v. NLRB*, 987 F.2d 1381, 1383 (8<sup>th</sup> Cir. 1993).

In the instant case, in the period since certification, March 26, 2008, until December 4, 2008, a period just shy of eight months, the parties scheduled 14 meetings, of which six bargaining sessions were held; one was cancelled by the Charging Union; seven were cancelled by Respondent. Limiting the review to the two month period

commencing on October 6, 2008, and ending December 4, 2008, of the seven bargaining sessions scheduled, only three were conducted, while four were cancelled by Respondent. However, of the three sessions conducted, one of them can be considered a cancellation because neither of Respondent's negotiators, Denise McCarthy and Mr. Devaney, attended. Instead, one of Devaney's associates was sent merely to "hold the date" and to deliver Respondent's counter-proposal. Of the four sessions that were cancelled by Respondent, Counsel for the General Counsel submits that only one could be considered legitimate, the October 6 session that was cancelled because of an illness in Denise McCarthy's family. The remaining three were all cancelled by Respondent's attorney, Mr. Devaney, for the following asserted reasons:

- October 23 Cancelled on October 22 in order to gather requested information without asking the Union how urgently they needed the information for continued bargaining.
- November 5 Cancelled the morning of the scheduled afternoon meeting in order to allow Mr. Devaney to file an answer to the initial Complaint, which he then filed that morning.
- December 4 Cancelled in order to determine exactly what information the Union was requesting without affording the Union the opportunity to discuss the matter.

In each of these instances, Respondent's counsel made a conscious decision to act unilaterally and without affording the Charging Union the opportunity to respond to counsel's concerns or questions. It is also important to note that Devaney made this decision not to schedule any further bargaining sessions for the entire months of December, January, February, and part of March because of: (1) the holidays; (2) conflicts in his schedule and the needs of other clients; and (3) personal reasons,

demonstrating Respondent's lack of urgency to get to the bargaining table with the Union.

Respondent argues that the Charging Union acquiesced in the cancellations and failed to bargain with any sense of urgency. However, Counsel for the General Counsel contends that there was little the Charging Union could do. In two of the three cancellations, Respondent gave very little notice that it would not be attending the sessions. What could the Charging Union do in those situations? Declare to Respondent, no we are attending without you? Respondent presented the cancellations as a fait accompli, and for more than two months, ignored the Charging Union's December 3 request for bargaining dates, and there was nothing that the Charging Union could do about Respondent's decisions, other than file the unfair labor practice charge.

In *Barclay Caterers, Inc.*, 308 NLRB 1025, 1035-1036 (1992), in a panel consisting of members Devaney, Oviatt, and Raudabaugh, the Board upheld the administrative law judge's finding that Respondent was not free to evade its statutory responsibility to meet at reasonable times by employing as a representative an attorney (or anyone else) who could not meet at reasonable times. The "busy lawyer" defense has never been held to excuse a pattern of chronic delays between bargaining sessions. As the Fifth Circuit stated in *NLRB v. Exchange Parts Co.*, supra at 832 – 833:

Respondents appear not to challenge that part of the Board's order based on its findings that they adopted "delaying tactics in connection with the scheduling of meetings." The record shows that only an average of 8 hours per month were consumed with negotiations during a period of 8 months covered by the record. It is plain that the negotiations were carried on primarily on behalf of respondents by a busy and successful lawyer, Mr. Harold Mueller. It is understandable that in a busy law practice some

difficulty arises in giving as prompt consideration to the requests of a representative of the opposing side as would entirely satisfy the latter. Nevertheless, we conclude that the inherent difficulty arising when a lawyer in full practice represents the employer in bargaining sessions does not exempt the employer from the normal requirements that nothing be done for the purpose of stifling an opportunity for discussion. There remains on the employer the positive legal duty to meet and confer with the Union at reasonable times and intervals.

Based on the above, Counsel for the General Counsel submits that, by engaging in the course of conduct it did throughout the certification year, cancelling meetings for specious reasons without just cause and not providing the Charging Union with alternative dates to make up for those cancellations, Respondent violated Sections 8(a)(1) and (5) of the Act.

### **III. SPECIAL REMEDIES**

#### **A. A Minimum One Year-Extension of the Certification Year**

It has long been Board policy to ensure that newly-certified unions have the opportunity to focus solely on bargaining for at least one full year. *Brooks v. NLRB*, 348 U.S. 96, 101-103 (1954); *Kimberly Clark Corp.*, 61 NLRB 90, 92 (1945). To that end, the Board will not allow a union's majority status to be challenged within one year of certification in order to provide the union with "a reasonable period in which it can be given a fair chance to succeed." *Centr-O-Cast*, 100 NLRB 1507, 1508 (1952)(quoting *Frank Bros. Co. v. NLRB*, 321 U.S. 702, 705 (1944)). Consequently, where an employer's unfair labor practices delay good-faith bargaining during that period, the Board retains the discretion to extend the certification year. *Mar-Jac Poultry Co.*, 136 NLRB 785, 786-787 (1962). The Board takes into consideration the context of any

particular refusal to bargain in deciding whether to grant a certification year extension, and if so, for how long, particularly taking into account “the nature of the violations; the number, extent, and dates of the collective bargaining sessions; the impact of the unfair labor practices on the bargaining process; and, the conduct of the union during negotiations. *Mercy, Inc.*, 346 NLRB 1004 (2006), citing *Northwest Graphics, Inc.*, 342 NLRB 1288, 1289 (2004); *Metta Electric*, 338 NLRB 1059, 1065 (2003), enfd in relevant part 360 F.3d 904, 912-913 (8<sup>th</sup> Cir. 2004). The purpose of such an extension is to return to the union the opportunity to bargain during the period when it is generally at its greatest strength. See, *Van Dorn Plastic Machinery Co.*, 300 NLRB 278 (1990), enfd. 939 F.2d 402 (6<sup>th</sup> Cir. 1991).

Although Respondent argues that under no circumstances should the certification year be extended more than three months, Counsel for the General Counsel submits that the circumstances require a full one-year extension of the certification year. As of December 4, eight meetings were cancelled and Respondent was directly responsible for the cancellation of seven of them. Of the seven meetings that were held as of March 10, 2009, the two principal negotiators for Respondent chose not to attend on November 10. Respondent was responsible for a three month delay in negotiations, from April 15 to July 17, and another three-month delay from December 4 to March 10, 2009. Respondent is responsible for the parties having only two meetings at which its principal negotiators attended during the almost six month period from September 27 though March 10, 2009, when the parties last met. The policy of the Board and the Act is to provide at least a year of good-faith bargaining. *Northwest Graphics*, supra at 1289. That standard has not been

met in this case. Accordingly, Counsel for the General Counsel submits that the Administrative Law Judge properly provided for a 12-month extension of the certification year, starting when Respondent begins bargaining in good faith under a Board order. See, e.g. *Id.*, at 1289-1290 (given respondent's behavior in the first six months and its unfair labor practices in the next six months, a 12-month extension of the certification year was necessary). See also, *Metta Electric*, supra. at 1065 (granting 12-month extension).

**B. Requiring Bargaining on a Prescribed or Compressed Schedule**

Furthermore, Counsel for the General Counsel submits that the Administrative Law Judge properly required that, on request, Respondent bargain with the Charging Union, in good faith, not less than 24 hours per month, during the 12-month extension until a complete collective-bargaining agreement or good-faith impasse is reached. Such a bargaining schedule will effectively remedy the unlawful delay aspects of an employer's bad-faith bargaining. Together with other appropriate substantive remedies, such a bargaining order improves the likelihood that the bargaining unit can attain a first contract despite an employer's initial bad-faith bargaining, to minimize the potential for further delay, and help secure a meaningful opportunity for bargaining. See, e.g. *Harowe Servo Controls*, 250 NLRB 958, 1123-1125 (1980).

Further, this bargaining schedule also will counter any employee disaffection caused by the Respondent's illegal tactics. The bargaining schedule will demonstrate to employees that the Charging Union's request to bargain collectively on their behalf is

being honored, and that their selection of the union as their collective bargaining representative was not futile.

In this context, the Board, with judicial approval, has alternatively demanded that the parties meet at reasonable consecutive intervals,<sup>4</sup> for a minimum number of days per week,<sup>5</sup> or for a minimum number of hours per week,<sup>6</sup> until an agreement or good-faith impasse is reached.

#### IV. CONCLUSION

For the reasons stated above, Counsel for the General Counsel requests that the Board uphold the Administrative Law Judge's finding that Respondent violated Section 8(a)(1) and (5) of the Act by failing to timely provide to the Charging Union the information it requested, by cancelling bargaining sessions and failing to offer alternative dates, and extending the certification year with a 24-hour per month bargaining schedule.

Submitted this 29<sup>th</sup> day of July 2009.

/s/ Richard F. Czubaj

Richard F. Czubaj  
Counsel for the General Counsel  
National Labor Relations Board  
Seventh Region  
477 Michigan Ave. – Room 300  
Detroit, MI 48226-2569

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<sup>4</sup> See, e.g., *NLRB v. Johnson Mfg. Co. of Lubbock*, 511 F.2d 153, 156 (5<sup>th</sup> Cir. 1975); *NLRB v. Metlox Mfg. Co.*, 1973 WL 3146 (9<sup>th</sup> Cir. April 16, 1973).

<sup>5</sup> See, e.g., *Straight Creek Mining, Inc. v. NLRB* 2001 WL 1262218 (6<sup>th</sup> Cir. May 11, 2001)(ordering bargaining at least one day per week); *NLRB v. H&H Pretzel Co.*, 1991 WL 111249 (6<sup>th</sup> Cir. June 25, 1991)(three days per week).

<sup>6</sup> See, e.g., *NLRB v. Schill Steel Prods.*, 480 F.2d 586, 598 (5<sup>th</sup> Cir. 1973)(15 hours, unless the union agreed to less.)

### ECF Certificate of Service

I hereby certify that on July 29, 2009, I electronically filed the foregoing Answering Brief to Respondent's Exceptions with the Executive Secretary of the National Labor Relations Board using the ECF system. I hereby further certify that I have also served via e-mail Dennis M. Devaney, Respondent's Counsel and John Canzano, Charging Union's Counsel.

/s/ Richard F. Czubaj  
Richard F. Czubaj  
Counsel for the General Counsel  
National Labor Relations Board  
Seventh Region  
477 Michigan Ave. – Room 300  
Detroit, MI 48226-2569