

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

ART'S-WAY VESSELS, INC.,

and

Case 33-CA-15771

INTERNATIONAL ASSOCIATION
OF MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO

Deborah A. Fisher, Esq.,
for the General Counsel.
Kevin J. Visser, Esq.,
(*Simmons Perrine Moyer Bergman, PLC*)
Cedar Rapids, Iowa,
for the Respondent.

DECISION

Statement of the Case

PAUL BOGAS, Administrative Law Judge. This case was tried in Peoria, Illinois, on September 21, 2009. The International Association of Machinists and Aerospace Workers, AFL-CIO (the Union or the Charging Party), filed the original charge on March 5, 2009, and an amended charge on April 30, 2009. The Regional Director for Subregion 33 of the National Labor Relations Board (the Board) issued the complaint on April 30, 2009. The complaint alleges that Art's-Way Vessels, Inc. (the Respondent) violated Section 8(a)(5) and (1) when it withdrew recognition from the Union, ceased honoring the terms and conditions of the collective bargaining agreement (labor agreement or contract), and made unilateral changes. The Respondent filed a timely answer in which it denied committing any violation of the Act, and also asserted multiple affirmative defenses. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following findings of fact and conclusions of law.

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, manufactures steel tanks at its facility in Dubuque, Iowa, where it annually sells and ships goods valued in excess of \$50,000 directly to points outside the State of Iowa and annually purchases and receives goods valued in excess of \$50,000 directly from points outside the State of Iowa. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. Facts

1. Respondent Ceased to Recognize the Union and Honor the Collective Bargaining Agreement

5 The Respondent makes pressurized steel tanks that are used to hold gases and liquids. It is located in Dubuque, Iowa, and is a wholly owned subsidiary of Art's-Way Manufacturing.¹ On January 25, 1995, when the Respondent's facility was under different ownership, the Union was certified as the collective bargaining representative for a unit of production and maintenance employees working there.² The Respondent took over the facility in October 2005 when Art's-Way Manufacturing purchased the assets of Vessel Systems, Inc. (VSI). At that time, the Respondent recognized the Union as the bargaining representative of its production and maintenance employees, and honored the terms of the existing labor agreement between the Union and VSI. That labor agreement expired in 2006, and the Respondent and the Union entered into a new labor agreement which, by its terms, was effective from August 16, 2006, to August 15, 2009. As of the beginning of October 2007, there were approximately 20 bargaining unit employees working for the Respondent.

20 In 2006 or 2007, the Respondent began to build a new, larger, facility to which it intended to relocate its operation. The new facility was in Dubuque, just a few blocks from the original location. The Respondent, which had been leasing the real property where the original facility was located from the former owners of VSI, gave notice that the Respondent would vacate the premises as of October 2007. Subsequently, the Respondent changed its mind and asked to extend its use of the location past October, but the owners of the property refused that request. In October, while awaiting the completion of its new permanent facility, the Respondent relocated its operations to a temporary facility in Dubuque. Approximately 9 months later, the Respondent moved into its permanent facility. The Respondent removed all of the manufacturing equipment from the original location and continued to use much of that equipment in its operations.

35 Sometime after the October 2007 relocation and prior to the expiration of the labor agreement, the Respondent ceased to recognize the Union as the collective bargaining representative of unit employees. The date when the Respondent withdrew recognition is hard to pinpoint since the Respondent never notified the Union of its action, either orally or in writing. Nor did the Respondent assert to the Union that the company believed a majority of unit employees no longer wished to be represented. Indeed, Carrie Majeski, CEO and president of Art's-Way Manufacturing, testified that she did not know whether or not the Union lacked majority support at the time the Respondent withdrew recognition from the Union. After the October 2007 relocation and prior to the labor agreement's August 2009 expiration date, the Respondent also ceased to honor the terms of the labor agreement. Here again, the Respondent failed to provide the Union with written or verbal notification of its action.

45 ¹ Art's-Way Manufacturing owns a number of other production operations, but the Respondent is the only one of its companies that manufactures steel pressure vessels and the only one located in Dubuque, Iowa.

² The bargaining unit is composed of:

50 All regular full-time and regular part-time production and maintenance employees, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

Well before the expiration of the labor agreement in August 2009, the Respondent began making unilateral changes to employment terms covered by the agreement. The first of these changes that is established by the record was made in August 2007 – before the October 2007 time period when the Respondent claims it withdrew recognition. The labor agreement provides that “Payday is every Friday,” but starting in August 2007 the Respondent unilaterally disregarded that requirement and began paying unit employees on a bi-weekly, rather than a weekly, basis.

After October 2007, and prior to the expiration of the labor agreement, the Respondent made numerous, more significant, unilateral changes to unit employees’ terms and conditions of employment. These included changes to wages (including to overtime pay), holidays, vacation, bereavement leave, accrual of seniority, health insurance, dental insurance, prescription coverage, short-term disability benefits, life insurance, and retirement plans. At some point in time from late February to March 1, 2009 – still prior to the expiration date of the labor agreement – the Respondent issued an employee handbook that set forth terms of employment regarding, inter alia, attendance, hours of work and overtime, wage administration, holidays, personal leave, jury duty, bereavement leave, vacation, health insurance, life insurance, short-term disability benefits, seniority, and work rules/discipline. According to the Respondent, the terms in the employee handbook superseded those in the labor agreement. The Respondent also prepared a document, dated March 1, 2009, which provided an overview of unit employees’ benefits. The Respondent did not give the Union notice or an opportunity to bargain before making the changes or issuing the employee handbook. Most, but not all, of the Respondent’s unilateral changes diminished employees’ terms of employment below the levels that the parties agreed to in the labor contract.

Regarding the unilateral changes individually referenced in the complaint, the record shows the following. The labor agreement provides that each unit employee will receive a 50-cent per hour pay increase upon the completion of a 90-day probationary period, and 25-cent per hour increases each calendar quarter thereafter until reaching the maximum wage rate for his or her job classification. By the fall of 2008, the Respondent has ceased to provide these automatic raises. The labor agreement provides that employees will receive overtime pay if they work over 40 hours in a week *or* over 8 or 10 hours on a particular day (depending on their schedule), but the Respondent’s employee handbook limits overtime pay to employees who work over 40 hours in a week, regardless of how many hours the employees work on a particular day. During the term of the labor agreement, the Respondent unilaterally changed providers for health insurance and dental insurance, and announced terms regarding, inter alia, employees’ deductibles and share of premiums, that deviated from those previously provided under the labor agreement. The labor agreement provision regarding employees’ 401(k) plans provides that for every quarter percent the employee contributes to the plan, the Respondent will contribute one percent, up to a maximum Respondent contribution of four percent. Under the terms that the Respondent set forth in the employee handbook, however, the employer’s maximum required contribution is one percent, and anything over that is at the Respondent’s discretion. In addition, the employee handbook limits participation in the Respondent’s 401(k) contribution benefit to those employees who work more than 1000 hours per year, whereas the labor agreement does not contain that limitation. The employee handbook, unlike the labor agreement, does not require that the employee contribute anything to the 401(k) plan in order to trigger a contribution by the Respondent. The labor agreement provides for a total of eleven paid holidays (eight identified holidays plus three “floating” holidays to be chosen by the employee). Under the employee handbook, the Respondent reduced this to a total of ten paid holidays (nine identified holidays plus one “floating” holiday), and imposed a new requirement that the employee work the full day before, and the full day after, a holiday in order to qualify for

holiday pay. The Respondent's employee handbook also sets forth a different vacation benefit than is provided to unit employees by the labor agreement. Depending on the employee's years of service the employee handbook in some instances provides more, and in some instances fewer, vacation days than the labor agreement.³

5 At some point after the Respondent relocated from the original facility, it ceased to remit employees' dues to the Union as required by the labor agreement. On about February 27, 2008, three of the Respondent's production/maintenance employees – Robert Dolter, Jeff Henry, and David Tigges – signed union "Membership Application and Check-Off Authorization" cards which authorized the Respondent to deduct union dues from their paychecks and forward
10 the dues to the Union. The employees submitted the union cards to the Respondent's general manager, and former president, E.W. "Swede" Muehlhausen. Muehlhausen sent these cards, by facsimile, to Marc McConnell, the executive vice chairman of the board of Art's-Way Manufacturing, along with a note stating: "Here are the membership forms for the guys that are signing up for the union. I am assuming that the union dues are the same as they were before."
15 Subsequently, Muehlhausen, Marc McConnell, Ward McConnell (chairman of the board of Art's-Way Manufacturing), and Carrie Majeski (CEO and president of Art's-Way Manufacturing) discussed how the company should respond to the union cards. After that discussion, the Respondent chose not to honor the employees' requests to have union dues deducted from their pay.

20 Through the two relocations discussed above, the Respondent has had the same name, ownership, and corporate structure. The Respondent has never been dissolved. It has remained in the business of manufacturing pressurized steel tanks, using substantially the same manufacturing equipment and processes as it did at the original facility, and has continued to
25 employ individuals to perform bargaining unit work. The Respondent serves the same types of customers as it did prior to relocating in October 2007; however, since relocating it has not supplied one customer – referred to in the record as "Vactor" – that previously accounted for approximately 50 percent of the Respondent's business.

30 2. Employees Meet with Union Official in Late September 2008

Wayne Laufenberg is a business representative for the Union, District 6. He was the Union negotiator for the labor agreement between the Union and the Respondent and has been
35 the Union's service representative for the bargaining unit since 1995. In September 2008, after the Respondent refused to honor employees' union cards, one of the employees contacted Laufenberg by phone and asked how he could become a member of the Union and what could be done about the Respondent's failure to adhere to certain labor agreement terms. Laufenberg told the employee to "get some folks down to talk to me about what was going on,
40 so that I could get some information about what was happening under the contract." In late September 2008, that employee and two others met with Laufenberg to provide the information. Prior to receiving the information from employees in September 2008, Laufenberg was not aware that the Respondent had stopped paying union dues and otherwise adhering to the labor agreement.⁴ Laufenberg credibly testified that the Union had, at all relevant times, been willing

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³ In addition to the unilateral changes specifically referenced in the complaint, the record shows that the Respondent's failure to honor the labor agreement resulted in a number of other changes in terms and conditions of employment. These included changes to unit employees' short-term disability insurance and life insurance.

50 ⁴ I credit Laufenberg's testimony that he was not previously aware that the Respondent had
Continued

Respondent and the Union. The Respondent contends that American Tank, by triggering such a duty for itself, somehow relieved the Respondent of its own duty to recognize the Union and honor the parties' labor agreement, even though the Respondent continued to operate as the same corporate entity, engage in the same business, and employ individuals to perform bargaining unit work. As is discussed more fully below, I have concluded that this defense is not viable as a matter of law, and, at trial, sustained the General Counsel's objections to the admission of evidence relating to it on the basis of relevance. For clarity's sake, I summarize the record evidence and Respondent's offers of proof concerning this defense.

When the Respondent commenced operations in 2005, it hired one of VSI's former owners, Mark Klausner, to serve as the new company's general manager. Klausner was also one of two owners of the real property where the original facility was located. The Respondent fired Klausner in July 2007. Subsequently, Klausner, and the other owner of the original location, declined the Respondent's request to extend the lease past the date on which the Respondent had previously said it would vacate the premises.

As the Respondent prepared to relocate to a temporary facility in October 2007, all of the incumbent bargaining unit employees resigned their employment. They did this despite being offered continued employment by the Respondent at the new, temporary, location. The Respondent immediately began seeking replacements, and by the end of October had hired six employees, and in November hired two more. Although the Respondent states that it had ceased to honor the labor agreement by the time it made these hires, written employment offers that it sent in October and November set forth wage rates and wage increase schedules that were identical to those provided by the labor agreement. By the fall of 2008, however, the Respondent had ceased giving employees the automatic wages raises that were promised by the letters offering employment and provided for by the labor agreement.

Laufenberg was not involved in the exodus of union members from the Respondent. He testified, credibly and without contradiction, that he first found out that large numbers of union employees had left the Respondent when Muehlhausen (the Respondent's general manager) contacted him by phone and asked for help hiring new welders. This contact occurred during the period when the Respondent had relocated to a temporary facility, and after the unit employees had resigned their employment with the Respondent. Laufenberg testified that he was not able to be of much assistance to Muehlhausen because the Union does not operate a hiring hall. However, Laufenberg knew of one welder who had worked for the Respondent in the past and was looking for work, and Laufenberg referred that individual to the Respondent.

Majeski, the CEO and president of Art's-Way Manufacturing, testified that after the Respondent left the original location, Klausner began doing business from that location using the name American Tank. According to Majeski, American Tank is engaged in the same type of business as the Respondent. In addition, Majeski asserted that Vactor, who had been the Respondent's largest customer prior to October 2007, became a customer of American Tank. Majeski also stated that all of the unit employees who had been working for the Respondent prior to early October 2007 had gone to work for American Tank. She knew this, she said, because she saw the personal vehicles of the Respondent's former employees parked outside the American Tank facility. The Respondent offered an exhibit consisting of payroll records from American Tank. According to the Respondent's counsel, those records showed that virtually every employee of American Tank had been an employee of the Respondent immediately prior to early October 2007. I sustained the General Counsel's objection to the admission of American Tank's payroll records on the basis of relevancy because those records

did not relate to any issue other than the Respondent's legally untenable "de facto successor" defense.⁵ Majeski testified that, after the unit employees resigned in about early October 2007, she ceased to adhere to the labor agreement because "we did not feel we ha[d] a union anymore" and "felt that the Union abandoned us."

5 The Respondent subpoenaed Klausner to appear at the trial in this matter, but Klausner did not appear. The Respondent asked the General Counsel to seek enforcement of the subpoena and requested that I adjourn the trial indefinitely while that was done. Counsel for the General Counsel objected that Klausner's testimony would relate only to the legally untenable defense based on de facto successorship and stated that, even if Klausner's attendance was secured, the General Counsel would object to the presentation of Klausner's testimony on relevancy grounds. Based on discussions at trial, I agree with the General Counsel that any evidence the Respondent might elicit from Klausner would, in fact, go exclusively to the de facto successor defense. Klausner had left the Respondent months before any of the conduct at issue in this case and the Union does not represent employees at Klausner's new company. Therefore, I declined to delay the proceedings in this case while the Respondent sought to have the General Counsel seek enforcement of the subpoena to Klausner.⁶

C. The Complaint Allegations

20 The complaint alleges that, since about September 5, 2008, the Respondent has failed and refused to bargain collectively and in good faith with the Union in violation of Section 8(a)(5) and (1) by: failing to continue in effect all the terms and conditions of the labor agreement which was to remain in effect from August 16, 2006 to August 2009; unilaterally changing employees' contractual wages and quarterly wage increases; unilaterally changing employees' health and dental insurance providers and benefits; unilaterally changing employees' 401(k) plan contributions and benefits; and unilaterally decreasing the number of employees' paid vacation days and paid holidays. The complaint further alleges that, in about October or November 2008, the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union and failing and refusing to recognize and bargain with the Union.

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40 ⁵ I directed the court reporter to include the exhibit, Respondent's Exhibit (R Ex.) 1, in a rejected exhibit file. The court reporter did not create a separate rejected exhibits file, but rather included the rejected exhibit along with the Respondent's other exhibits and made a notation that it had been rejected.

45 ⁶ During the course of discussions with counsel at, and in preparation for, trial, the Respondent's counsel made reference to ongoing disputes between the Respondent and Klausner/American Tank. Those discussions raised the specter that the Respondent was attempting to use the instant proceedings as a means of obtaining discovery from Klausner for use in unrelated disputes that the Respondent had with Klausner and American Tank. However, I would have denied the Respondent's request for an indefinite adjournment based on the General Counsel's valid objection that Klausner's testimony was not relevant, irrespective of my concerns about the Respondent's possible ulterior motives for seeking that testimony.

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III. Analysis and Discussion

A. During the Effective Period of the Collective Bargaining Agreement, the Respondent Withdrew Recognition from the Union, Repudiated the Contract, and Made Unilateral Changes to the Contractual Terms

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It is a “long-established principle that a union enjoys an irrebuttable presumption of majority support during the term of a collective bargaining agreement, up to three years.” *Trailmobile Trailer, LLC*, 343 NLRB 95, 97 (2004); see also *Auciello Iron Works v. NLRB*, 517 U.S. 781, 786 (1996); *Spectrum Health—Kent Community*, 353 NLRB No. 99, Slip Op. at 5 (2009). Therefore, an employer’s failure to recognize and bargain with a union during that period is a per se violation of Section 8(a)(5) and (1) of the Act, and an employer cannot use doubt about a union’s majority status as a defense. *Spectrum Health, supra*; *Syscon International, Inc.*, 322 NLRB 539 fn.1 (1996). It is also well-settled that “an employer violates Section 8(a)(5) and (1) of the Act as elucidated in Section 8(d) of the Act,⁷ by modifying a term of a collective-bargaining agreement without the consent of the other party while the contract is in effect.” *Bonnell/Tredegar Industries*, 313 NLRB 789, 790 (1994), *enfd.* 46 F.3d 339 (4th Cir. 1995); see also *Public Service Co. of New Mexico*, 337 NLRB 193,198 (2001).

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In this case, the Respondent entered into a labor agreement with the Union in 2006 and then, during the 3-year term of the labor agreement, withdrew recognition from the Union, repudiated the labor agreement, and made unilateral changes to employees’ terms and conditions of employment. The Respondent does not dispute any of this. That would end the matter, but for the fact that the Respondent interposes a number of affirmative defenses. I discuss those affirmative defenses below.

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B. Respondent’s Purported Defenses

In its answer post-trial brief, the Respondent forwards seven separate affirmative defenses. These are: that the charge is untimely; that the Respondent lawfully withdrew recognition because the Union has lost the majority support of unit employees; that the Union is equitably estopped from alleging an unfair labor practices charge; that the Union has disclaimed interest in representing the unit employees; that the Union has materially breached and/or repudiated the collective bargaining agreement; that the Union is unable or unwilling to represent the unit employees; and that the Respondent is relieved of its obligations to recognize the Union and adhere to the contract because American Tank is the Respondent’s de facto successor. For the reasons discussed below, the Respondent’s purported defenses lack merit.

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The Respondent argues that the allegations of wrongdoing are time-barred because the Union filed its charge on March 5, 2009, more than 6 months after the Respondent withdrew recognition and repudiated the contract in October 2007 and, therefore, beyond the time deadline set forth in Section 10(b) of the Act. Section 10(b) states in relevant part: “[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made.” The 10(b) period does not begin to run until the aggrieved party receives actual or constructive notice of the conduct that constitutes the alleged unfair

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⁷ Section 8(d) provides, in relevant part, that “the duty to bargain collectively shall also mean that no party to such contract shall [unilaterally] terminate or modify such contract.” 29 U.S.C. Sec. 158(d).

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labor practice. *University Moving & Storage Co.*, 350 NLRB 6, 7 and 18 (2007); *Concourse Nursing Home*, 328 NLRB 692, 694 (1999). The notice, “whether actual or constructive, must be clear and unequivocal” to start the limitations period running. *Salem Electric Co.*, 331 NLRB 1575, 1576 (2000); *Patsy Trucking*, 297 NLRB 860, 862 (1990). It is well-established that the party asserting the Section 10(b) defense bears the burden of showing such notice. *Salem Electric Co.*, 331 NLRB at 1576; *Carrier Corp.*, 319 NLRB 184, 190 (1995); *Leach Corp.*, 312 NLRB 990, 991 (1993), *enfd.* 54 F.3d 802 (D.C. Cir. 1995).

In this case, the Respondent, has not met its burden of showing that, prior to the charge filing period, the Union had actual or constructive notice that the company was withdrawing recognition, repudiating the labor agreement, or unilaterally changing unit employees’ contractual terms and conditions of employment. Indeed, the Respondent admits that it *never* gave the Union actual notice that it was taking these actions. Nor has the Respondent shown that Union had “clear and unambiguous” constructive notice more than 6 months prior to the filing of the charge. To the contrary, the record shows that Laufenberg, the Union official responsible for servicing the labor agreement, was unaware of the Respondent’s conduct in violation of Section 8(a)(5) until employees contacted him and, in late September 2008, came to his office to provide information about “what was going on” and “happening under the contract.” Moreover, although the Respondent had made some of its unilateral changes before September 2008, it was not until some point during the time period from February to March 1, 2009 – well within the 6-month period before the Union’s March 5, 2009 charge – that the Respondent issued the employee handbook that superseded the entire labor agreement.

Even though it provided no notice to the Union, the Respondent urges me to infer that the Union knew about the withdrawal of recognition in October 2007 because the company has not remitted any union dues to the Union since that time. This argument is not persuasive. First, the Board has found that, for the purposes of determining timeliness, an employer’s showing that it did not continue deducting union dues and remitting them to a union is insufficient to meet the employer’s affirmative burden of showing that the union had clear and unambiguous notice of the employer’s refusal to recognize the union. *Stanford Realty Associates*, 306 NLRB 1061, 1064-65 (1992). The Respondent’s argument on this score is even less persuasive than it might otherwise be because, as Laufenberg testified, Iowa has a state “right-to-work” law, which provides that employees cannot be required to join a union, pay union dues, or consent to paycheck deduction of union dues, as a condition of employment. Transcript at Page(s) (Tr.) 98; see also Iowa Code, Title XVI, Chapter 731, Sections 731.4 and 731.5. Thus even if Laufenberg had discovered that the Respondent was no longer remitting dues to the Union, that would not constitute unambiguous notice of withdrawal of recognition or repudiation of the labor agreement because, *inter alia*, unit employees were not required to join the Union or authorize that dues be deducted from their paychecks. *Cf.*, *Trans-Lux Midwest Corp.*, 335 NLRB 230, 232 (2001) (Iowa is a right-to-work state and therefore an employee’s failure to participate in dues checkoff is not necessarily the same as lack of support for union representation), *enfd.* 53 Fed. Appx. 571 (D.C. Cir. 2002).

For the reasons discussed above, I reject the Respondent’s contention that the Union’s charge was untimely under Section 10(b).

The Respondent’s next affirmative defense is that it had a good faith basis for doubting that the Union had the support of a majority of bargaining unit employees and, therefore, the company was legally entitled to withdraw recognition from the Union. This argument is frivolous. The Board has long held that a union enjoys an irrebuttable presumption of majority support during the first three years of a collective bargaining agreement. *Auciello Iron Works v. NLRB*, *supra*; *Spectrum Health*, *supra*; *Trailmobile, LLC*, *supra*. Thus even assuming the

Respondent had a reasonable basis for believing the Respondent had lost majority support, it is perfectly clear that the Respondent could not lawfully withdraw recognition when it did – i.e., prior to the August 15, 2009, expiration of the labor agreement which came at the 3-year mark. It is disappointing that the Respondent’s counsel continues to press this argument without even mentioning the dispositive precedent establishing an irrebutable presumption of continued majority support, especially since the existence of the presumption was discussed during the trial. Tr. 13 and 76. The Respondent’s insistence on continuing to press this defense is even more disappointing given that, presumptions aside, the Respondent did not show that it believed that the Union lacked the support of the majority of employees. Majeski – the only management official who testified – stated that she *did not know* whether or not the Union lacked majority support at the time she withdrew recognition. Indeed, the record shows that five of the approximately seven employees performing bargaining unit work signed union authorization cards and that the Union presented those cards to the Respondent. In conclusion, the Respondent’s defense that it lawfully withdrew recognition based on a reasonable belief that the Union had lost majority support is frivolous as a matter of both law and fact.

The Respondent also contends that the Union is equitably estopped from pursuing an unfair labor practices charge against the company. According to the Respondent’s brief, equitable estoppel applies because, in October 2007, all of its “bargaining unit employees, and by extension, the [Union], chose to associate with American Tank and effectively disassociate with [the Respondent]” and that the Union “presumably benefited from this decision and cannot use the same facts and circumstances to allege an unfair labor practice.” For a statement of the principles of equitable estoppel the Respondent cites the decision in *Red Coats, Inc.*, in which the Board noted that:

The gist of equitable estoppel is that a party who has by his statements or conduct, asserted a claim based on the assumption of the truth of certain facts, whereby he has obtained a benefit from another party, cannot later assert that those facts are not true if thereby the other party will be prejudiced.

328 NLRB 205, 206 (1999), quoting *Principles of Equity*, McClintock at 80 (2d ed. 1948)

The principles of equitable estoppel, as set forth by the Board in *Red Coats*, simply have no application to the present situation and the Respondent’s attempt to force this case into the equitable estoppel framework results in an argument that is, at best, nonsensical. What is the prior “claim” that the Union has asserted and on which it has already “obtained a benefit” from the Respondent? What are the “certain facts” that the Union relied on in making that claim? How has the Union changed its position and “assert[ed] that those facts are not true” in this proceeding?⁸ What prejudice to the Respondent has resulted from any change the Union has made in its position regarding “certain facts”? None of these questions are answered by the Respondent, nor, I am confident, can they be answered in any coherent way. Not only does the Respondent’s argument have nothing to do with the principles of equitable estoppel, but that argument is based on a farfetched and unsupported assertion of fact. The Respondent asserts that the Union “benefited” when unit employees left the Respondent to work for American Tank. However, the Respondent does not even attempt to explain how the Union could possibly have benefited from the decision of a group of mostly dues-paying members to leave the Respondent’s bargaining unit and go to work for an employer with whom the Union has no bargaining relationship. At any rate, the resignation decisions of unit employees, who were not

⁸ Indeed, the Respondent’s argument, which is summarized above, is that the Union is relying on the “same facts,” not a denial of facts previously asserted.

agents of the Union, cannot be attributed to the Union. Indeed, the Union did not have authority to require that unit employees who wished to go to work for another employer, instead remain with the Respondent against their wills.⁹ The Respondent's argument based on equitable estoppel is completely frivolous.

5 The Respondent's fourth affirmative defense is that the Union "disclaimed interest" in representing the unit employees. This contention is contrary to the evidence. Laufenberg testified, credibly and without contradiction, that the Union had never disclaimed interest in representing the Respondent's employees. The Respondent seems to be arguing that, even though the Union never expressly disclaimed interest, it constructively disclaimed interest through inattention to the bargaining unit from October 2007 to March 2009. It is not clear whether the Respondent's theory is that the Union, through a lack of action, manifested an intent to disclaim interest or whether its theory is that the representation provided was so deficient as to disqualify the Union from continuing to serve as bargaining representative irrespective of any intention on its part to disclaim. At any rate, the Respondent cites no authority, and I am unaware of none, for the proposition that a union may be found to have constructively disclaimed interest under either theory.

10 Even assuming that it might be possible in certain circumstances to find a disclaimer based entirely on a union's inaction, these are not those circumstances. During the relevant time period, the Union had a labor agreement with the Respondent that was still in its mid-term. The Union was not shown to have ignored requests from unit employees for assistance or action and certainly was not shown to have ignored such requests so pervasively as to suggest that the Union had lost interest in representing unit employees. To the contrary, the evidence shows that the Union acted quickly in its capacity as bargaining representative when called upon to do so. From October 2007, until September 2008, the Union was not contacted by unit employees to take action on their behalf. As soon as a unit employee contacted the Union in September 2008 to request assistance, Laufenberg arranged a meeting with a group of unit employees to explore their concerns. Within days of that meeting, Laufenberg visited the Respondent's facility and met with O'Neill, the plant manager, to discuss concerns raised by the discussions with unit employees. When Muehlhausen, the Respondent's general manager, contacted Laufenberg to refer welders, Laufenberg referred a welder who had experience with the Respondent. I note, moreover, that the Respondent clearly did not rely on the purported disclaimer of interest at the time it claims to have withdrawn recognition, since the Respondent states that it withdrew recognition in October 2007, at a time when there had been no significant period of Union inaction. The Respondent's defense that its actions were lawful because the Union had disclaimed interest in representing unit employees is frivolous.

20 The next defense that the Respondent forwards is that the Union materially breached and repudiated the contract. The Respondent cites *United Electrical, Radio & Machine Worker v. NLRB*, for the general principle that "one party to a contract need not perform if the other party refuses in a material respect to do so." 223 F.2d 338, 341 (D.C. Cir. 1955), cert. denied, 350 U.S. 981 (1956). The problem with this argument is that the Respondent does not point to a single provision in the labor agreement that the Union has refused to comply with. The Respondent appears to be suggesting that there was a breach because the Union did not somehow force individuals who had been performing bargaining unit work to remain with the Respondent against their wills, or because the Union failed to ensure that the Respondent had a

50 ⁹ This is especially true in this case, since Iowa State law provides that no person "shall be deprived of the right to work at his chosen occupation for any employer because of membership in, [or] affiliation with . . . any labor union." Iowa Code, Title XVI, Chapter 731, Section 731.1.

full-complement of unit employees. However, the Union did not agree to do either of those things in the labor contract, and has not been shown to have repudiated or breached the contract in a material way. As with the Respondent's other affirmative defenses, this one is frivolous.¹⁰

5 The next affirmative defense that the Respondent asserts is that the Union is defunct. The Board has stated:

10 [A] representative is defunct, and its contract is not a bar, if it is unable or unwilling to represent the employees. However, mere temporary inability to function does not constitute defunctness; nor is the loss of all members in the unit the equivalent of defunctness if the representative otherwise continues in existence and is willing and able to represent the employees.

15 *Kent Corp.*, 272 NLRB 735 (1984), quoting *Hershey Chocolate Corp.*, 121 NLRB 901, 911 (1958). The decision about a labor organization's willingness and ability to represent employees is made "regardless of the relative inactivity of a labor organization." *Kent*, 272 NLRB at 736.

20 In cases applying the above-stated standards, the Board has placed an extraordinarily high burden on those attempting to establish that a union is defunct. For example, in *Kent Corp.*, supra, the Board considered a situation where a labor organization had "no . . . members; no membership applications; no initiation fees; no dues; no treasury; no bank account; no books or records, meetings, or recent (if any) election of officers; and no information available to employees regarding . . . contract negotiations or attempts to enforce the collective-bargaining agreement." 272 NLRB at 735-36. Even under those extreme circumstances, the Board refused to find that the labor organization was defunct because an organization official had testified that the organization was willing to continue to represent the unit employees, and because there was no evidence that the organization "was called on and failed to act on unit employees' behalf."¹¹ In another case, the employer's defense that the union was defunct was

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 35 ¹⁰ Under the heading of its repudiation/material breach defense, the Respondent also argues that the company was entitled to withdraw recognition based on the fact that there was a period of less than a month in October 2007 when it employed one or fewer individuals in the bargaining unit. Although the Respondent attempts to shoe horn this argument into one of its existing affirmative defenses, the defense is clearly new. The Respondent's assertion of this affirmative defense is untimely because it was not alleged by the Respondent in its answer, and cannot be raised for the first time in a post-trial brief. *SEIU United Healthcare Workers-West*, 350 NLRB 284 fn.1 (2007), enfd. 574 F.3d 1213 (9th Cir. 2009). At any rate, the fact that an employer has one or fewer unit employees for a brief period of time does not entitle it to withdraw recognition. *Galicks, Inc.*, 354 NLRB No. 39, slip op. at 5 (2009). In order for such a defense to succeed the employer must show that it had a "stable" unit of one employee or less. Ibid. A period of 15 months during which an employer's complement of unit employees dropped to one or fewer individuals has been found insufficient to make out this defense. Ibid. In the instant case, the Respondent's complement of unit employees dropped to one or below in early
 45 October 2007, but the Respondent immediately began seeking new employees and by the end of that same month it had hired six new employees. Under these circumstances the Respondent has fallen far short of showing that it ever had a stable unit of one employee or less. Therefore, even if this defense had been timely raised, it would fail on the merits.

50 ¹¹ Incredibly, *Kent Corp.*, is one of the two cases that the Respondent relies on as precedent to support its defunctness defense. In the other case, *Hershey Chocolate Corp.*, the Board did

Continued

rejected even though the union was inactive with respect to the particular bargaining unit involved, because the evidence showed that the union had actively represented employees of other employers with whom it had contracts. *Syscon International, Inc.*, 322 NLRB at 543.

5 The Respondent's contention that the union at issue here is defunct lacks any reasonable basis. As in *Kent Corp.*, supra, a union official (in this case Laufenberg) credibly testified that the Union was willing and able to represent employees of the Respondent, and the record contains no evidence that the Union was called on and failed to act on unit employees' behalf. Indeed, as discussed above in reference to the Respondent's disclaimer of interest defense, when one of the Respondent's unit employees contacted Laufenberg to complain about the Respondent's conduct, Laufenberg immediately set up a meeting to explore employee concerns, and then Laufenberg approached the Respondent about those concerns. In addition, Laufenberg's testimony indicated that he had been actively representing employees of other employers with whom the Union had contracts. The Respondent's evidence in this case does not even begin to support an affirmative defense that the Union is defunct.

15 The Respondent's seventh, and final, affirmative defense is that in October 2007, it was relieved of its obligations with respect to the Union because another company – American Tank – became its de facto successor. This argument is not viable as a matter of law. To begin with, it is doubtful that American Tank is subject to any successorship obligations at all in this case. The Board has found that successorship is generally found “in the context of two categories of cases: (1) those in which the employer has purchased all or part of the predecessor employer's business; and (2) those in which the employer has succeeded the predecessor employer on a contract for the performance of services.” *Harter Tomato Products Co.*, 321 NLRB 901, 902 (1996) (footnotes omitted), enfd. 133 F.3d 934 (D.C. Cir. 1998). In this case, American Tank did not purchase, directly or indirectly, any part of the Respondent's business, nor did it succeed the Respondent on a contract for the performance of services. The record indicates that American Tank is the Respondent's current competitor and adversary, not its successor.

30 Even if I were to assume that American Tank somehow triggered a bargaining responsibility for itself, I find that the Respondent has failed to show that that would relieve the Respondent of its own obligation to recognize the Union and honor the labor agreement that the Respondent had entered into. The Respondent did not dissolve as a corporation, or go into a different line of business, at any time since American Tank came into existence. Rather the Respondent continued as the same corporate entity, engaged in the same business, under the same name and ownership. It continued to use essentially the same equipment, employ individuals to do the same type of unit work, and serve the same type of customers, as it had prior to October 2007. Therefore, the Respondent continued to have all of its obligations with respect to the Union, the unit employees, and the labor agreement.

40 During off-the-record discussions with counsel for the Respondent, I requested legal support for its contention that the Respondent would be relieved of its bargaining obligations if American Tank was found to have triggered a bargaining obligation with respect to persons who came to work for it after leaving the Respondent. I mentioned this issue to Respondent's counsel again at trial. Tr. 77-78. However, the Respondent has failed to cite any authority, or even articulate a coherent legal theory, on this issue. Decisions of the Board support the view that, contrary to the Respondent's contention, even when a successor employer has an obligation to bargain with the predecessor's union, the predecessor employer may retain its own bargaining obligation with respect to remaining business for which it employs persons to

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not reach the question of whether the union was defunct. 121 NLRB at 911.

perform bargaining unit work. See, e.g., *Bronx Health Plan*, 326 NLRB 810, 810-13 (1998) (predecessor that continued in business had its own bargaining relationship with the union, even though its successor was found to have a bargaining obligation with respect to one group of employees), enf. 203 F.3d 51 (D.C. Cir. 1999) (Table); *Contee Sand & Gravel Co.*, 274 NLRB 574, 587 (1985) (“the collective-bargaining agreement applies to Calan and Tycon [two partial successors] as well as to Contee Sand [the predecessor]”); *Miami Industrial Trucks, Inc.*, 221 NLRB 1223, 1224-25 (1975) (Board modifies certification of representation to provide that union represents employees of both the successor and the predecessor); see also *Mason City Dressed Beef*, 231 NLRB 735, 745-47 (1977) (a predecessor has two successors, and each successor has a bargaining obligation), enf. granted in part, denied in part 590 F.2d 688 (8th Cir. 1978). I find that the Respondent’s de facto successor defense is without merit.

For the reasons discussed above, all of the Respondent’s affirmative defenses are invalid. Therefore, the Respondent’s withdrawal of recognition, refusal to bargain, repudiation of the labor agreement, and unilateral changes to contractual terms of employment, all violated the Section 8(a)(5) and (1) of the Act.

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

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

3. The Union has, at all times relevant to this action, been the exclusive bargaining representative of Respondent’s employees in the following unit:

All regular full-time and regular part-time production and maintenance employees, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

4. The Respondent has failed and refused to bargain collectively and in good faith with the Union in violation of Section 8(a)(5) and (1) by: withdrawing recognition from the Union; failing and refusing to recognize and bargain with the Union; repudiating, and failing to continue in effect terms of, the collective bargaining agreement during the term of that agreement; unilaterally changing employees’ contractual wages and quarterly wage increases; unilaterally changing employees’ contractual health and dental insurance; unilaterally changing employees’ contractual 401(k) plan contributions and benefits; and unilaterally changing employees’ contractual vacation and holiday benefits.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In particular, I recommend that the Respondent be required to place in effect all terms of the collective bargaining agreement that went into effect on August 16, 2006, and maintain those terms in effect until the parties have bargained to agreement or a valid impasse, or the Union has consented to changes. In addition, I recommend that the Respondent be ordered to make whole the unit employees and former unit employees for any loss of benefits they suffered as a result of the Respondent’s unlawful alteration of their terms and conditions of employment, as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enf. 444 F.2d 502 (6th Cir. 1971), with interest as set forth in *New Horizons for the Retarded*,

283 NLRB 1173 (1987). I also recommend that that the Union be ordered to reimburse the Union, with interest, for any dues that, under the collective bargaining agreement, the Respondent was required, but failed, to withhold and remit to the Union since September 5, 2008.

5 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.¹²

ORDER

10 The Respondent, Art's-Way Vessels, Inc., Dubuque, Iowa, its officers, agents, successors, and assigns, shall

1. Cease and desist from

15 (a) Refusing to recognize and bargain with the International Association of Machinists and Aerospace Workers, Local Lodge 1238, District 6, AFL-CIO as the collective bargaining representative of the Respondent's employees in the following appropriate unit concerning terms and conditions of employment:

20 All regular full-time and regular part-time production and maintenance employees, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

25 (b) Repudiating or refusing to adhere to the collective bargaining agreement that the Respondent entered into with the Union on September 18, 2006.

(c) Making unilateral changes to employees' terms and conditions of employment during the term of a collective bargaining agreement without the consent of the Union.

30 (d) 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.

35 (a) Upon request of the Union, adhere to the collective bargaining agreement that went into effect on August 16, 2006, give effect to its terms retroactive to August 16, 2006, and continue those terms and conditions until such time as the parties complete a new agreement, good-faith bargaining leads to a valid impasse, or the Union consents to changes.

40 (b) Upon request of the Union, rescind any unilateral changes to the terms and conditions of employment of unit employees that were made without the consent of the Union during the term of the collective bargaining agreement when such terms and conditions were subjects covered by the collective bargaining agreement.

45 (c) Recognize the Union as the exclusive representative of employees in the bargaining

¹² 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
50 waived for all purposes.

unit.

(d) Make whole employees and former employees, with interest, for any and all losses of wages and benefits suffered since September 5, 2008, as a result of the Respondent's repudiation of, and refusal to adhere to, the collective bargaining agreement reached with the Union on September 18, 2006.

(e) Reimburse the Union, with interest, for any dues that, under the collective-bargaining agreement, the Respondent was required, but failed, to withhold and remit to the Union since September 5, 2008.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Subregion, post at its facility in Dubuque, Iowa, copies of the attached notice marked "Appendix."¹³ Copies of the notice, on forms provided by the Regional Director for Subregion Thirty-Three, 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 during the period beginning on September 5, 2008.

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

Dated, Washington, D.C. December 23, 2009

PAUL BOGAS
Administrative Law Judge

¹³ 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."

APPENDIX

NOTICE TO EMPLOYEES

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

10 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

15 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

20 WE WILL NOT refuse to recognize and bargain with the International Association of Machinists
and Aerospace Workers, Local Lodge 1238, District 6, AFL-CIO (the Union) as the collective
bargaining representative of our employees in the bargaining unit composed of full-time and
regular part-time production and maintenance employees.

25 WE WILL NOT repudiate or refuse to adhere to the collective bargaining agreement that we
entered into with the Union on September 18, 2006.

30 WE WILL NOT make unilateral changes to the terms and conditions of employment of our
employees in the bargaining unit during the term of a collective bargaining agreement without
the consent of the Union.

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.

35 WE WILL, upon request of the Union, adhere to the collective bargaining agreement that went
into effect on August 16, 2006, and give effect to its terms retroactive to August 16, 2006, and
continue those terms and conditions until such time as the parties complete a new agreement,
good-faith bargaining leads to a valid impasse, or the Union consents to changes.

40 WE WILL, upon request of the Union, rescind any unilateral changes to the terms and
conditions of our bargaining unit employees made without the consent of the Union during the
term of the collective-bargaining agreement when such terms and conditions were subjects
covered by the collective-bargaining agreement.

45 WE WILL recognize the Union as the collective bargaining representative of our employees in
the bargaining unit.

50 WE WILL make you whole, with interest, for any and all losses of wages and benefits suffered
since September 5, 2008, as a result of our repudiation of, and refusal to adhere to, the
collective bargaining agreement reached with the Union on September 18, 2006.

WE WILL reimburse the Union, with interest, for any dues that, under the collective bargaining agreement, the Respondent was required, but failed, to withhold and remit to the Union since September 5, 2008.

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ART'S WAY VESSELS, INC.

(Employer)

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Dated _____

By _____

(Representative)

(Title)

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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.

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300 Hamilton Boulevard, Suite 200

Peoria, Illinois 61602-1246

Hours: 8:30 a.m. to 5 p.m.

309-671-7080

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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, 309-671-7085.

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