

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

# Advice Memorandum

DATE: November 12, 1999

TO : Ralph R. Tremain, Regional Director  
Region 14

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: Ray Black & Sons Construction, Inc.  
Case 14-CA-25618

530-4050  
530-4080-0175-9000  
530-8020-1200  
530-8020-7500  
530-8023-6800

This Section 8(a)(5) case was submitted for advice as to whether the Employer has established the existence of a stable one-employee unit so that it is no longer obligated to recognize, bargain with, or supply requested information to the Union.

### FACTS

In Case 14-RC-11648, IBEW, Local 702 (the Union) sought to become the certified collective-bargaining representative of the journeymen and apprentice electricians at Ray Black & Sons Construction, Inc. (the Employer). On June 24, 1996, the Regional Director's Decision and Direction of Election issued; the appropriate unit for the purposes of collective bargaining was found to be:

[a]ll employees who are primarily engaged in the performance of electrical work, EXCLUDING office clerical and professional employees, guards and supervisors as defined in the Act and all other employees.

Pending unfair labor practice charges<sup>1</sup> blocked the tallying of ballots.<sup>2</sup> Nevertheless, from May 1, 1996 to April 30,

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<sup>1</sup> Cases 14-CA-24071, 24103, 24246, and 24341.

<sup>2</sup> There were 14 individuals who cast votes in Case 14-RC-11648. Eight ballots were challenged, and six of these challenges were sustained. Six votes were cast for the Union and two against.

1997, the Employer employed five unit electricians for a substantial period of time, and five others for periods of five to fifteen weeks.

On April 17, 1997, pursuant to a settlement agreement resolving the pending unfair labor practice charges, the Union was certified as the exclusive collective-bargaining representative of the unit established in Case 14-RC-11648. The terms of the settlement agreement required the Employer to place unfair labor practice strikers<sup>3</sup> on a preferential recall list and to engage in good faith bargaining, upon request, with the Union. In August 1997, the Employer recalled four unfair labor practice strikers for a three-week period ending September 3, 1997. These employees were then laid off.

From April 1997 through March 27, 1998, the parties engaged in negotiations for an initial contract. On May 1, 1998, Mark Collier, a unit employee, advised the Employer in writing that he did not wish to be represented by the Union.<sup>4</sup> Subsequently, on May 28, 1998, the Employer withdrew recognition from the Union, claiming that it had only two employees primarily performing electrical work, and that one of those electricians was a supervisor as defined in Section 2(11) of the Act and as set forth in the Decision and Direction of Election in Case 14-RC-11648. The other employee was Collier.

On June 22, 1998, the Union filed a charge over the Employer's May 21, 1998 withdrawal of recognition. On January 6, 1999, the Union filed a charge alleging that the Employer failed and refused to supply requested information.<sup>5</sup> A Consolidated Complaint and Notice of

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<sup>3</sup> It is not clear when this strike occurred.

<sup>4</sup> From May 1, 1997 until his resignation on or about June 25, 1997, Tom Cagle was also a unit employee. However, Collier apparently was the Employer's only unit employee after September 3, 1997, although the Employer did attempt to recall laid-off unit employee Dorris in February 1998.

<sup>5</sup> In November 1998, the Union requested information pertaining to the Employer's Asgrow Seed Company construction bid. The Union requested "the general contract, any electrical subcontract, bids for electrical work, and records showing the names, dates and hours worked by any employees performing electrical work."

Hearing issued on March 3, 1999. On April 9, 1999, the parties entered into an informal settlement agreement resolving the June 1998 and January 1999 charges. Under this settlement agreement, the Employer agreed to recognize the Union, to bargain for a reasonable period of time, and to provide the Union with the requested information.

Pursuant to the April 1999 settlement agreement, the parties met on April 29, May 14, and June 10. At the May 14 bargaining session, the Union requested the information the Employer had agreed to provide under the settlement agreement. On May 21, the Employer provided the Union with the electrical bid for the Asgrow Seed Company job, but failed to provide the names, dates, and hours worked by the employees performing electrical work. On June 10, the Union informed the Employer that it had not received all of the requested information. The Employer agreed to provide the remaining information. However, by correspondence dated June 14, 1999, the Employer again withdrew recognition based on the claim that it had only one unit employee who did not desire union representation.<sup>6</sup>

On June 18, 1999, the Union filed the charge in the present case. The charge alleges that the Employer violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union, by failing and refusing to supply requested information, by assigning bargaining unit work to non-bargaining unit employees, and by failing to comply with an outstanding informal Board settlement.

#### **ACTION**

We conclude that complaint should issue, absent settlement, alleging that the Employer violated 8(a)(5) and (1) of the Act by withdrawing recognition from the Union because the Employer has failed to establish the existence of a stable one-employee unit that would relieve it of any obligations under the settlement agreement.

The Board has held that "a settlement agreement containing a bargaining provision, if it is to achieve its purpose, must be treated as giving the parties thereto a *reasonable time* in which to conclude a contract," without regard to whether or not there are fluctuations in the

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<sup>6</sup> From May 1998 to June 1999, the Employer used non-unit employees to perform approximately 950 hours of bargaining unit work. David Hester and Dean Marlow, two non-unit employees, performed 90% of this work.

majority status of the union in that period of time.<sup>7</sup> In determining whether a reasonable period of time has passed, the Board's focus is not on the passage of time or on the number of times that the parties have met, but rather on "what transpired during those meetings and what was accomplished."<sup>8</sup> Relevant factors include whether the parties are negotiating their first contract, whether impasse was reached, and whether the employer engaged in meaningful good-faith negotiations over a substantial period of time.<sup>9</sup>

In N. J. MacDonald & Sons, Inc.,<sup>10</sup> the complaint alleged that the employer violated Section 8(a)(5) and (1) by refusing to bargain with the union. In that case, a majority of the unit employees designated the union as their collective-bargaining representative in May 1964. After the union filed unfair labor practice charges alleging that the employer violated various sections of the Act, the Regional Director, in August 1964, approved a settlement agreement in which the employer agreed to bargain with the union. The parties then engaged in nine bargaining sessions from September 1964 to January 1965. However, in January 1965, the employer was presented with a decertification petition signed by 11 of the 13 unit employees. Subsequently, the employer informed the union that it would not bargain any further.

The Board found that the employer violated the Act because "a reasonable time had not elapsed after the effective date of the settlement agreement when [the employer] refused to bargain with the union."<sup>11</sup> This decision was based in part on the fact that the parties had not reached an impasse. The Board also emphasized that the parties were negotiating their first contract, thereby entitling them to an extended period of time to bargain given the special considerations that surround such

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<sup>7</sup> Poole Foundry & Machine Co., 95 NLRB 34, 36 (1951), enfd. 192 F.2d 740 (4th Cir. 1951), cert. denied 342 U.S. 954 (1952) (emphasis added).

<sup>8</sup> See Brennan's Cadillac, 231 NLRB 225, 226 (1977).

<sup>9</sup> See, e.g., Gerrino Restaurant, 306 NLRB 86, 88-89 (1992); Shangri-La Health Care Center, 288 NLRB 334, 337-338 (1988); VIP Limousine, 276 NLRB 871, 877 (1985).

<sup>10</sup> 155 NLRB 67 (1965), enfd. 62 LRRM 2296 (1st Cir. 1966).

<sup>11</sup> Id. at 72.

negotiations.<sup>12</sup> Also relevant was the fact that the parties had made substantial progress toward reaching a contract, with the amount of a wage increase and a union-security provision being the only terms that remained in dispute.

Here, as in N. J. MacDonald & Sons, the Employer and the Union entered into a settlement agreement in which the Employer agreed to recognize and bargain with the Union in exchange for withdrawal of the charges. The parties engaged in only three bargaining sessions before the Employer withdrew recognition on June 14, 1999. The evidence fails to show that impasse had been reached. Moreover, the parties were bargaining over their first contract, entitling them to an extended period of time for negotiations.<sup>13</sup> The presence of three bargaining sessions over two months does not satisfy the requirement that the parties bargain for a reasonable period of time after entering a settlement agreement resolving a refusal to bargain charge.

In addition, after the May 14, 1999 bargaining session, the Union requested information that the Employer had agreed to provide under the April 1999 settlement agreement. Although some information was provided, the Employer failed to supply the names, dates, and hours worked by the employees performing electrical work at the Asgrow Seed Company job. The Employer never provided this information. This unlawful failure and refusal to supply requested information, necessary and relevant to the negotiations for the parties' initial contract, further supports the argument that a reasonable period of time for bargaining had not passed prior to the withdrawal of

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<sup>12</sup> Id. at 71-72.

<sup>13</sup> See Ford Center for the Performing Arts, 328 NLRB No. 1, slip op. at 1 (April 7, 1999); Shangri-La Health Care Center, 288 NLRB at 338 (the evidence must be viewed "in light of the reality that this was bargaining for a first or initial contract between the parties, requiring, as it does, the hammering out of fundamental procedures, rights, basic wage scales, and fringe benefit plans without prior established practices on which to rely for starters"); Blue Valley Machine & Mfg. Co., 180 NLRB 298, 304 (1970), enfd. in part 436 F.2d 649 (8th Cir. 1971); N. J. MacDonald & Sons, Inc., 155 NLRB at 71-72.

recognition.<sup>14</sup> Accordingly, the Employer could not challenge the Union's majority status and was obligated to continue to recognize and bargain with the Union and to supply the requested information.

The Employer nevertheless asserts that it lawfully withdrew recognition because of the presence of a stable one-employee unit. Moreover, the Employer asserts that because it lawfully withdrew recognition, it was not obligated to provide the requested information to the Union.

In Foreign Car Center,<sup>15</sup> the Board set forth the general principles surrounding one-employee units:

The Board has held that it will not certify a one-[employee] unit because the principle of collective-bargaining presupposes that there is more than one eligible person who desires to bargain. The Act therefore does not empower the Board to certify a one-[employee] unit. By parity of reasoning, the Act precludes the Board from directing an employer to bargain with respect to such a unit. While we have held that the Act does not preclude bargaining with a union on behalf of a single employee, if an employer is willing, we have never held that an employer's refusal to bargain with a representative on behalf of a one-[employee] unit is a refusal to bargain within the meaning of Section 8(a)(5).

Consequently, the one-employee unit defense has been recognized in cases where an employer has failed to bargain during the certification year,<sup>16</sup> and where an employer has

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<sup>14</sup> See, e.g., Wells Fargo Armored Services Corp., 322 NLRB 616, 617 (1996) (employer's refusal to supply requested financial information deemed sufficient to warrant a 6-month extension of the certification year). See also Mar-Jac Poultry Company, Inc., 136 NLRB 785 (1962).

<sup>15</sup> 129 NLRB 319, 320 (1960).

<sup>16</sup> See Crescendo Broadcasting, 217 NLRB 697 (1975) (employer was under no obligation to bargain with the union where it established that there was a permanent one-employee unit approximately two months after union was certified as the exclusive collective-bargaining representative of the unit employees); Paramount Liquor Co., 270 NLRB 339, 344 (1984).

withdrawn recognition from a union during the term of a collective-bargaining agreement.<sup>17</sup> Given the application of the stable one-employee unit defense in these contexts, we conclude, as a preliminary matter, that the defense is also available to an employer after it has entered into a settlement agreement containing a bargaining provision. However, we further conclude that the Employer has not established that it employs a stable one-employee unit.

Stable one-employee unit cases involve situations where either the bargaining unit over time has been confined to one or no employees,<sup>18</sup> or the unit currently has one or no employees and the employer can show that such will be the condition in the future.<sup>19</sup> The focus in these cases is on whether the one-employee unit is a temporary or permanent situation.<sup>20</sup> In addition, the burden is on the employer to prove that any reduction in unit size is permanent.<sup>21</sup>

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<sup>17</sup> See Kirkpatrick Electric Co., 314 NLRB 1047, 1053 (1994); Searls Refrigeration Co., 297 NLRB 133, 135 (1989); Stack Electric, 290 NLRB 575, 577 (1988) (citing D&B Masonry, 275 NLRB 1403, 1408 (1985)) ("if an employer employs one or fewer unit employees on a permanent basis ... the employer, without violating Section 8(a)(5) ... may withdraw recognition from a union, repudiate its contract with the union, or unilaterally change employees' terms and conditions of employment without affording a union an opportunity to bargain"). Compare McDaniel Electric, 313 NLRB 126 (1993) (rejecting claim of stable single employee unit).

<sup>18</sup> See, e.g., Stack Electric, 290 NLRB at 577-578.

<sup>19</sup> See, e.g., Crescendo Broadcasting, 217 NLRB at 697.

<sup>20</sup> Compare Fish Engineering and Construction, 308 NLRB 836 (1992) (election appropriate where employer finishing work in area had bid on future projects) with Davey McKee Corp., 308 NLRB 839 (1992) (election petition dismissed where employer was completing project and had not bid on other projects in area). See also Copier Care Plus, 324 NLRB 785 (1997).

<sup>21</sup> See Crispo Cake Cone Co., 190 NLRB 352, 354 (1971), *enfd.* 464 F.2d 233 (8th Cir. 1972).

In D&B Masonry,<sup>22</sup> the complaint alleged that the employer violated 8(a)(5) by failing to abide by the terms of the contract until August 31, 1984, by repudiating the agreement, and by unlawfully withdrawing recognition from the union. In 1981, the employer signed a letter of assent making it a party to a collective-bargaining agreement between a multi-employer association and the union. The alleged unfair labor practices occurred when the employer refused to abide by a one-year contract extension that the association and union had entered into.

The ALJ, as affirmed by the Board, found that the employer had not violated 8(a)(5) because there was a stable one-person unit.<sup>23</sup> The ALJ noted that the employer was interested only in work that required two full-time bricklayers (i.e., the employer and his brother), and that a third bricklayer was only employed occasionally. After assuming that the employer's brother was a unit employee, the ALJ analyzed the employment pattern of the other bricklayers. Even though the employer hired four different individuals as a third bricklayer for 13 out of the 19-½ months examined, the ALJ found that such employment was casual and intermittent. Moreover, when each bricklayer left the employer, not one was given any indication that he would be rehired. This combination of facts resulted in the conclusion that the occasional third bricklayer who was hired was not a permanent employee, and that the employer had a stable one-employee unit.

The facts in D&B Masonry are distinguishable from those in the present matter. From at least May 1996 to the present, the Employer has continuously employed one unit employee, Mark Collier. At the time of the representation election in 1996, there were eight unit employees. In addition, the evidence shows that from May 1, 1996 to April 30, 1997, the Employer employed five unit electricians for a substantial period of time, and five other unit employees for periods of 5 to 15 weeks. From May 1, 1997 to June 25, 1997, the Employer employed Tom Cagle as a second unit employee. The Employer also recalled four unit employees for approximately a three-week period in August 1997. In February 1998, the Employer even attempted to recall a laid-off unit employee to work alongside Collier. Finally, from May 1998 to June 1999, the Employer used non-unit employees to perform approximately 950 hours of unit work. Two specific non-unit employees performed most of this

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<sup>22</sup> 275 NLRB at 1403.

<sup>23</sup> Id. at 1409-10.

work. This hiring history establishes that the Employer has a sustained need for more than one unit employee.

Moreover, while the Employer asserts that it does not have the amount of electrical work that the Union claims, the Employer has not demonstrated, or even stated, that it is interested in acquiring only those construction jobs that can be handled by a single unit employee. Given that the Employer is a general contractor primarily engaged in commercial construction, it is unlikely that it would avoid electrical jobs calling for multiple unit employees. This is evidenced by the fact that the Employer bids on a variety of work and that at the time of the election in Case 14-RC-11648, there were eight unit employees. Therefore, this case is unlike D&B Masonry where the employer showed that it was interested only in construction projects requiring only a one-employee unit.

The present facts are more analogous to the circumstances in SAS Electrical Services.<sup>24</sup> In that case, the employer had at least two employees for each of 13 months in a period from December 1989 to October 1991. From October 1991 to the spring of 1993, the employer had only one unit employee. However, in 1993, the employer employed several employees who were engaged in various jobs. In rejecting the employer's claim that there was a stable one-employee unit, the ALJ, as affirmed by the Board, noted that employment fluctuations were typical in the construction industry.<sup>25</sup>

Here, the Employer employed eight unit employees at the time of the representation election in 1996. Since that time, the Employer has continuously employed one unit employee and has regularly sought the assistance of additional unit employees. Currently, the Employer uses non-unit employees to perform unit work. Thus, the Employer has failed to establish the presence of a permanent one-employee unit. This conclusion is reinforced by the fact that the Employer works in the construction industry, which is characterized by fluctuating employment patterns.

In summary, because a reasonable time has not passed since the execution of the settlement agreement, and because the Employer has failed to show the presence of a stable one-employee unit, the Employer must continue to recognize, bargain with, and supply requested information

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<sup>24</sup> 323 NLRB 1239 (1997).

<sup>25</sup> Id. at 1251-52.

to, the Union in compliance with the terms of the settlement agreement. Having failed to do so, the Employer is violating Section 8(a)(5) and (1), and an appropriate complaint should issue, absent settlement.

B.J.K.