United Kiser Services, LLC and Construction and General Laborers Union, Local 1329 *and* Northern Wisconsin Regional Council of Carpenters. Cases 30–CA–18129 and 30–CB–5352

July 22, 2010

DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBERS SCHAUMBER AND BECKER

On August 28, 2009, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The General Counsel and the Charging Party each filed exceptions and a supporting brief. The Respondent Employer and the Respondent Union each filed an answering brief to the General Counsel's and the Charging Party's exceptions. The General Counsel filed reply briefs to both the Respondent Employer's and the Respondent Union's answering briefs. The Charging Party filed a reply brief to the Respondent Employer's and the Respondent Union's answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions, as explained below, and to adopt the recommended Order.

The judge dismissed the complaint allegations that the Respondent Employer and the Respondent Union (Laborers) violated Section 8(a)(1), (2), (3), and (5) and Section 8(b)(1)(A) and (b)(2) of the Act, respectively, by entering into a collective-bargaining agreement at a time when the Charging Party (Carpenters) was the recognized representative of the unit.[2] The judge found that the allegations were barred by Section 10(b) because the Carpenters filed them more than 6 months after it knew or should have known about the conduct in question. We adopt the judge's dismissals of the allegations under Section 10(b), but solely for the reasons explained below.

The Employer engineers and repairs hydroelectric equipment. It employs individuals at its shop facility in Norway, Michigan, and at various jobsites.

In late 2006, five nonmanagerial employees worked in the shop facility: four millwrights represented by the Carpenters and one electrician represented by the Laborers. The millwrights' regular work schedule was Monday through Thursday, 10 hours per day. The Employer and the Carpenters were parties to a multiemployer field working agreement and a shop addendum agreement that were in effect at all pertinent times.

In December 2006, the Employer entered into a new contract to service marine industry equipment in its shop. In early 2007, it began hiring additional employees to perform that work. On or about March 1, 2007, the Employer recognized the Laborers as the exclusive collective-bargaining representative for those newly hired employees, and the parties entered into a collective-bargaining agreement that purportedly applies to employees performing "all work of unskilled and skilled nature" in the Employer's shop. The General Counsel contends that the Laborers agreement overlaps with the Employer's shop addendum agreement with the Carpenters. Neither the Employer nor the Laborers informed the Carpenters about the Laborers agreement.

Carpenters Business Representative Greg Dhein visited the shop twice in 2007, and on January 11 and June 19, 2008.[3] During the June 19 visit, approximately 15 months after the Employer entered into its collective-bargaining agreement with the Laborers, Dhein noticed a "shop full of workers." Upon inquiry, Dhein learned that the additional employees were represented by the Laborers. On July 16, the Carpenters sent a letter to the Employer demanding that it repudiate the "agreement with another union purporting to cover the same work and positions as that covered under your voluntary recognition agreement with the [Carpenters]." On August 21, the Carpenters filed the instant charge against the Employer.[4] The Carpenters filed the charge against the Laborers on October 27.

Section 10(b) states, in pertinent part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." The party raising Section 10(b) as an affirmative defense bears the burden of establishing that a complaint is time barred. *Chinese American Plan-*

[1] The General Counsel and the Charging Party have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The judge also dismissed the complaint allegation that the Employer refused to negotiate with the Carpenters from August 25 to October 22, 2008. We adopt the judge's dismissal solely on the ground that the Employer's request to delay bargaining so that it could consult with legal counsel was reasonable under the circumstances of this case.

[3] All subsequent dates are in 2008, unless otherwise indicated.

[4] On p. 8, L. 21 of his decision, the judge inadvertently stated that the Carpenters filed its initial charge against the Employer on February 21.

ning Council, 307 NLRB 410 (1992), review denied mem. 990 F.2d 624 (2d Cir. 1993). The Board has found that the 6-month 10(b) period begins only when a party has "clear and unequivocal" notice of a violation of the Act. *Broadway Volkswagen*, 342 NLRB 1244, 1246 (2004), enfd. sub nom. *East Bay Automotive Council* v. *NLRB*, 483 F.3d 628 (9th Cir. 2007). This burden is met by showing that the charging party had either actual or constructive knowledge of the alleged unfair labor practice more than 6 months before the filing of the charge. Id. In evaluating whether a party had either actual or constructive notice, the Board has found that

> [s]uch knowledge may be imputed where the conduct in question was sufficiently "open and obvious" to provide clear notice. Similarly, knowledge may be imputed where the filing party would have discovered the conduct in question had it exercised reasonable or due diligence.

Id. (citations and footnotes omitted).

As noted above, the Carpenters filed the initial charge on August 21. Therefore, in order to meet its 10(b) burden, the Respondents must show that the Carpenters had actual or constructive notice of the facts giving rise to the charge on or before February 21. For the reasons explained below, we find that the Respondents have established that the Carpenters had constructive notice of those facts when its Business Representative Dhein visited the shop on January 11, prior to the commencement of the 10(b) period.

On the morning of January 11, a Friday, Dhein met with the Employer's vice president of operations, Jeff Kiser, in Kiser's office at the Norway facility. Later that day, Dhein visited the part of the shop where the majority of the millwrights worked, intending to talk to some of the employees. Dhein testified that he did not observe any unfamiliar faces that day. He also testified that no one informed him that a number of employees represented by the Laborers were working in the shop.

By January 11, however, the Employer had hired approximately 11 employees who were represented by the Laborers to work in the shop. Indeed, at the time of Dhein's visit, more than twice as many employees in the shop were represented by the Laborers as were represented by the Carpenters. That disparity would have been even more obvious on the day of Dhein's visit, as it fell on a Friday, which was not a scheduled workday for the millwrights represented by the Carpenters.

In the circumstances described above, we find that the fact that the Employer had hired employees who were not represented by the Carpenters was "open and obvious." *Broadway Volkswagen*, 342 NLRB at 1246. We further find that Carpenters Business Representative Dhein would have discovered the newly hired employees and the fact that they were not represented by the Carpenters on January 11, had he exercised reasonable diligence. Cf. *Comcraft, Inc.*, 317 NLRB 550, 550 fn. 3 (1995) (no constructive notice where unlawful conduct would not have been "readily discovered by the Union merely by visiting the Respondent's offices during operating hours").

For these reasons, we find that the Carpenters had constructive notice of the alleged violations more than 6 months before it filed its initial charge on August 21. Accordingly, the allegations are time barred under Section 10(b).[5]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. July 22, 2010

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

Craig Becker, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Andrew S. Gollin, Esq., for the General Counsel.
David W. Croysdale, Esq., of Milwaukee, Wisconsin, for the Respondent Employer.
Scott Graham, Esq., of Portage, Michigan, for the Respondent Union.
Ying Tao Ho, Esq., of Milwaukee, Wisconsin, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on June 10 and 11, 2009, in Iron Mountain, Michigan, pursuant to individual complaints and

[5] Given our dismissals of the allegations on this ground, we find it unnecessary to pass on the judge's finding that the Carpenters had actual notice of the violations outside of the 10(b) period through Union Steward Michael Manowski.

Additionally, in adopting the judge's dismissals, we do not rely on his finding that the allegations were also untimely under *Local Lodge No. 1424 (Bryan Mfg.)*, 362 U.S. 422, 417 (1960), because the alleged violations occurred outside the 10(b) period. *Bryan Mfg.*, which involved a party with undisputed notice of the allegations outside the 10(b) period, did not alter the Board's well-established law that the 10(b) period begins to run only after the aggrieved party receives actual or constructive notice of a violation of the Act. See *Broadway Volkswagen*, 342 NLRB at 1246.

notice of hearing in the subject cases (complaint) issued on December 31, 2008,[1] by the Regional Director for Region 30 of the National Labor Relations Board (the Board). Thereafter, by order of the Regional Director, the cases were consolidated. The underlying charges were filed by Northern Wisconsin Regional Council of Carpenters (the Charging Party or Carpenters) alleging that United Kiser Services, LLC (the Respondent Employer or Employer) and Construction and General Laborers Union, Local 1329, (the Respondent Union or Laborers), has engaged in certain violations of Section 8(a)(1), (2), (3), and (5) and 8(b)(1)(A) and (b)(2) of the National Labor Relations Act (the Act). The Respondent Employer and the Respondent Union filed timely answers to the complaint denying that they had committed any violations of the Act.

Issue

The complaint alleges that the Respondent Employer recognized the Charging Party as the representative of its Millwright Craft Unit employees but when it secured additional production work to be performed at its facility it assigned the work to employees represented by the Respondent Union rather then to the Charging Party. Additionally, the complaint alleges that the Respondent Employer granted recognition to, entered into an agreement and since about March 1, 2007, has maintained and enforced a collective-bargaining agreement with Respondent Union as the exclusive representative of employees performing the additional work even though the Respondent Union was not the exclusive collective-bargaining representative of the employees performing the work. The complaint further alleges that the Respondent Employer refused to bargain with the Charging Party and thereafter, unlawfully delayed bargaining. The complaint against the Respondent Union alleges that it received assistance and support from the Employer which referred all new employees performing the additional work to the Respondent Union rather than to the Charging Party. The complaint also alleges that when Respondent Union obtained recognition from and entered into a collective-bargaining agreement with the Respondent Employer, it did so even though it was not the lawfully recognized bargaining representative of the unit.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel,[2] Charging Party, Respondent Employer, and the Respondent Union, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Employer, with an office and place of business in Norway, Michigan, is engaged in the business of repairing hydroelectric equipment. The Employer, during the past calendar year, in conducting its business operations purchased and received goods valued in excess of $50,000 directly from points outside the State of Michigan. The Respondent Employer and the Respondent Union admit and I find that the Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Charging Party and the Respondent Union are labor organizations within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Since on or about January 1, 2006, the Charging Party has been the designated exclusive collective-bargaining representative of the Millwright Craft employees and has been recognized as the representative by Respondent Employer. In early 2007, the Employer established a new line of business to service the marine equipment industry that is performed entirely in its facility. On or about March 1, 2007, the Employer recognized the Respondent Union as the exclusive collective-bargaining representative for an appropriate unit of production employees to perform the marine equipment work exclusive of the Millwright Craft employees.

The Respondent Employer and the Respondent Union are parties to a multi-employer field agreement effective by its terms from May 1, 2005 (January 1, 2006 for the Respondent Employer) through April 30, 2010 (Jt. Exh. 5). The Respondent Employer and the Respondent Union are also parties to a Warehouse & Maintenance Shop Agreement effective from May 1, 2005 (March 1, 2007 for the Respondent Employer) through April 30, 2010 (Jt. Exh. 6).

The Respondent Employer and the Charging Party were parties to a multi-employer field working agreement effective from May 26, 2002 (January 1, 2006 for the Respondent Employer) through May 31, which agreement has been renewed and is presently in effect (Jt. Exh. 3).[3]

The Respondent Employer and the Charging party were parties to a Shop Agreement effective from January 1, 2006 through May 31 (Jt. Exh. 4).

At all material times, William Harris is the President of the Employer, Jeff Kiser serves as Vice President of Operations and Joseph Spinnato is the Shop Manager. Joseph Gallino is the Field Representative for the Respondent Union. Greg Dhein is the Business Representative for the Charging Party and Michael Manowski serves as the Charging Party Shop Steward in the facility.

[1] All dates are in 2008, unless otherwise indicated.

[2] Based on my decision herein, it is not necessary to address the General Counsel's request found in fn. 3 of its brief to reconsider my prior ruling to admit GC rejected Exhs. 20–31 into the record.

[3] Sec. 1.2 of the agreement states that the Union has claimed and the Employer is satisfied and acknowledges that the Union represents a majority of the Employer's employees in the bargaining unit covered by this Labor Agreement. The Employer hereby recognizes the Union as the exclusive bargaining agent under Sec. 9(a) of the National Labor Relations Act for all employees who perform work within such collective bargaining unit for all present and future job sites within the geographical jurisdiction covered by this Agreement. The Charging Party geographical jurisdiction is defined on pages 35-37 of the Agreement and is strictly limited to Wisconsin counties and a portion of Menominee County in Michigan. The Employer's facility is located in Dickinson County and is not included in the jurisdictional coverage of the Agreement.

B. The 8 (a)(1), (2), (3), and (5) and 8(b)(1)(A) and (b)(2) Allegations

1. The position of the parties

The General Counsel alleges that the acquisition of the marine equipment work should have been performed by the Millwright Craft employees represented by the Charging Party. It further asserts that when the Respondent Employer granted recognition to, entered into an agreement on March 1, 2007, and since then has maintained and enforced the collective-bargaining agreement with Respondent Union as the exclusive bargaining representative of the employees performing the marine equipment work it did so even though Respondent Union was not the exclusive collective-bargaining representative of the unit.

The Respondent Employer and the Respondent Union argue that the underlying charges are barred by Section 10(b) of the Act.

2. The facts

Manowski was appointed the Charging Party Shop steward by Dhein around 2002 while employed with one of the predecessor employers.[4] While Manowski testified that he stopped serving as the Shop steward around 2003, he admitted that he never informed the Charging Party or the Respondent Employer of his resignation and that he continued to hold the steward position after he commenced employment with the Employer in January 2006.[5]

Manowski acknowledged that he never filed or handled a grievance while serving as steward nor did he take any actions on behalf of employees. He asserted that this was due primarily to the harmonious working relationship with the Employer and a lack of problems raised by the Millwright Craft employees in the Shop. Manowski, however, has filled out documents for the Charging Party during his tenure as steward and has forwarded them to the Carpenter union office.

Manowski noted that he first observed laborer employees in the Shop performing marine equipment work between January and June 2007. He estimated that approximately 12 employees were hired during this period. These employees work in the next bay from his assigned location and he regularly eats lunch and socializes with them during the workday. Manowski testified that while he has not seen or read a copy of the Respondent Union's Shop Agreement, he has discussed the benefits contained therein with the laborer employees.

On February 9, 2009, Manowski was summoned to Kiser's office and was presented with a typed document titled "Declaration of Michael Manowski". He testified that the Declaration was not based on his words but he read it and signed the statement (GC Exh. 1(ii)). In response to my questions concerning each of the 11 paragraphs in the Declaration, Manowski testified that with the exception of paragraph 11 that he did not fully understand, all other paragraphs were accurate and correct.[6]

Dhein has been the Charging Party Business Agent/Organizer for approximately 8 years and services around 800 Millwright represented employees including the 4–6 shop Millwrights at the Respondent Employer. He testified that he has been the principal point of contact for the Respondent Employer Millwright Craft employees since January 2006, and for a number of years prior to that time with the predecessor employers.

Dhein stated that between January 1, 2006 and June 2008, he visited the Respondent Employer's facility on eight separate occasions. He maintains, in the regular course of business, a written day-timer in which he records meetings/appointments and also keeps a spiral notebook of telephone calls (GC Exhs. 32, 33, 34, 37, and R. Exh. 1).

The 2006 day-timer reflects that Dhein visited the facility on March 16 and 22, April 10, and October 25, 2006. The purpose of the March 16 and 22, 2006 meetings were to finalize a Shop Agreement between the Respondent Employer and the Charging Party. Dhein met with Kiser on both dates and a Shop Agreement was tentatively agreed upon that was thereafter finalized on April 10, 2006 (Jt. Exh. 4). The parties agreed to effective dates of January 1, 2006 to May 31.

The purpose for the October 25, 2006 meeting was to discuss the performance of two Millwright employees and was arranged by Spinnato. Dhein agreed to remove one of the two employees from the apprenticeship program. As of October 2006, there were four Millwright Craft employees working in the shop and one electrician. The electrician was the only laborer working in the shop and was represented for collective-bargaining by the Respondent Union. At no time during this meeting did Spinnato inform Dhein of any new work that he anticipated acquiring including the marine industry line of business because contracts for that work were not finalized until December 2006.

In 2007, Dhein was present at the facility on two occasions, February 2 and July 23, 2007. During the February 2, 2007 visit to the facility Dhein met with Kiser in his office and they had preliminary discussions about executing an International Agreement. An International Agreement allows the Employer

[4] Dhein testified that he appointed Manowski the Charging Party steward in 2002 or 2003 and has never rescinded the appointment. The business history of the Employer is detailed in the stipulated facts (Jt. Exh. 1). In his pretrail affidavit given to the Board in 2008, Dhein confirmed that Manowski is currently the Shop steward. He further acknowledged that Manowski, as the incumbent steward, had a duty to report to him any new employees that were working in the Shop but in this situation the system failed. It is further noted that Dhein, on May 27, returned Manowski's telephone call to discuss his inquiry about the negotiation of the successor Shop Agreement (GC Exh. 37). This reinforces the conclusion that Manowski is an agent of the Charging Party and Dhein recognizes him as the Carpenter steward. Indeed, Dhein conceded that Manowski had no qualifier or reduced steward duties.

[5] Spinnato credibly testified that Manowski informed him shortly after he became Shop Manager in July 2006 that he was the Carpenter shop steward.

[6] Manowski stated that Kiser did not inform him the meeting was voluntary nor did he assure him that no reprisals would be taken against him if he did not execute the Declaration. Manowski opined that he signed the Declaration because he believed he did not have a choice. I note that the complaint did not allege a violation of the Act based on this conduct nor did the General Counsel request to amend the complaint at the hearing to address this issue. *Johnnie's Poultry Co.,* 146 NLRB 770 (1964).

to take its Field Millwright employees to perform work outside the State of Wisconsin. Dhein testified that while he normally stops in the shop to visit and talk to the Millwright Craft employees, he has no recollection of doing so after his meeting with Kiser.

Dhein stated that on his next visit to the facility on July 23, 2007, he met with Kiser in his office around 10:30 a.m. They discussed additional issues surrounding the execution of an International Agreement but were unable to reach an understanding (GC Exh. 35). The meeting lasted approximately one hour and Dhein departed the facility without going into the shop to talk and visit with the Millwright Craft employees.

On January 11, Dhein met with Kiser in his office. The purpose of the meeting was to sign-up three new Field Millwright employees in the union. After the meeting, Dhein went to lunch and then returned to the shop with the intention of talking to some of the Millwright Craft employees. He proceeded to Bay 1 where the majority of the Millwright Craft employees work (GC Exh. 36 and R. Exh. 7), but did not have any recollection of how long he stayed or who he spoke with. He testified that he did not observe any unfamiliar faces and no one informed him that a number of laborer employees were now working in the shop.

By letter dated March 24, the Charging Party notified the Employer that they intended to open the Shop Agreement for modification (GC Exh. 2).

The parties held their first negotiation session on June 19. It was at this meeting that Dhein learned for the first time that laborer employees had been hired in early 2007 to perform production work in the shop for the marine equipment line of business and were still presently working in that capacity. He also learned that the laborer employees were represented for collective-bargaining purposes by the Respondent Union and a contract had been executed with the Employer (Jt. Exh. 6).

3. Discussion

Section 10(b) is a statute of limitations and is not jurisdictional in nature. The Respondent Employer and the Respondent Union have the burden of showing that the Charging Party knew or should have known prior to the 10(b) period that the disputed work was being performed by employees represented by the Laborers. *Dutchess Overhead Doors,* 337 NLRB 162 (2001).

Section 10(b) of the Act states that "no complaint shall issue based upon any unfair labor practice occurring more than 6 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 begins to run when the aggrieved party receives actual or constructive notice of the conduct that constitutes the alleged unfair labor practice. *Concourse Nursing Home,* 328 NLRB 692, 694 (1999). "The concept of constructive knowledge incorporates the notion of due diligence, i.e., a party is on notice not only of facts actually known to it but also facts that with 'reasonable diligence' it would necessarily have discovered." *Nursing Center at Vineland,* 318 NLRB 337, 339 (1995).

In *Moeller Bros. Body Shop, Inc.* 306 NLRB 192 (1992), the Board held that the "Union is chargeable with constructive knowledge by its failure to exercise reasonable diligence by which it would have much earlier learned of the Respondent's contractual noncompliance."

The Board has also held that based on the factual context unit employees' knowledge can be imputed to their bargaining representative for the purposes of determining whether the Section 10(b) period commences. *Courier-Journal,* 342 NLRB 1093, 1103 (2004); *Goski Trucking Corp.,* 325 NLRB 1032, 1034 (1998).[7]

The Charging Party filed its initial charge against the Respondent Employer on August 21, more than nineteen months after the first laborer employees were hired in January 2007, and sixteen months after the execution of the Shop Agreement between the Employer and the Respondent Union on March 1, 2007.

I find, for the following reasons, that the Charging Party had actual or constructive knowledge of the existence of the Shop Agreement and/or that the employees represented by the Respondent Union were performing the marine equipment work in the facility more then six months prior to the filing of the unfair labor practice charge on August 21.

The evidence establishes and Spinnato confirmed that at the inception of his employment in July 2006, the compliment of employees in the shop consisted of four Millwright Craft employees represented by the Charging Party and one electrician represented by the Respondent Union.

In late December 2006, the Employer acquired additional work in the marine equipment industry. In January 2007, Spinnato contacted Gallino to discuss entering into a Shop Agreement to cover the labor employees that would be performing the production work for the marine equipment line of business. Such an Agreement was ultimately signed with an effective date of March 1, 2007. Spinnato began to hire a laborer workforce in January 2007, and by March 2007, had five laborers working in the shop. Thereafter, four additional laborers were hired in the remaining portion of 2007 (R. Exh. 2).

The General Counsel argues that Dhein exercised due diligence by visiting the facility on eight occasions between January 2006, and June 2008, but was never told by anyone nor did he observe that laborers were performing the marine equipment line of work. The General Counsel further argues that Dhein made reasonable efforts to uncover the existence of this work including making shop visits but did not learn about the hiring of the laborer employees who were represented by the Respondent Union until June 2008.

For the following reasons, I find that the General Counsel did not conclusively establish the underpinnings of this argument.

The evidence discloses that Dhein made four visits to the facility in 2006. These visits occurred on March 16 and 22, April 10, and October 25, 2006. During this period the compliment of employees in the shop consisted of four Millwright Craft

[7] In the *Goski* case the administrative law judge found that the union steward knew of the existence of the issue in dispute outside the 10(b) period and his knowledge could be imputed to the Union since the steward acted as an agent. See also *Carpenters Local 17 (A&M Wallboard),* 318 NLRB 196 fn. 3 (1995).

employees and one electrician. Thus, any visits during 2006 would not have uncovered the existence of the laborer employees due to the fact that the first hires did not commence employment until January 2007.

In the year 2007, Dhein made two visits to the facility on February 2 and July 23, 2007. Dhein testified that he had no recollection of visiting the shop after completing his meeting on February 2, 2007, and did not visit the shop after his meeting with Kiser on July 23, 2007. Therefore, in the absence of visiting the shop on any occasions in 2007, it was impossible for Dhein to have learned whether laborers were working in the facility on the marine equipment line of business. Such inaction does not display due diligence. This is in stark contrast to the unrebutted testimony of Gallino who regularly visits the shop once or twice a week to meet with Employer officials and interact with the laborer employees the Respondent Union represents.[8]

Dhein also testified that he visited the shop on January 11, after having lunch but did not observe any unfamiliar faces. The January 11 visit was on a Friday and Dhein acknowledged that it could have been a scheduled non-work day as the shop employee's work a four-ten hour work week.[9] In any event, I find that had Dhein exercised due diligence during the entire year of 2007, by regularly talking to Manowski or going into the shop work area/visiting the facility on a more frequent basis, he could have learned that laborers were working in the shop.

Manowski, who was appointed the Carpenter shop steward by Dhein and has held the position since at least January 1, 2006, credibly testified that he was aware since at least early 2007 that the production employees represented by the Respondent Union were performing the disputed work in the facility and that they were working under a collective-bargaining agreement between the Employer and the Respondent Union. He further testified that as shop steward he is the point of contact for the employees to discuss terms and conditions of employment with the Employer.

Even if Dhein was not personally aware of the Laborers Shop Agreement prior to June 2008, it is undisputed that Manowski was fully aware that the disputed work was being performed by employees represented by the Respondent Union in the facility under a collective-bargaining agreement with the Employer since at least early 2007. Thus, Manowski's knowledge is imputed to the Charging Party. See *Goski Trucking Corp.* and *Courier-Journal.*

Additionally, even if the Charging Party lacked actual knowledge of the conduct underlying the unfair labor practice charge, it had constructive knowledge of the conduct well in advance of June 2008. With any reasonable diligence, Dhein could have discovered prior to June 2008 that the disputed work had been performed since at least early 2007 and continued through 2008. See *Moeller Bros. Body Shop, Inc.* (the Union is chargeable with constructive knowledge by its failure to exercise reasonable diligence by which it would have much earlier learned of the Respondent's contractual noncompliance).[10]

For all of the above reasons, and particularly noting that the Charging Party had actual or constructive notice that employees represented by the Respondent Union were performing the disputed work under a collective-bargaining agreement more than six months prior to the filing of the initial charge on February 21, I find that the subject unfair labor practice charges are time-barred under Section 10(b) of the Act.[11]

Accordingly, I recommend that the Section 8(a)(1), (2), (3), and (5) and 8(b)(1)(A) and 8(b)(2) charges be dismissed in there entirety.[12]

C. The Respondent Employer's Refusal to Negotiate

The General Counsel alleges in paragraph 10 of the complaint in Case 30–CA–18129 that since on or about August 25, the Employer has refused to negotiate with the Charging Party.[13] The Employer defends its conduct by asserting that the Charging Party insisted upon negotiating to expand the scope of the bargaining unit, a permissive subject of bargaining, to which it lawfully exercised its right not to engage in bargaining. The Respondent further argues that it did not refuse to negotiate on August 25 because the Shop Agreement with the Charging Party extended for an additional year through May 31, 2009.

The Board has held that an impasse created in part "on bargaining about a permissive subject is invalid under the Act" and constituted an independent violation of Section 8(a)(5). *Quality House of Graphics,* 336 NLRB 497, 510 (2001). See also *Reading Rock, Inc.,* 330 NLRB 856, 861 (2000) (a party may advance a proposal on a permissive subject of bargaining . . . so long as it does not insist upon it as a price for an overall agreement) and *Raymond F. Kravis Center For The Performing Arts,* 351 NLRB 143, 144 (2007) (as explained more fully in the judge's decision, the Respondent insisted to impasse that, inter alia, the collective-bargaining agreement would apply only to those workers referred from the Union's hiring hall. The judge found, and we agree, that this constituted an insistence by the

[8] Gallino, in his testimony, addressed the openness of the shop area which permits a clear view of all employees working in the bay areas. Indeed, although only 5' 4" tall, Gallino asserted that when he visits the shop area he has no problem in observing both the Millwright and laborer employees who are working in Bays 1, 2, and 3 (R. Exh. 7).

[9] Spinnato confirmed that the Millwright employees work schedule in the shop is four 10-hour days Monday–Thursday.

[10] I further find that the complaint is untimely under Section 10(b) of the Act because the only unlawful conduct alleged is based upon a time-barred event-the March 1, 2007 execution of the Laborers Shop Agreement. *Local Lodge No. 1424 (Bryan Mfg.),* 362 U.S. 411, 417 (1960) (the complaints were time-barred because the conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice and to permit the [time-barred] event itself to be so used in effect results in reviving a legally defunct claim).

[11] The charge in the CB case was filed on October 27.

[12] In view of my finding that the subject charges were untimely filed, it is not necessary to address the General Counsel's arguments found on pp. 37–54 of its posthearing brief as well as similar arguments advanced by the Charging Party.

[13] The record confirms, and the parties stipulated, that the Employer and the Charging Party met on June 19, August 14, November 7, and December 4 to negotiate a successor Shop Agreement. No bargaining sessions have been held between the Employer and the Charging Party since March 6, 2009.

Respondent on changing the scope of the bargaining unit, which included all workers performing stagehand work. The scope of the bargaining unit is a permissive subject of bargaining over which a party may not insist to impasse. Thus, we find that the Respondent's declaration of impasse was unlawful). A Union's insistence upon permissive subjects of bargaining to the point of impasse likewise, constitutes a per se refusal to bargain. *NLRB v. Longshoremen (ILA), South Atl. & Gulf Coast Dist. (Lykes Bros. S.S. Co.)*, 443 F.2d 218 (5th Cir. 1971), *enfg.* 181 NLRB 590 (1970).

1. Facts

The Shop Agreement between the Charging Party and the Respondent Employer was scheduled to terminate on May 31.[14] By letter dated March 24, the Charging Party notified the Respondent Employer of its intention to renegotiate the Shop Agreement (GC Exh. 2).[15]

The parties stipulated that four collective-bargaining sessions were held for the purpose of renegotiating the Shop Agreement (Jt. Exh. 1).

Spinnato testified that he attended all of the negotiation sessions and stated that during the August 14 meeting he asked Dhein whether the Carpenters intended to represent everyone in the shop. Dhein replied that we do not have a position and are not taking a stance.[16]

By email dated August 25, the Employer informed the Charging Party that they could not meet on September 4 as originally planned. Rather, the Employer needed to postpone the meeting until further notice in order to review the union jurisdiction matter in the shop between the Laborers and the Millwrights (GC Exh. 5).

By letter dated October 22, the Employer acknowledged that it had previously suspended negotiations in order to obtain a legal review of the jurisdictional issue, and now that the review has been completed, it was prepared to resume negotiations (GC Exh. 6).

2. Discussion

I find that the Respondent Employer did not refuse to negotiate on August 25 for the following reasons.

First, the correspondence between the parties establishes that the Employer postponed negotiations pending its review of the jurisdictional issue raised by the Charging Party in its letter of July 16, and the filing of the subject charge against the Employer on August 21. Contrary to the General Counsel, I find that there was never a firm refusal to negotiate by the Employer. Indeed, once the legal review was finalized, the Employer agreed to resume negotiations and held two additional bargaining sessions on November 7 and December 4. See, *Massey-Ferguson, Inc.,* 184 NLRB 640, 644 fn. 6 (1970) (employer notified the union that it was suspending bargaining to obtain legal advice regarding the impact of a decertification petition).[17]

Second, I find that there was never an obligation by the Employer to commence negotiations for a successor Shop Agreement because neither of the parties gave 90 days advance notice to the other to open negotiations. Indeed, the Charging Party Attorney conceded this fact in a January 23, 2009, letter to the Regional Director wherein he stated that neither party gave the required 90 days advance notice to the other and therefore, the Shop Agreement renewed for the time period of June 1 through May 31, 2009 (R. Exh. 24).[18] Therefore, since the Respondent Employer never had an obligation to negotiate over a successor Shop Agreement in the first place, it did not independently refuse to do so on August 25, or unlawfully delay the bargaining process. Since the Shop Agreement renewed on June 1, the actions of the Employer in voluntarily meeting with the Charging Party to explore possible revisions to the existing agreement cannot be construed as a waiver by the Employer in not previously objecting to the timeliness of the reopener notice.

Lastly, I note that the Respondent Employer argues that it was privileged to not engage in bargaining on August 25 because the Charging Party insisted upon negotiating to expand the scope of the unit, a permissive subject of bargaining.

Contrary to the Respondent Employer, I find that the facts do not substantiate this position. Rather, Spinnato testified that he asked Dhein at the August 14 negotiation session whether the Charging Party intended to represent everyone in the shop and Dhein replied that they have no position and are not taking a stance. Charging Party Director of Organizing Mark Kramer, who attended the August 14 negotiation session, testified that he never informed any of the Employer negotiators that the Millwright Craft employees should be performing the marine equipment line of work. Further, there was no evidence presented by the Respondent Employer that the Charging Party attempted to negotiate over expanding the scope of the unit or that they would negotiate to impasse on this issue at any of the bargaining sessions held between the parties. Lastly, the Respondent Employer's reliance on the Charging Party's letter of July 16 is also unavailing. Nothing contained therein establishes that the Charging Party intended to negotiate over expanding the scope of the unit.

Based on the totality of the above discussion, however, I find that the Respondent Employer did not refuse to negotiate with the Charging Party on August 25 or unlawfully delay bargaining.

[14] The Shop Agreement by its terms may be renewed from year to year unless either party gives 90 days advanced notice to the other.

[15] Dhein independently requested to renegotiate the parties' Shop Agreement in May 2008, as he was unaware of the Charging Party's March 24 letter. He testified that he knew the Shop Agreement was about to expire but did not focus on the time constraints contained therein in order to open negotiations.

[16] By letter dated July 16, the Charging Party informed the Employer that they recently learned that it had signed an agreement with another union to cover the same work and positions as provided under their Shop Agreement. The Charging Party stated that if the Agreement is not repudiated, it will have no choice but to pursue our legal remedies (GC Exh. 4).

[17] The General Counsel's reliance on *Dresser Industries,* 264 NLRB 1088 (1982), is misplaced. In that case the respondent refused to continue bargaining with the union. In the subject case, bargaining was postponed not permanently cancelled.

[18] See also GC Exhs. 16 and 18, that confirms this fact and notes that no future contract negotiations are necessary.

Therefore, I recommend that paragraph 10 of the complaint be dismissed and further recommend that the Respondent Employer did not violate Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. United Kiser Services, LLC is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party and the Respondent Union are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent Employer did not violate Section 8(a)(1), (2), (3), and (5) of the Act because the underlying original and amended unfair labor practice charges were untimely filed and it did not refuse to negotiate or unlawfully delay bargaining as alleged in the complaint.

4. Respondent Union did not violate Section 8(b)(1)(A) and (b)(2) of the Act because the underlying unfair labor practice charge was untimely filed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[19]

ORDER

The complaint is dismissed.

Dated, Washington, D.C. August 28, 2009

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