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300 Exhibit Services & Events, Inc. and Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 631 affiliated with International Brotherhood of Teamsters and Southwest Regional Council of Carpenters and its Local 1780, Intervenor. Case 28–CA–22347

December 30, 2010

DECISION AND ORDER

BY MEMBERS BECKER, PEARCE, AND HAYES

On November 27, 2009, Administrative Law Judge John J. McCarrick issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party filed 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,¹ findings,² and conclusions, to

¹ The Respondent excepts to many of the judge's evidentiary rulings. It is well established that the Board will affirm an evidentiary ruling of an administrative law judge unless that ruling constitutes abuse of discretion. See *Aladdin Gaming, LLC*, 345 NLRB 585, 587 (2005), petition for review denied sub. nom. *Local Joint Executive Board of Las Vegas v. NLRB*, 515 F.3d 942 (9th Cir. 2008). After a careful review of the record, we find no abuse of discretion in any of the challenged rulings.

² The Respondent has 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. In doing so, we note that "[a] trier of fact need not accept uncontradicted testimony as true if it contains improbabilities or if there are reasonable grounds for concluding that it is false. It is well settled that a witness' testimony may be contradicted by circumstances as well as by statements and that demeanor may be considered in such circumstances." *Operative Plasterers, Local 394*, 207 NLRB 147, 147 (1973) [footnote omitted]; see also *Richard Mel-low Electrical Contractors Corp.*, 327 NLRB 1112 fn. 1 (1999).

We agree with the judge that Sec. 10(b) bars the Respondent's challenge to its earlier recognition of the Union based on the absence of proof of the Union's majority status. In doing so, we find that the Respondent recognized the Union by its course of conduct in June and July 2008, more than 6 months prior to the Union's filing of the first unfair labor practice charge alleging the Respondent's refusal to bargain. During that period, the Respondent applied the Union's collective-bargaining agreement's terms to its employees (e.g., the contractual requirements as to wages, benefits, and the grievance procedure). In addition, the Respondent's president, Michael Cunningham and secretary treasurer, Kurt Walsiak acknowledged the Respondent's

modify his recommended remedy,³ and to adopt the recommended Order as modified.⁴

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, 300 Exhibit Services & Events, Inc., Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the recommended Order as modified.

1. Substitute the following for paragraph 2(c).

"(c) Within 14 days after service by the Region, post at its Las Vegas, Nevada facility, copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 28, 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. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 em-

contractual relationship with the Union to its payroll services company, Employco, in June/July 2008 email exchanges. The Respondent also was conspicuously silent when it failed to deny the existence of a contractual relationship after third-party beneficiary Western Conference of Teamsters Pension Trust Fund referred to the collective-bargaining agreement between the Respondent and the Union in a series of letters to the Respondent and mailed it reporting forms required by the agreement.

³ The make-whole relief included in the judge's Order shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

⁴ We shall modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB No. 9 (2010). For the reasons stated in his dissenting opinion in *J. Picini Flooring*, Member Hayes would not require electronic distribution of the notice.

⁵ 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."

ployees and former employees employed by the Respondent at any time since February 6, 2009.”

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. December 30, 2010

Craig Becker,	Member
Mark Gaston Pearce,	Member
Brian E. Hayes,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT do anything that interferes with these rights. More particularly:

WE WILL NOT refuse to recognize or bargain collectively with Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 631, affiliated with the International Brotherhood of Teamsters (the Union) as the representative of the appropriate unit of employees by repudiating and refusing to honor our collective-bargaining agreement with the Union. The appropriate bargaining unit (the Unit) is:

All employees of the 300 Exhibit Service & Events, Inc. who perform erection, touch-up painting, dismantling and repair of all exhibits including Decorating, Freight, I&D, Specialty Crafts, and leadman/foreman, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to honor the terms of the collective-bargaining agreement we have entered into with the Union.

WE WILL NOT in any similar way frustrate your exercise of the rights stated above.

WE WILL adhere to our collective-bargaining agreement with the Union during its term and any renewals of it, and WE WILL make whole our employees for any losses of wages and benefits, including those who would have been referred to us by the Union had we requested employees through the dispatch procedure as provided for in our collective-bargaining agreement with the Union.

WE WILL, on request, bargain with the Union, as the exclusive collective-bargaining representative of the employees in the Unit, concerning wages, hours, and terms and conditions of employment of the Unit.

300 EXHIBIT SERVICE & EVENTS, INC.

Mara-Louise Anzalone, Esq., for the General Counsel.

Gregory E. Smith, Esq. and *Mohamed A. Iqbal Jr., Esq.* (*Lionel, Sawyer & Collins*), of Las Vegas, Nevada, for the Respondent.

John M. Masters, Esq., of Las Vegas, Nevada, for the Charging Party.

Kathleen M. Jorgenson, Esq. (*DeCarlo Connor Shanley*), of Los Angeles, California, for the Intervenor.

DECISION

STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in Las Vegas, Nevada, on August 4 and 5, 2009, upon the complaint, as amended,¹ issued on May 27, 2009, by the Regional Director for Region 28.

The complaint alleges that 300 Exhibit Services & Events, Inc. (Respondent) violated Section 8(a)(1) and (5), and 8(d) of the Act by withdrawing recognition of and repudiating its collective-bargaining agreement with Teamsters Local 631 (Union). Respondent filed a timely answer to the complaint stating it had committed no wrongdoing and specifically that it did not enter into a valid collective-bargaining agreement with the Union.

¹ At the outset of the hearing, counsel for the General Counsel made a motion to amend the complaint by adding language alleging that Respondent violated Sec. 8(d) of the Act. The parties also stipulated that complaint subparagraph 5(a), as amended, was an appropriate unit. In addition counsel for the General Counsel filed a “Notice of Intent to Amend Complaint” at the hearing adding subparagraphs 5(g), (h), and (i) (GC Exh. 2). The amendments were granted. Respondent denied the allegations of the complaint, as amended. In addition Respondent added a further affirmative defense to the complaint that the alleged collective-bargaining agreement was an agreement encompassed by Sec. 8(e) of the Act.

Findings of Fact²

Upon the entire record herein, including the briefs from the General Counsel, Charging Party, and Respondent,³ I make the following findings of fact.

I. JURISDICTION

Respondent admitted it is an Illinois corporation with an office and place of business located in Las Vegas, Nevada, where it is engaged in providing trade show installation and dismantling services. Annually, Respondent in the course of its business operations performed services valued in excess of \$50,000 in States other than the State of Nevada.

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

II. LABOR ORGANIZATION

Respondent admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts⁴

Respondent was established on about May 5, 2008, for the purpose of setting up and removing exhibitor's booths at trade shows throughout the United States. The initial equal shareholders of Respondent were: Michael Cunningham, president; Kurt Walisiak, secretary treasurer; William Muhich and Joseph Holgado, vice president for sales. In May 2008, Edward Rodriguez was Respondent's Las Vegas City manager.⁵ In September 2008, Rodriguez became a 15 percent owner of Respondent's stock and was made a vice president.

Cunningham and Rodriguez left another exhibit installation company named "Willwork" when Respondent was formed. In 2006 Cunningham had helped negotiate an agreement⁶ that allowed 21 of Willwork's employees to become union journeymen without completing the Union's apprenticeship program. The Willwork agreement reflected that the 21 Willwork employees voted to have the Union as their collective-bargaining agent. The agreement further states that until Willwork's employees obtain journeyman status through the apprenticeship program, they are limited to dispatch to Willwork

if they join the Union or pay the applicable hiring hall fee. About 10 to 11 of Willwork's former employees joined Respondent when it was established.

At the time Respondent was created, Cunningham was told by union business agent, Laura Sims, that Respondent needed to obtain payroll and benefits bonds in order to utilize Union labor.

Respondent utilized the services of Employco, a payroll services company for the payment of its employees' wages and benefits as well as mandatory deductions. There is no dispute that Employco had no authority to direct the day-to-day operations of Respondent or its employees. While Respondent contends that it utilized an Employco collective-bargaining agreement with the Union to secure union labor in Las Vegas, no evidence of such an agreement was produced nor did an Employco witness testify that such an agreement exists.

On about May 19, 2008, Respondent secured its first contract from Ozram—the Ozram booth at a Light trade show in Las Vegas. Cunningham notified Rodriguez he would be the leadman on the Ozram job at the Light show the same day he secured the Ozram agreement. On May 24, 2008, Holgado faxed a letter to the Union notifying them that Rodriguez was Respondent's Las Vegas City Manager in charge of coordinating payroll for Respondent.⁷ The installation work was to commence on May 25, 2008. On May 21, 2008, Rodriguez made a request through the Union's hiring hall for eight men Cunningham said he wanted to install and remove Ozram's exhibit booth at the Light show. Presumably these were the employees who left Willwork to join Respondent. On May 22, 2008, at the union hall, Rodriguez was told by a union agent that he was not a journeyman member of the Union and thus was not entitled to be dispatched until all journeymen on the hiring hall list had been exhausted. When Rodriguez explained that he was a journeyman union member, the union agent said that Rodriguez was part of the Willwork group and confiscated Rodriguez journeyman's card. Rodriguez explained what had happened to Respondent's president Cunningham. On May 23, 2008, Cunningham told Rodriguez to pick up some documents from union agent Tim Koviak (Koviak). Cunningham explained he would fly to Las Vegas the following day to look at the documents. When Rodriguez met Koviak on May 23, 2008, Koviak gave him an envelope containing three documents, a Short Form Collective Bargaining Agreement with the Union, a Western Conference of Teamsters Pension Trust Fund Certificate and a Trust Acceptance and Control Data form.⁸ Koviak said he needed to have the documents returned to his house the following day. Cunningham did not arrive in Las Vegas the following day so Rodriguez met Koviak on May 24 at the Mirage Hotel. When Rodriguez gave the documents to Koviak, Koviak said the contracts were not signed. Rodriguez explained that Cunningham did not make it to Las Vegas. Koviak said that Cunningham needed to sign the contracts or Respondent was not working tomorrow at the Light show. Rodriguez briefly looked at the documents and signed Cunningham's name to each of them and returned the contracts to Koviak. The Short Form

² In its brief, Respondent moves that its rejected exhs. 6, 7, 11–13, and 17–19 as well as testimony of its witnesses that was stricken be entered into the record. Respondent sets forth no reasons for why I should reverse my rulings, nor does Respondent specify what witness or what testimony it seeks to have entered. The Motion is denied.

³ On September 24, 2009, Respondent filed a motion to accept and consider late file post-trial brief. Good cause having been shown for the late filing and there being no objection filed, I grant Respondent's motion.

⁴ On September 23, 2009, counsel for the General Counsel filed a Motion to Correct the Record. Good cause having been shown and no objection having been filed, the motion is granted.

⁵ As city manager, Rodriguez had the authority to settle employee grievances and effectively recommended the hiring and firing of employees. I find that Rodriguez, in his capacity as city manager, was a supervisor within the meaning of Section 2 (11) of the Act.

⁶R. Exh. 14.

⁷ GC Exh. 5.

⁸ GC Exhs. 13, 14, and 15.

Agreement binds the signatory employer to the Collective Bargaining Agreement between GES Exposition Services, Inc. and the Union⁹ (GES Agreement). The GES Agreement contains a hiring hall provision¹⁰ that specifies that journeymen must be referred before extra board workers. Journeymen are defined as individuals qualified as journeymen under a prior collective-bargaining agreement or individuals certified as journeymen by the apprenticeship training program.¹¹ According to Respondent's witnesses, Respondent did not become aware that Rodriguez had signed the three documents until February 2009. However, Rodriguez admitted that after May 20, 2008, he signed Cunningham's signature on a bond agreement¹² the Union required on behalf of Respondent. Cunningham identified the bond form and admitted he did not sign it.

On June 9, 2008, Western Conference of Teamsters Pension Trust sent Cunningham a letter enclosing reporting forms in accordance with their collective-bargaining agreement. The certified receipt was signed by Cunningham.¹³ On June 10, 2008, the Western Conference of Teamsters Pension Trust sent Cunningham written notification of labor agreement acceptance¹⁴ to the same address as the June 9, 2008 letter advising that Respondent's collective bargaining agreement had been accepted. In addition Walsiak received a copy of the August 20, 2008 letter¹⁵ from the Western conference of Teamsters pension fund demanding remittance of pension contributions required by Respondent's labor agreement.

Pursuant to the provisions of the GES Agreement, the Union refused to refer Respondent's employees, who had previously worked for Willwork,¹⁶ until the journeymen referral list had been exhausted.

On June 19, 2008, Cunningham met with union representatives Tim Koviak, Terry Shartung, and Laura Sims to discuss the journeyman status of Respondent's employees. The union agents told Cunningham that Respondent's employees, the former employees of Willwork, were not valid journeymen since the Willwork addendum was invalid. The Union, in the addendum to its Short Form Collective Bargaining Agreement with Willwork, agreed to dispatch to Willwork 20 of its employees named in the addendum notwithstanding the provisions of the hiring procedures set forth in the GES Exposition Services Labor Agreement.¹⁷ Cunningham tried to get the Union to agree to the same addendum for Respondent that it had given to Willwork. However, the Union refused, taking the position that such an agreement was illegal.

On July 16, 2008, Tina Chen of Employco sent Cunningham an email requesting a copy of Respondent's contract with the Union. Cunningham responded he would get a copy from Rod-

riguez.¹⁸ That same day Chen requested a copy of Respondent's collective-bargaining agreement from Respondent's secretary in Las Vegas who replied that there was a copy in Chicago.¹⁹ On July 18, 2008, Chen emailed Walsiak that the Teamsters Southwest Administrators had mailed a copy of Respondent's contract with the Union to Walsiak and Walsiak replied, "No problem."²⁰ On August 4, 2008, Walsiak replied to Chen's email saying that he had not received the contract from the Teamsters.

On about July 28, 2008, Cunningham, Muhich, and Walsiak met with union representatives Koviak, Don McNab, and Sheridan at the union hall. Cunningham again attempted to have his employees grandfathered into the Union as journeymen. The Union again refused to allow Respondent's employees to become journeymen. However, Cunningham stated that he continued to abide by the collective-bargaining agreement paying wages, benefits, and using the Union hiring hall for referrals.

On January 30, 2009, Cunningham met with Union Business Agent Steve LoPresti (LoPresti) and once again tried to have Respondent's employees grandfathered as union journeymen. LoPresti said it could not be done.

On February 5, 2009, Cunningham and Danny Gai, Respondent's New Orleans, Louisiana City manager, met with LoPresti and Union Secretary-Treasurer John Phillipenas. Cunningham said that he wanted to have his employees made union journeymen and work out a contract like Willwork did. The Willwork addendum was displayed and Phillipenas said, "Are you talking about this document?" When Cunningham said it was, Phillipenas said the addendum was illegal and that the Union could not discuss this anymore as to the 21 former Willwork employees. After further heated discussion Phillipenas left. LoPresti told Cunningham he wanted to discuss a grievance but Cunningham said he was there only to negotiate a contract and get his employees back in the Union. LoPresti continued to press the grievance and Cunningham said he would pay the grievance if LoPresti could show him a copy of Respondent's contract with the Union. LoPresti was unable to find the contract. Initially when called by General Counsel Cunningham testified that LoPresti said "Well, if you don't have contract with us you can just go down the street and sign with the Carpenters." Later when called by Respondent Cunningham testified that LoPresti said, "go to the Carpenters" but admitted he could not recall if LoPresti had prefaced his statement with if you don't have a contract with us. According to Gai's testimony on cross examination LoPresti said, "You know what? I can't help you. Since you don't have a contract with us, go to the Carpenters? Maybe they can help you." Gai was absolutely sure that LoPresti said this. Gai's affidavit dated May 14, 2009, states, "If the employer didn't have a contract to go see the Carpenters."²¹ At that point the meeting ended.

⁹ GC Exh. 16.

¹⁰ Id. at pp. 5-8, art. 4, sec. 1E.

¹¹ Id. at page 6, art. 4, sec. 1A.

¹² GC Exh. 12.

¹³ GC Exh. 9.

¹⁴ GC Exh. 8.

¹⁵ GC Exh. 11.

¹⁶ The terms of the agreement between the Union and Willwork specifically limited the Willwork employees to be treated as journeymen only for hiring hall requests made by Willwork.

¹⁷ GC Exh. 16.

¹⁸ GC Exh. 4, p. 1.

¹⁹ Id at p. 2.

²⁰ Id at p. 6.

²¹ I credit Cunningham's version of the statement when initially called as a witness by General Counsel. It is consistent with Gai's affidavit.

On February 6, 2009, Respondent signed a collective-bargaining agreement²² with the Carpenters Union which grandfathered Respondent's employees as journeymen.

According to Cunningham, he did not learn that Rodriguez had signed Cunningham's name to the short form contract until February 25, 2009.

At all jobs Respondent performed in Las Vegas it paid wages and benefits pursuant to the Union's collective-bargaining agreement. Respondent also processed and settled grievances raised by the Union. All labor for jobs Respondent performed in Las Vegas was secured through the union hiring hall.

B. The Analysis

Counsel for the General Counsel contends that Respondent violated Section 8(a)(1) and (5) and Section 8(d) of the Act when it repudiated its collective-bargaining agreement with the Union. General Counsel's theory of the case asserts that Rodriguez was clothed with apparent or ratified authority to sign the May 24, 2008 short form agreement with the Union and that moreover Respondent adopted the short form agreement by its conduct. Counsel for the General Counsel contends that Respondent violated Section 8(a)(1) and (5) and Section 8(d) of the Act when it repudiated its collective bargaining agreement with the Union. General Counsel's theory of the case asserts that either Rodriguez was clothed with apparent or ratified authority to sign the May 24, 2008 short form agreement with the Union or in the alternative Respondent adopted the short form agreement by its conduct. Respondent counters that Rodriguez had no authority to enter into a collective bargaining agreement with the Union, that no contract may be formed by an employer's conduct where it has not been established that the Union enjoys majority support in the bargaining unit, that the Respondent's conduct was insufficient to show it had adopted the contract by its conduct and that the Union repudiated the collective bargaining agreement.

1. The apparent authority of Rodriguez

In *SSC Corp.*, 317 NLRB 542, 546 (1995), the Board restated the standard for determining apparent authority it had applied in *Dentech Corp.*, 294 NLRB 924, 925 (1989), quoting from *Service Employees Local 87 (West Bay Maintenance)*, 291 NLRB 82 (1988):

Apparent authority is created through a manifestation by the principal to a third party that supplies a reasonable basis for the latter to believe that the principal has authorized the alleged agent to do the acts in question. *NLRB v. Donkin's Inn*, 532 F.2d 138, 141 (9th Cir. 1976); *Alliance Rubber Co.*, 286 NLRB 645, 646 fn. 4 (1987). Thus, either the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct is likely to create such a belief. Restatement 2d, Agency Section 27 (1958), Comment.

Two conditions must be present satisfied in order to establish apparent authority, a manifestation by the principal to a third party and a reasonable basis for the third party to believe that

the authority granted to the agent encompasses the contemplated activity. See also *Cora Realty Co., LLC*, 340 NLRB 366 (2003).

On about May 19, 2008, Cunningham notified Rodriguez he would be the leadman on the Ozram job at the Light show. Sometime after May 20, 2008, Rodriguez also signed Cunningham's signature on a bond agreement the Union required of Respondent. On May 21, 2008, Rodriguez made a request through the Union's hiring hall for eight men Cunningham said he wanted to install and remove Ozram's exhibit booth at the Light show. On May 24, 2008, Holgado faxed a letter to the Union notifying them that Rodriguez was Respondent's Las Vegas City manager in charge of coordinating payroll. On May 24, 2008, when Rodriguez signed Cunningham's name to the short form union contract, Cunningham had made no representations to the Union concerning Rodriguez' authority to sign a collective-bargaining agreement.

Based upon the above, it does not appear that Respondent manifest to the Union any facts that would lead to a reasonable belief that Rodriguez had authority to sign Cunningham's name to a collective-bargaining agreement nor to believe that Rodriguez himself had authority to negotiate and sign a collective bargaining agreement for Respondent. From about May 19, 2008, until September 2008, Rodriguez held the position of Respondent's Las Vegas City manager, a lower level supervisory position. His duties were limited to requesting employees from the Union's hiring hall, directing employees, handling grievances, and recommending the hiring and firing of employees. Nothing in these duties coupled with the absence of any representations by Respondent to the Union regarding Rodriguez' further authority, created a reasonable basis for the Union to conclude that Rodriguez had apparent authority to sign the short form agreement. *Local Union No. 483*, 242 NLRB 573, 575 (1980).

2. Did Respondent adopt the union short form agreement through its conduct?

In *DST Insulation, Inc.*, 351 NLRB 19 (2007), the Board held that a binding agreement may be formed even when the parties have not reduced to writing their intent to be bound citing *Haberman Construction Co.*, 236 NLRB 79, 85-86 (1978), *enfd.* 641 F.2d 351 (5th Cir. 1981). The Board said it considers whether the party at issue has engaged in a course of conduct that reflects its intent to follow the terms of the agreement. The adoption by conduct rule applies to both 9(a) and 8(f) contracts. *ESP Concrete Plumbing Co.*, 327 NLRB 711, 713 (1999). In *ESP* the Respondent applied the collective-bargaining agreement to its work, acquiesced in a judgment against it for unpaid contributions to the Bricklayers' Pension Fund and held itself out as a union contractor. Under these circumstances the Board said, "it makes little difference whether that conduct be appraised as expressing the intent of the parties to an ambiguous contract or as the creation of an estoppel against repudiation." *Arco Electric Co. v. NLRB*, *supra*, 618 F.2d at 699. The Board noted, as the Supreme Court observed in *McNeff*, "Having had the music, [the Respondent] must pay the piper." *McNeff*, *supra*, 461 U.S. at 271. The Board went on that in the language of *Deklewa*, the Respondent "vol-

²² R. Exh. 8.

untarily recognize[d] the union, enter[ed] into a collective-bargaining agreement, and then set about enjoying the benefits and assuming the obligations of the agreement.” 282 NLRB at 1387. See also *CAB Associates*, 340 NLRB 1391, 1401–1402 (2003).

Initially Respondent contends that it was not even aware that Rodriguez had signed the short form agreement with the Union until Rodriguez’s admission in February 2009. I find this contention incredible.

Commencing in early June 2008 the Western Conference of Teamsters Pension Trust sent Respondent a series of three letters advising that it had a collective-bargaining agreement with the Union. In July 2008, Respondent’s own payroll service sent a series of emails requesting a copy of Respondent’s collective bargaining agreement with the Union. Both Cunningham and Respondent’s Las Vegas administrative aide replied they would get the payroll service a copy. When the payroll service advised Walsiak that a copy of Respondent’s contract with the Union was being sent to him, he said there was “no problem.”

Further, Respondent acted as if it had a collective-bargaining agreement with the Union in that it applied all the terms of the GES Agreement to the jobs performed in Las Vegas by paying wages and benefits pursuant to the Union’s collective-bargaining agreement, processing and settling grievances raised by the Union and securing all labor through the hiring hall. Respondent’s contention that its conduct over an 8 month time period is insufficient to establish a contract through adoption. I disagree. Nothing in the Board’s cases cited by Respondent suggests there is a minimum time period for evaluating if a party has adopted a contract through course of conduct. Rather the Board looks at the party’s conduct to determine if it shows that the party has adopted the contract. Here everything Respondent did from the time Rodriguez signed the short form agreement until Respondent repudiated its agreement with the Union by signing a collective-bargaining agreement with the Carpenters reflected that it applied the terms and conditions of the Union’s contract to its jobs in Las Vegas.

Respondent’s contention that its actions manifest an intent that it was bargaining for an initial contract is not supported by the evidence. It is clear that what Respondent sought from the Union was not bargaining for an initial labor agreement, but rather a side agreement like Willwork’s that merely grandfathered Respondent’s employees as journeymen so that they could be referred from the hiring hall. At no time did Respondent submit any bargaining proposals for any terms of a collective-bargaining agreement as would be expected from an employer seeking an initial collective-bargaining agreement. Rather Respondent acted as if it were already bound by the terms of a collective-bargaining agreement as noted above.

Respondent’s contention that there can be no contract created by its actions since it has not been established that the Union enjoyed majority support is not supported by the law.

In *Alpha Associates*, 344 NLRB 782 (2005), the Board held that Section 10(b) of the Act precludes an employer from defending against a refusal-to-bargain allegation on the basis that its initial recognition of the union was invalid or unlawful. See *Route 22 Honda*, 337 NLRB 84, 85 (2001); *Morse Shoe*, 227

NLRB 391, 394 (1976), supplemented by 231 NLRB 13 (1977), *enfd.* 591 F.2d 542 (9th Cir. 1979); *North Bros. Ford*, 220 NLRB 1021, 1021 (1975). The Board has further held whether or not the recognized union had proffered evidence demonstrating its majority status at the time of recognition is irrelevant. The Board in *Oklahoma Installation Co.*, 325 NLRB 741, 742 (1998), stated that the rule concerning nonconstruction industries is plain:

If an employer voluntarily recognizes a union based solely on that union’s assertion of majority status, without verification, an employer is not free to repudiate the contractual relationship that it has with the union outside the 10(b) period, i.e., beyond the 6 months after initial recognition, on the ground the union did not represent a majority when the employer recognized the union. *enfd.* denied on other grounds 219 F.3d 1160 (10th Cir. 2000). see *Moisi & Son Trucking*, 197 NLRB 198 (1972).

Accordingly, as the Respondent’s voluntary recognition of the Union in this case on May 24, 2008, when Respondent became signatory to the short form agreement binding them to the recognition clause of the GES Agreement,²³ more than 6 months prior to the Union’s filing of the first unfair labor practice charge alleging the Respondent’s refusal to bargain, Section 10(b) bars the Respondent’s challenge to its earlier recognition of the Union based on the absence of proof of the Union’s majority status.

I find that by its actions Respondent has adopted the May 24, 2008 agreement signed by Rodriguez.

3. Did the Union repudiate its agreement with Respondent?

Finally, Respondent asserts that the Union repudiated its collective-bargaining agreement with Respondent. The evidence does not support this contention. At the February 5, 2009 meeting between Cunningham and Danny Gai, Respondent’s New Orleans, Louisiana City Manager and Union Business Agent Lo Presti and Union Secretary-Treasurer John Phillipenas, I have previously found that LoPresti’s comment that Respondent could sign with the Carpenters was conditional, predicated by the assumption that Respondent did not have a contract with the Union. Such a conditional disclaimer is not effective to repudiate interest in the bargaining unit or the contract with Respondent. *Longshoremen Local 1294 ILA (Cibro Petroleum Products)*, 257 NLRB 403, 406 (1981).

When Respondent signed the collective-bargaining agreement with the Carpenters on February 6, 2009, it repudiated its agreement with the Union and thereby violated Section 8(a)(1) and (5) and 8(d) of the Act.

CONCLUSION OF LAW

Respondent has engaged in conduct in violation of Section 8(a)(1) and (5) and 8(d) of the Act by failing and refusing to recognize the Union and by unilaterally refusing to honor the terms of the collective-bargaining agreement Respondent entered into with the Union. The above are unfair labor practices

²³ GC Exh. 16, at p. 4.

affecting commerce within the meaning of Sections 2(6), (7), and (8) of the Act.

REMEDY

In determining make-whole relief herein, counsel for the General Counsel urges that the current practice of awarding only simple interest on backpay and other monetary awards be replaced with the practice of compounding interest. Counsel for the General Counsel requests that I recommend that the Board adopt a policy that requires interest to be compounded on a quarterly basis. Under its current policy, the Board calculates interest on monetary remedies using the short-term Federal rate plus three percent. See *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

In that it is the Board's policy at this time to award simple interest on backpay and other monetary awards, I have no authority to rule on General Counsel's request for an award of compound interest and defer this issue to the Board.

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the purposes of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.²⁴

ORDER

The Respondent, 300 Exhibit Services and Events, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain in good faith with Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 631, affiliated with the International Brotherhood of Teamsters (the Union), as the exclusive collective-bargaining representative in the following appropriate unit:

All employees of the Respondent who perform erection, touch-up painting, dismantling and repair of all exhibits including Decorating, Freight, I&D, Specialty Crafts, and lead-man/foreman, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

(b) Failing and refusing to honor the terms of the collective-bargaining agreement we have entered into with the Union.

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

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

(a) Recognize and bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for employees in the above described unit.

(b) Adhere to our collective-bargaining agreement with the Union during its term and any renewals of it, and make whole employees for any losses of wages and benefits, including those

²⁴ 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.

who would have been referred by the Union had Respondent requested employees through the dispatch procedure as provided for in the collective-bargaining agreement with the Union.

(c) Within 14 days after service by the Region, post at its facilities in Las Vegas, Nevada, copies of the attached notice marked "Appendix."²⁵ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Company's authorized representative, shall be posted by the Company immediately on receipt 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 Company 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 Company have gone out of business, closed a facility involved in these proceedings, or has laid off employees, Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since February 6, 2009.

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

Dated, Washington, D.C., November 27, 2009.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

WE WILL NOT do anything that interferes with these rights. More particularly:

WE WILL NOT refuse to recognize or bargain collectively with Teamsters, Chauffeurs, Warehousemen and Helpers, Local Union No. 631, affiliated with the International Brotherhood of Teamsters (the Union) as the representative of the appropriate unit of employees by repudiating and refusing to honor our collective-bargaining agreement with the Union. The appropriate bargaining unit (the Unit) is:

²⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted Pursuant to an 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."

All employees of the 300 Exhibit Service & Events, Inc. who perform erection, touch-up painting, dismantling and repair of all exhibits including Decorating, Freight, I&D, Specialty Crafts, and leadman/foreman, excluding all other employees, office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to honor the terms of the collective-bargaining agreement we have entered into with the Union.

WE WILL NOT in any similar way frustrate your exercise of the rights stated above.

WE WILL adhere to our collective-bargaining agreement with the Union during its term and any renewals of it, and WE WILL

make whole our employees for any losses of wages and benefits, including those who would have been referred to us by the Union had we requested employees through the dispatch procedure as provided for in our collective-bargaining agreement with the Union.

WE WILL, on request, bargain with the Union, as the exclusive collective-bargaining representative of the employees in the Unit, concerning wages, hours, and terms and conditions of employment of the Unit.

300 EXHIBIT SERVICE & EVENTS, INC.