UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, DC

HARGROVE ELECTRIC CO., INC.
Respondent
and **Case No. 16-CA-027812**

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 20,
Charging Party

ALMAN CONSTRUCTION SERVICES, LP
Respondent
and **Case No. 16-CA-027813**

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 20,
Charging Party

BOGGS ELECTRIC CO., INC.
Respondent
and **Case No. 16-CA-027814**

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 20,
Charging Party

COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENTS' CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE AND ARGUMENTS IN SUPPORT THEREOF

The Honorable Administrative Law Judge Margaret Brakebusch heard this case on October 11, 2011 and issued her recommended Decision and Order on January 13, 2012. The recommended Decision and Order requires each Respondent to post a Notice and to take certain "make whole" affirmative action to the extent urged by Counsel for the Acting General Counsel.

Specifically, the judge's recommended Order requires Respondent Hargrove Electric Co., Inc., herein Respondent Hargrove, to make employees whole for any losses that may have occurred because of Respondent Hargrove's unilateral reduction in wage rates for newly hired employees and for its failure to continue recognizing the grievance procedure.

Likewise, the judge's recommended Order mandates that Respondent Alman Construction Services, LP, herein Respondent Alman, make employees whole for any losses they may have suffered because of Respondent Alman's unilateral reduction in wage rates for new employees and its failure to make vacation deductions. In addition, the judge's recommended Order requires Respondent Alman to make required contributions to both the National Electrical Benefit Fund and to the Annuity Fund. Furthermore, the judge also ordered Respondent Alman to reimburse employees for any expenses resulting from their failure to make the required contributions.

The judge's recommended Order also requires Respondent Boggs Electric Co., Inc., herein Respondent Boggs, to make employees whole for any losses suffered as a result of its unilateral implementation of a new wage scale for new employees, its failure to make vacation deductions for employees, and its failure to recognize the parties' grievance procedure.

Counsel for the Acting General Counsel submits that the judge's recommended Order be adopted to the extent referenced above[1] and, pursuant to Section 102.46(d)(1) of the Rules and Regulations of the National Labor Relations Board (herein Board), hereby

[1] The judge failed to find Respondents' cessation of dues deductions to be a violation of the Act. Counsel for the Acting General Counsel will address this issue in a Reply Brief to Respondents' Answering Brief to the Charging Party IBEW Local Union 20's Exceptions to the Decision of the Administrative Law Judge.

files its Answering Brief to Respondents' Cross-Exceptions to the Decision of the Administrative Law Judge and Arguments in Support thereof.

Respondents filed 26 exceptions to the judge's finding of facts, conclusions of law and recommended remedy and submitted three issues for the Board's consideration. Counsel for the Acting General Counsel submits that these exceptions should be rejected as the judge's findings of facts and conclusions of law were correct on those issues and should be affirmed. All of Respondents' cross-exceptions regarding the unlawful unilateral changes lack merit and must be denied. Accordingly, the Board should adopt the judge's Decision and Recommended Order to the extent requested herein.

1. FACTS

A. Respondents Announce Changes During the Term of an Section 8(f) Agreement

The three Respondents enjoyed a lengthy 8(f) relationship with the International Brotherhood of Electrical Workers, Local Union 20 (Union) for at least 25 years. (JD slip op. at 3; Tr. 45) In January 2008, the Respondents signed Letters of Assent – B, by which they agreed to comply with all provisions of the Inside Agreement including addenda between the North Texas Chapter NECA and the Union. (JD slip op. at 3; GC Exhs. 15, 16 and 17)

By separate letters dated February 6, 2008, the Respondents notified the Union they would abide by the terms of the current Inside Agreement until its expiration on November 30, 2010, but announced their intention not to be bound by any subsequent approved agreements or addenda between North Texas Chapter, NECA and the Union. (JD slip op. at 3; GC Exhs. 19, 20 and 21) In addition, each Respondent announced that it would implement certain new terms and conditions of employment and explicitly stated

that it "will not honor any terms from the expired Section 8(f) contract." (JD slip op. at 3; GC Exhs. 19, 20 and 21)

Respondent Hargrove's letter provided for reductions in journeyman pay, holiday pay, health and welfare contributions and annuity contributions. (JD slip op. at 3; Tr. 67-71; GC Exh. 19)

Respondent Alman's February 6, 2008 letter announced reductions in the pay for journeymen, apprentices, construction wiremen and construction electricians, a reduction in the holiday rate of pay, a reduction in annuity fund payments for journeymen and apprentices, and a reduction in health and welfare contributions for journeymen, apprentices and construction electricians. (JD slip op. at 3; Tr. 71-73; GC Exh. 20).

The February 6, 2008 letter from Respondent Boggs also announced reduced journeyman pay, holiday pay, annuity fund contributions for journeymen and apprentices, health and welfare contributions for journeymen, apprentices and construction electricians. (JD slip op. at 3; Tr. 73-74; GC Exh. 21).

The Union was not concerned about the announced implementation because Respondents' employees notified the Union's Business Manager, A.C. McAfee, that each Respondent informed them the letter was just their initial proposal. (JD slip op. at 4; Tr. 65-66)

B. The Union Obtains Section 9(a) Status

Before expiration of the Inside Agreement, the Union was certified as the Section 9(a) representative of each Respondent's electrical employees. (JD slip op. at 4; Tr. 52-53; GC Exhs. 22, 23 and 24).

C. Negotiations After the Section 9(a) Certifications

After the Section 9(a) certifications, Respondents Alman and Boggs on August 9, 2010, notified the Union that they were revoking their Letters of Assent – B and served notice to terminate the present contract between the Local Union and the Respondents. (JD slip op. at 4; GC Exhs. 25 and 39). Respondent Hargrove sent the identical letter to the Union on August 13, 2010. (JD slip op. at 4; GC Exh. 26). The Union sent a letter to each Respondent asking to open negotiations for a new collective bargaining agreement and confirmed the termination of the Inside Agreement on November 30, 2010. (JD slip op. at 4; GC Exhs. 27, 28 and 29).

On August 27, 2010, each Respondent, through attorney Michael Osterle, notified McAfee, in writing, that the terms and conditions listed in their February 6, 2008 letters constituted each Respondent's initial proposal and that each Respondent reserved the right to withdraw, alter or amend any proposal made during the course of negotiations. (JD slip op. at 5; GC Exhs. 30, 31 and 32).

At the initial negotiation session with the Union, each Respondent presented a written proposal, which contained more proposals than those listed in each Respondent's February 6, 2008 letter and included such items as the no-strike clause, the grievance procedure, a management rights clause, a favored nations clause, injury time lost, a comprehensive apprenticeship program, a show-up time clause, and clauses pertaining to tools to be provided by each Respondent and by employees, travel time and travel expenses clauses. In addition, each Respondent's offer also included a grievance/arbitration procedure, contributions to the union's health and benefit trust fund

and contributions to the annuity plan. (JD slip op. at 5; Tr. 37, 40, 76-77; GC Exhs. 5, 9 and 14).

On November 30, 2010, each Respondent notified McAfee, in writing, that it was serving its ten-day notice to terminate the (Inside) Agreement and that the Agreement would no longer be in effect after December 10, 2010. (JD slip op. at 5; GC Exhs. 33, 35 and 37).

D. Respondents Implement Some, but not all, of the Terms Contained in the February 6, 2008 Letters

On or about December 11, 2010, all three Respondents terminated the Inside Agreement and changed employee terms and conditions of employment. Respondents admit they implemented their changes without bargaining to impasse. (JD slip op. at 5-6; Tr. 35-37)

Respondent Alman changed terms and conditions of employment including: (1) a reduced wage rate for new employees; (2) cessation of payments to the National Electrical Benefit Fund; (3) reductions in the amount paid to the annuity fund; (4) cessation of dues deduction for employees; and (5) cessation of vacation deductions. (JD slip op. at 5; Tr. 36)

Respondent Hargrove implemented a reduced wage rate for newly hired employees, ceased dues deduction for employees, and ceased recognizing the parties' grievance procedure. (JD slip op. at 5-6; Tr. 35-36)

Respondent Boggs implemented a reduced wage rate for new employees, ceased making vacation deductions, ceased dues deductions and ceased recognizing the grievance procedure. (JD slip op at 5; Tr. 36-37, 77)

On December 15, 2010, the Union objected to the announced changes and notified each Respondent that "Local 20's electrician members have advised us of your stated intent to unilaterally implement lesser terms and conditions of employment for electricians, without bargaining in good faith to impasse concerning those changed terms and conditions" and would treat such implementation as an "unfair labor practice and respond accordingly." (JD slip op. at 6; GC Exhs. 34, 36 and 38).

2. ARGUMENT

The Judge's decision concerning the unlawful changes should be affirmed because the Judge correctly applied Board law in finding that Respondent violated Section 8(a)(5) and (1) of the Act by making certain unilateral changes without bargaining to impasse after the Union attained Section 9(a) status.

A. The Judge Correctly Determined That Respondents Were No Longer Privileged to Make Unilateral Changes After the Union was Certified as the Section 9(a) Representative

It is well settled that an employer who enjoys a Section 8(f) relationship with a union must maintain the terms of an 8(f) agreement during its term and may repudiate the terms of an 8(f) agreement upon its expiration. *John Deklewa and Sons,* 282 NLRB 1375, 1385 (1987). However, if a union enjoys Section 9(a) status, an employer may not repudiate the terms of a collective bargaining agreement upon its expiration, but must bargain to impasse before any implementation. *Litton Financial Printing Div. v. NLRB,* 501 U.S. 190, 206-207 (1991); *Comau, Inc.,* 356 NLRB No. 21, slip op. at 8 (2010), citing, inter alia, *Bottom Line Enterprises,* 302 NLRB 373 (1991), enfd. sub nom. *Master Window Cleaning, Inc. v. NLRB,* 15 F.3d 1087 (9th Cir. 1994). Indeed, as the judge noted, the Board has long held that an employer is prohibited from implementing

unilateral changes in terms and conditions of employment without first bargaining in good faith to impasse with a certified representative of its bargaining unit employees. *NLRB v. Katz,* 369 U.S. 736 (1962). As the judge, citing the Supreme Court noted, "it is difficult to bargain if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of those negotiations." *Litton Financial* supra at 198.

When a union attains Section 9(a) status during the term of a Section 8(f) agreement, the relationship between the union and employer becomes a Section 9(a) relationship. Accordingly, the employer is bound by the post-expiration bargaining obligations of Section 9(a) and is no longer privileged to change terms and conditions of employment without bargaining to impasse. *VFL Technology Corp.,* 329 NLRB 458, 459 (1999). In the instant case, the Union became the 9(a) representative during the term of the Section 8(f) agreement and well before Respondents implemented any changes. The judge correctly applied *VFL Technology* and determined that, upon the Union's certification as 9(a) representative, the 8(f) agreement converted to a 9(a) agreement and was vested with the full effect of a 9(a) collective bargaining agreement. Accordingly, at that point, Respondents were no longer privileged to change employees' terms and conditions of employment without bargaining in good faith to impasse. (JD slip op. at 9, citing *VFL Technology,* supra at 459.)

Moreover, it is well settled that, once the Union became the Section 9(a) representative, Respondents needed to maintain the status quo until reaching impasse unless there was a showing of exigent circumstances that would require prompt action. *RBE Enterprise of S.D., Inc.,* 320 NLRB 80 (1995); and *Bottom Line* supra. Respondents

failed to make any such showing. Therefore, they were not privileged to make those changes.

B. The Judge Correctly Determined That *Starcraft Aerospace Inc., SGS Control Services* and *Consolidated Printers* Are Inapplicable Because Respondents' Decisions to Implement Were Not Firm Decisions

The judge correctly determined that the cases upon which Respondents' rely, *Starcraft Aerospace, Inc.*, 346 NLRB 1228 (2006); *SGS Control Services,* 334 NLRB 858 (2001); and *Consolidated Printers*, 305 NLRB 1061 (1992) are inapplicable because the changes Respondents announced in their February 2008 correspondence did not reflect the "same specificity of intent" as those announced in *Starcraft, Control Services and Consolidated Printers.* (JD slip op. at 9). The judge properly observed that Respondents, through Attorney Michael Osterle, notified the Union on August 27, 2010 that the terms and conditions established by the February 6, 2008 letters served as Respondents' initial bargaining proposal. Therefore, the judge correctly determined that the changes identified in the February 6, 2008 letter were not "a firm decision" but were simply proposed changes that Respondents were incorporating in the bargaining process. Because of this fact, the judge reached the unmistakable and correct conclusion that the terms outlined by Respondents in February 2008 were not firm decisions and *Starcraft, Control Services* and *Consolidated Printers*, in which the employers had made firm decisions before the unions obtained Section 9(a) status did not apply. (JD slip op. at 9).

Respondents' argument that their implementation in December 2010 was consistent with their definite plans announced in February 2008 is further undercut because the Respondents notified the Union of their planned changes in February 2008, then in the first negotiation session, each Respondent submitted a much more

comprehensive proposal than what was contained in its February 2008 letter. Finally, in December 2010, each Respondent implemented only part of the changes it announced in February 2008. Thus, the changes announced by each Respondent in February 2008 were not "clear decisions." See *Tocco, Inc.*, 323 NLRB 480, fn. 2 (1997) (distinguishing *Consolidated Printers,* 305 NLRB 1061 (1992), where the evidence failed to show that the employer made a "clear decision" to discontinue an employee benefit before the union's certification.)

Moreover, even if Respondents had firmly decided to make the changes announced in 2008, they were obligated to implement all of their announced changes unless they reached agreement with the Union. It is well settled that piecemeal implementation of announced changes violates the Act. *Bottom Line Enterprises*, supra. Respondents rely upon *Plainville Ready-Mix Concrete Co.*, 309 NLRB, 578, 582, n. 3 (1992); and *Bi-Rite Foods, Inc.*, 147 NLRB 59 (1964) to assert that they were not required to implement all announced changes. However, Respondents are well aware that these cases are distinguishable because as they acknowledge in their Answering Brief, these cases involve post-impasse implementation and Respondents admit there is no impasse in the instant case.

In addition, unlike the instant case where the Union held Section 8(f) status prior to attaining Section 9(a) status, the unions involved in *Starcraft, SGS Control and Consolidated Printers, Inc.,* were not 8(f) representatives before obtaining 9(a) status. Therefore, in *Starcraft, SGS Control* and *Consolidated Printers,* there was no conversion of the union's status from Section 8(f) representative to a Section 9(a) representative and no corresponding obligation to bargain to impasse arose.

C. Respondents' Cross-Exceptions Lack Merit And Must Be Rejected

In its cross-exceptions, Respondents urge rejection of the judge's decision about the unilateral changes outlined above and insist that Respondents retained the right to implement the changes announced in February 2008 because these changes were decided upon and announced before the Union attained Section 9(a) representative status. As referenced above, the judge correctly applied the law and rejected Respondents' contentions.

Respondents seek to avoid the finding of liability by arguing that under *Deklewa* they were privileged to make the unilateral changes they announced in February 2008. Had the relationship remained governed by Section 8(f), Respondents' argument would have merit. However, this argument ignores the intervening fact that a Section 9(a) conversion occurred that changed the landscape and extinguished Respondents' privilege to make these changes.

Respondents cites *Starcraft* to argue that, while Board law allows an employer with no union relationship to carry out plans announced before a union obtains 9(a) status, that, under the judge's reasoning, an employer who has a 8(f) relationship would have fewer rights than an employer with no previous relationship with a union. Contrary to Respondents' assertion, Respondents' argument conveniently ignores the intervening event that the Union obtained 9(a) status and therefore, their 8(f) Inside Agreement converted to a 9(a) agreement and Respondents were no longer privileged to make any changes without bargaining in good faith to impasse.

Respondents also argue that the August 27, 2010 letters, which stated that the changes announced in February 2008 would constitute Respondents' initial bargaining

proposals, did not state or imply that Respondents would not implement the previously announced conditions upon contract expiration somehow shows that the decisions announced in February 2008 were firm decisions. Respondents' argument misses the mark because the August 2010 letters, by stating that the February 2008 announced terms and conditions of employment were initial contract proposals, clearly demonstrates that the Respondents' announced changes were not unyielding and shows Respondents' intent to bargain over them. Respondents' expressed willingness to bargain over these changes cuts against any argument that these terms were firm decisions.

Respondents, in a footnote, also argue that the Union waived its right to bargain after it knew of the changes announced in February 2008. By advancing this argument, Respondents seek to have it both ways. Respondents argue that the February 2008 announcement, notwithstanding the change in the Union's status from an 8(f) to a 9(a) representative, somehow privileged them to implement these changes after the November 2010 expiration of the 8(f) agreement, yet Respondents fault the Union for not demanding bargaining once it obtained 9(a) status, over changes announced but not yet made. Furthermore, Respondents ignore the record evidence that McAfee heard from Respondents' electrical employees that the announced changes were "just initial proposals for bargaining, and therefore, was not concerned about the letters." (JD slip op. at 4). In addition, it is well settled that any waiver must be clear and unmistakable and the facts herein do not establish such a clear and unmistakable waiver. *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693 (1983). As the parties asserting waiver, Respondents bear the burden of establishing the existence of a waiver. *Pertec Computer,* 284 NLRB 810 (1984). Although Respondents provided some evidence that the Union filed a

grievance after the changes were announced in February 2008, which was denied, McAfee testified that he did not know that such a grievance was filed. (Tr. at 83-84) Moreover, McAfee objected to the announced changes four days after their implementation. (JD slip op. at 5-6; Tr. 59; GC Exh. 34) These facts do not establish a clear and unmistakable waiver because the clear and unmistakable standard "requires bargaining partners to unequivocally and specifically express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007).

Respondent also urges reversal of the judge's failure to find the dues deduction authorizations were invalid. Although Respondents point to language about vacation deduction authorizations and argue that this language invalidates the authorization cards, this argument conveniently ignores the fact that the Inside Agreement allows an employee to opt out of the vacation authorization. Respondents also urge that because the Union's dues authorization card changed in 2011, the previously used card was invalid.

Despite Respondents' assertions, in any event, the evidence does not establish that the cards were invalid and the language relied upon by Respondent, without any testimonial support, is insufficient to establish that any employee signed a form involuntarily. Indeed, at hearing, McAfee's testimony that none of the Respondents ever complained or expressed concern about the validity of any of the authorization cards in its possession was uncontroverted. (Tr. 80-81) Notwithstanding these facts, Respondents argue that to be lawful authorizations must be voluntary and cite *Local 74, SEIU*

(Parkside Lodge of Connecticut, Inc.), 323 NLRB 289 (1997) and *Electrical Workers Local 6601 (Westinghouse Corporation)*, 180 NLRB 1062 (1970) as support. Both cases are distinguishable as they arise from situations where union security clauses are at issue. Nonetheless, while stating that authorizations must be voluntary, Respondents then extrapolate to a conclusion that has no basis in the record evidence: "None of the forms utilized for dues deduction authorization by the Union as of December 2010 were voluntary." In addition, each Respondent resumed making dues deductions before the hearing and, therefore, it strains logic to believe that Respondents would do so if they believed the dues checkoff authorizations were invalid. (Tr. 19 and 81) Indeed, such conduct could subject each Respondent to liability for deducting dues in the absence of a valid dues authorization. Therefore, the judge's failure make a finding that the dues authorizations were invalid should not be reversed.

D. The Judge's Recommended Order Concerning the Unlawful Unilateral Changes Should Be Affirmed

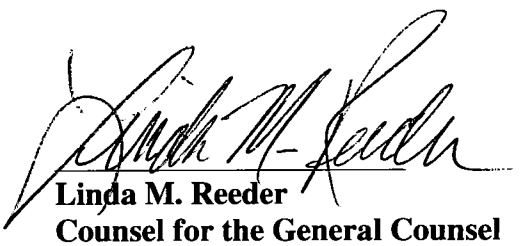
Contrary to Respondents' assertions, the judge correctly determined that they violated Section 8(a)(5) and (1) Act when they made unilateral changes without bargaining in good faith to impasse.

3. CONCLUSION

For the foregoing reasons, Counsel for the Acting General Counsel respectfully requests that the Board affirm the judge's findings of fact and conclusions of law, to the extent urged herein, and adopt the judge's recommended Order as referenced above. Counsel for the Acting General Counsel also requests that the Board's Order include any such additional relief deemed appropriate.

DATED at Fort Worth, Texas, this 9th day of March 2012.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Counsel For The Acting General Counsel's Answering Brief To Respondents' Cross-Exceptions To The Decision Of The Administrative Law Judge And Arguments In Support Thereof has been served this 9th day of March 2012, by electronic mail on:

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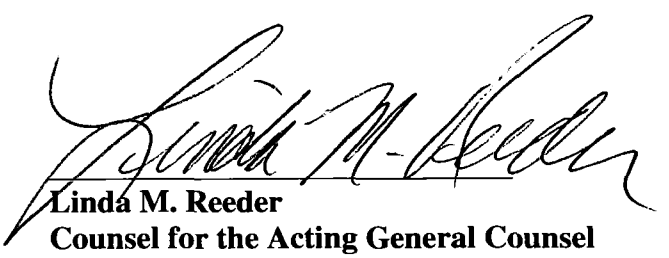

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