

Respondent's stated intent to discontinue applying the CBA to its core employees is *irrelevant*. All that is required for repudiation is for the Union to be provided clear notice of Respondent's intent. *Vallow Floor Coverings, Inc., 335 NLRB 20 (2001)*. Such notice of repudiation is *undisputedly* established by the testimony of Respondent's president (Russell Ritchie) that he told the Union through its representatives that he was repudiating the CBA as to his core employees. Irby and Cacioppo even testified that they told Richie "there is no way to let him out of the contract," thereby corroborating the fact that that they had been told by Richie that Respondent was repudiating the CBA as to its core employees. (Tr. 386, lines 18-25; Tr. 387, lines 1-7, ALJ 25, lines 10-12; ALJ 7, lines 28-30).

Thus, regardless of whether Irby and Cacioppo implicitly agreed (as Respondent claims) or disagreed (as the Union claims), what is clear and undisputed by both parties is that the Union was given notice that Respondent was repudiating the parties' CBA as to Respondent's core employees. Once on notice of Respondent's repudiation, it was incumbent upon the Union timely to challenge Respondent's action within the limitations of Section 10(b) of the Act, which the Union failed to do.

Second, Counsel for the Acting General Counsel *unbelievably* argue that Respondent did not introduce testimony or documentary evidence that the nine core employees at the time of the May 5, 2009 repudiation meeting were employed, or if they were employed, that they performed bargaining unit work, after the May 5, 2009 repudiation meeting with the Union, and that this somehow precluded a finding of repudiation of the CBA as to Respondent's core employees (Answering Brief, p. 14, 15 and 16). Counsel for the Acting General Counsel argue that the Union could not have been on notice since the Union did not know whether any of Respondent's core employees were performing bargaining unit work subsequent to the May 5, 2009

repudiation. However, Counsel for the Acting General Counsel do not address whether the Acting General Counsel had any obligation to present evidence that core employees were performing bargaining unit work after May 5, 2009. Absent such evidence, the Acting General Counsel could not sustain its burden of proving a violation 8(a)(5) as there could not be an “unilateral change” in violation of Section 8 (a)(5) for failing to apply a CBA for individuals who were not shown to have been performing bargaining unit work during the period in question. Accordingly, Respondent submits that based upon Counsel for the Acting General Counsel’s admission and the failure of the Acting General Counsel to point to any evidence that core employees performed bargaining unit work after May 5, 2009, the Section 8(a)(5) allegations contained in Paragraph 11 of the Complaint should additionally be dismissed.

II. Modification of *Central Illinois*¹

Respondent agrees with, and did not except to, the ALJ’s finding that the agreement between the parties was ambiguous, and that considering relevant extrinsic evidence regarding the past relationship of the parties, the circumstances surrounding the entering into of the agreement, and the lack of majority status on the part of the Union, the record evidence established that an 8(f) relationship was intended by the parties. Respondent also agrees with the ALJ’s recommendation that *Central Illinois* be modified or overruled to the extent that it has been interpreted to permit contract language alone to establish the nature of an intended construction industry relationship - 8(f) or 9(a) - without consideration for the circumstances in which the relationship was formed.

Respondent, however, has excepted to the proposed new evidentiary paradigm proposed by the Acting General Counsel and recommended by the ALJ. The recommended paradigm deals with burden shifting of only one factual aspect of potentially relevant factors – evidence of

¹ *Stanton Fuel and Material (Central Illinois)*, 335 NLRB 717 (2001).

the union's majority status at the time of signing. While evidence of actual majority status is a critical element, it is not the only extrinsic factor that would be probative of the parties' intent. As in the instant case, factors such as the parties' bargaining history, the circumstances leading to the signing, and the statements and actions of the parties both before and after the signing would all be relevant to the determination of 8(f) or 9(a) intent. Accordingly, Respondent submits that a traditional "totality of the evidence" standard be adopted, in which the burden of proof remains with the party advocating a Section 9(a) relationship, in place of the highly criticized *Central Illinois* standard.²

Respectfully submitted, this 21st day of March, 2012.

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² See *Nova Plumbing, Inc.*, 336 NLRB 633 (2001), *enf. den.* 330 F.3d 531(D.C. Cir. 2003).

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Respondent's Reply to Counsel for the Acting General Counsel's Answering Brief To Respondent's Cross-Exceptions To the Decision Of the Administrative Law Judge has been served via e-mail on the following this 21st day of March, 2012:

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