UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

ALCOA POWER AND PROPULSION D/B/A
HOWMET CASTINGS & SERVICES, INC.

and Case 05-CA-092579

UNITED STEEL, PAPER AND FORESTRY,
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE WORKERS
INTERNATIONAL UNION, AFL-CIO, CLC

HOWMET CASTINGS & SERVICES, INC.,

and Case 05-RC-089312

UNITED STEELWORKERS OF AMERICA,
DISTRICT 8, AFL-CIO, CLC

COUNSEL FOR THE ACTING GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Alcoa Power and Propulsion d/b/a Howmet Castings & Services, Inc., Respondent, filed a Motion for Summary Judgment, on April 16, to dismiss the allegations in paragraph 5 of the Complaint and Notice of Hearing and Objection numbers 4 and 6 of the Order Consolidating Cases, Report on Objections and Notice of Hearing for the above-captioned Cases.[1] Paragraph 5 of the Complaint and Notice of Hearing alleges Respondent violated Section 8(a)(1) of the Act

[1] Respondent previously filed a Motion for Summary Judgment on March 12, 2013, requesting the dismissal of objection numbers 4, 5, 8, and 9 because the objections are coextensive with allegations in the unfair labor practice charge in Case 05-CA-092579 that were dismissed by the Region and not alleged as violations of Section 8 of the Act in the Order Consolidating Cases, Report on Objections and Notice of Hearing. Counsel for the Regional Director filed an Opposition to Respondent's Motion for Summary Judgment arguing that, pursuant to *ADIA Personnel Services*, 322 NLRB 994 fn. 2 (1997), the fact that an unfair labor practice charge allegation has been dismissed does not require the pro forma overruling of an objection based on the same conduct. The Motion for Summary Judgment is pending before the Board.

on or about July 19, 2012, and from on or about October 8, 2012, to October 20, 2012 by preventing employees from a unionized Alcoa facility in Davenport, Iowa, from having access to the outdoor, non-work areas of Respondent's facility in Hampton, Virginia, the facility at issue in these Cases, to engage in organizing activities, including handing out flyers to Respondent's employees. As Respondent admits on page 9 of its Memorandum in Support of its Motion for Summary Judgment, Alcoa, Inc. is the parent corporation of both the Davenport, Iowa facility and the Hampton, Virginia facility. Objection 4 states that during the critical period in the weeks leading up to the election, Respondent interfered with employees' Section 7 rights by telling employees they could not handbill anywhere on the Employer's property when they were not on shift. Objection 6 states that on or about October 8, 2012, Respondent interfered with employees' Section 7 rights by preventing employees from other facilities from having access to the outdoor areas of the Hampton, Virginia facility. A hearing before an Administrative Law Judge in these Cases is scheduled to begin on May 14, 2013, in Hampton, Virginia.

Respondent argues that the allegation and objections should be dismissed as a matter of law because the individuals who sought access to Respondent's Hampton, Virginia facility were not employees of Respondent and because Respondent is neither a single nor joint employer with the Davenport, Iowa facility that employs the individuals who sought access to Respondent's Hampton, Virginia facility.

Counsel for the Acting General Counsel opposes Respondent's Motion for Summary Judgment because there is a genuine issue of material fact. First, the issue raised by Respondent in its motion—whether Respondent is or is not a single or joint employer of the off-duty individuals who sought access to the outdoor non-work areas of its Hampton, Virginia facility during an organizing campaign—involves an analysis of specific facts that are best presented and

argued at a hearing before an administrative law judge. The four factors for determining whether the two entities are separate and distinct employers—common ownership; interrelation of operations; common management; and centralized control of labor relations—clearly involve a detailed factual analysis. Respondent primarily relies on the affidavit of Mr. Jack Bodner in support of its argument that the Davenport, Iowa facility and the Hampton, Virginia facility are distinct entities with separate employers. It presents no primary source materials, such as annual reports, financial statements, or documents showing the management structure. This is the kind of factual evidence that is best presented and developed at a hearing before an administrative law judge.

Second, determining the Section 7 access rights of offsite employees for organizational purposes also raises a genuine issue of material fact. The Board has long held that under the rationale of *Tri-County Medical Center*, 222 NLRB 1089, 1089 (1976), employers may not promulgate or enforce rules denying their off-duty employees access to parking lots, gates, and other outside working areas, except where justified by business reasons. In *Hillhaven Highland House*[2] and *ITT Industries*,[3] the Board determined the applicability of *Tri-County* to offsite employees. In those cases, the Board determined that, although employers have a heightened property interest with regard to offsite as opposed to onsite off-duty employees, the Section 7 rights of offsite employees is a primary, non-derivative right and will generally outweigh those property interests, except where the exclusion of offsite employees is justified by business reasons. *Hillhaven Highland House*, 336 NLRB at 648. Thus, the analysis involves balancing

[2] 336 NLRB 646, 648 (2001), *enforced sub. Nom, First Health Care Corp. v. NLRB*, 344 F.3d 523 (6th Cir. 2003).

[3] 341 NLRB 937 (2004), *enforced*, 413 F.3d 64 (D.C. Cir. 2005),

the Section 7 rights of offsite employees with the Employer's private property concerns. Respondent's motion presents no facts concerning this analysis.

Moreover, as recognized in *Hillhaven Highland House*, the Section 7 rights of the offsite employees includes concerted activity where employees "seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels *outside the immediate employee-employer relationship*." 336 NLRB at 648, quoting *Eastex, Inc.*, 437 U.S. 556, 565 (1978). The Board in *Hillhaven Highland House* went on to state the following:

> The offsite employee's personal stake in organizing his counterparts at a different employer facility is clearest where he is, or will be, part of a multifacility bargaining unit that includes onsite employees. But a similar self-interest arises even where the unorganized employees may be in a different bargaining unit. Precisely because they work for the same employer, even at different workplaces, employees will often have common interests and concerns related to wages, benefits, and other workplace issues that may be addressed by concerted action.

As evidenced by Exhibit G of Respondent's Motion, the employees of the Davenport, Iowa facility that sought access to the Hampton, Virginia facility are covered by a collective-bargaining agreement between Alcoa, Inc., the parent corporation, and the United Steelworkers. Indeed, a total of four facilities are part of that agreement: Davenport, Iowa; Lafayette, Indiana; Massena, New York, and Warrick, Indiana. This raises a genuine issue of fact concerning whether the Davenport, Iowa employees had a reasonable expectation that they would be part of a multifacility bargaining unit that included the employees at the Hampton, Virginia facility. Even if they would not be part of a multifacility bargaining unit, an issue of fact exists concerning whether they shared common interests and concerns relating to wages, benefits, and other workplace issues.

For these reasons, Counsel for the Acting General Counsel respectfully requests the Board to deny Respondent's Motion for Summary Judgment.

Respectfully submitted on April 22, 2013,

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Certificate of Service

I hereby certify that Counsel for the Acting General Counsel's Opposition to Respondent's Motion for Summary Judgment was filed with the Board electronically on April 22, 2013, and, on that same day, a copy of the document was served on the following individuals by electronic mail at the address listed below:

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