

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

**UNITED UNION OF ROOFERS, WATERPROOFERS,
AND ALLIED WORKERS, LOCAL 162**

and

**Case 28-CB-080496
28-CB-085690**

A.W. FARRELL & SON, INC.

A.W. FARRELL & SON, INC.

and

Case 28-CA-085434

**UNITED UNION OF ROOFERS, WATERPROOFERS,
AND ALLIED WORKERS, LOCAL 162**

and

**SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, AFL-CIO, LOCAL UNION NO. 88
Party in Interest**

**BRIEF IN SUPPORT OF CHARGING PARTY A.W. FARRELL & SON, INC'S
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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I. INTRODUCTION.

This case combines two unfair labor practices charges brought by A.W. Farrell and Son, Inc. (“AWF” or “Company” or “Employer”) against the United Union of Roofers, Waterproofers, and Allied Workers Local 162 (“Roofers Local 162” or “Local 162) and one unfair labor practice charge brought by Roofers Local 162 against AWF. AWF is filing exceptions relating to 28-CB-080496/28-CB-085690, which is AWF’s charge that Local 162 failed and refused to bargain in good faith by failing and refusing to meet and bargain with AWF, cancelling bargaining sessions, and failing and refusing to schedule additional bargaining after one face-to-face meeting. The Administrative Law Judge’s decision found that Roofers Local 162 had engaged in conduct that:

would have generally violated the Act, when it unreasonably delayed scheduling bargaining sessions with Farrell, cancelled scheduled meetings, insisted that Farrell sign the Roofers Local 162:10-12 CBA before it might bargain, verbally abused Farrell’s representative at a bargaining session, and failed to arrange a follow-up session

but then erroneously concluded that AWF’s actions excused the misconduct and violations by Roofers Local 162. ALJD 14:18-23.¹

The ALJ’s decision relating to the Section 8(b)(3) allegations of refusal to bargain (ALJD 13:30-14:32) should not be adopted because it is based on faulty legal premises and a misapplication of the law as it relates to an employer having a relationship with two labor unions.

AWF has an expired collective bargaining agreement with Roofers Local 162 (“Roofers Local 162:2010-2012 Agreement”) and a series of collective bargaining agreement with Sheet Metal Workers International Association, both back East and with Local 88 (“SMWIA Local 88”

¹ Throughout this Brief, references to the Decision of Administrative Law Judge Paul Ringler will be designated as follows: ALJD followed by page and line numbers.

or “Local 88”) in Las Vegas, that are broader in coverage than the Roofers Local 162 Agreement. The fundamental error in the ALJ’s decision is the conclusion that AWF cannot have collective bargaining agreements with two unions with overlapping jurisdiction and that by assigning the work to SMWIA Local 88, AWF has wrongfully refused to recognize and bargain with Roofers Local 162. *See, e.g.,* ALJD 4:3-32; 6:41-7:1; 11: 23-30; 12:1-3; 14:25-28. It is well-established that an employer may have agreements with multiple unions, and that 9(a) status is not determinative in jurisdictional disputes. *See, e.g., Laborers Local 1184 (High Light Electric)*, 355 NLRB No. 29 n. 8 (2010); *Glaziers Dist. Council 16 (Service West)*, 356 NLRB No. 105 n. 11 (2011). Therefore, it was not wrongful action by AWF to assign work to Local 88 while it was in the process of bargaining for a new agreement with Local 162, and the ALJ’s Decision on this issue should not be adopted by the Board.

Further, the premise that wrongdoing by AWF negates Roofers Local 162’s duty to bargain is contrary to established Board law. *See, e.g., Beacon Sales Acquisition, Inc.*, 357 NLRB No. 75 (Aug. 26, 2011). Therefore, even if AWF had also engaged in wrongful actions under the National Labor Relations Act, Roofers Local 162 was not excused from its duty to bargain in good faith and its actions violated Section 8(b)(3) of the Act.

II. Statement of the Case.

A. Procedural History.

On May 7, 2012, AWF filed an unfair labor practice charge against Roofers Local 162 alleging that Roofers Local 162 violated Section 8(b)(3) of the NLRA by unreasonably delaying and failing to provide relevant information requested by AWF for bargaining, failing and refusing to meet and bargain at reasonable times and places, and failing to deal with the

Employer's designated bargaining representative. [GC-B Exh. 1(a)].² The General Counsel filed a Complaint and Notice of Hearing based on an amended charge on July 31, 2012.

On July 20, 2012, AWF filed an additional unfair labor practice charge under Section 8(b)(3) against Local 162 based on its conduct during the one face-to-face bargaining session held on July 14, 2012, and its refusal to schedule another bargaining session. [GC-B Exh. 1(e)]. A Consolidated Complaint and Notice of Hearing was issued on September 24, 2012.

Roofers Local 162 filed a charge against AWF on July 16, 2012, making several allegations, most of which were dismissed after investigation, but a Complaint and Notice of Hearing was issued on September 24, 2012, alleging that AWF violated Section 8(a)(1) of the NLRA by maintaining discriminatory handbook policies and that AWF violated Section 8(a)(5) by assigning work previously performed by Local 162 to employees represented by SMWIA Local 88. [GC-A Exh. 1(E)].

The three unfair labor practice charges were combined for hearing before one ALJ. [CG-A Exh. 1(Q)/1(E)]. A hearing was conducted on November 29-30, 2012, before ALJ Paul Ringler. The parties stipulated to exhibits and much of the case was presented on the stipulated record. Testimony was also taken from six witnesses.

On May 28, 2013, the ALJ issued his decision, concluding that:

(1) Roofers Local 162 had violated Section 8(a)(3) by delaying or refusing to provide information requested by AWF [ALJD 12:16-17];

(2) Roofers Local 162 had engaged in conduct that would generally be considered to be a violation of Section 8(a)(3) by refusing to set bargaining dates, cancelling bargaining dates, insisting that AWF sign the Roofers Local 162:10-12 Agreement, and failing to arrange for

² GC-B Exh. __ refers to the General Counsel's Exhibits in Cases 28-CB-080496/28-CB-085690. GC-A Exh. __ refers to the General Counsel's Exhibits in Case 28-CA-085434. Jt. Exh. __ refers to Joint Exhibits. TR __ refers to the Reporter's Transcript.

another bargaining meeting after the first face-to-face meeting, but that AWF's refusal to assign work to Roofers Local 162 and the assignment of work to SMWIA Local 88 under the Local 88 Agreement excused Local 162's misconduct [ALJD 14:18-32];

(3) That AWF violated section 8(a)(1) of the Act by maintaining certain handbook policies [ALJD 10:10, 10:22-25]; and

(4) That collateral estoppel precluded the ALJ from deciding the Section 8(a)(5) allegations that AWF had violated Section 8(a)(5) by assigning work to members of SMWIA Local 88 rather than assigning the work to Roofers Local 162 [ALJD 10:34].

The exceptions relate primarily to the findings of fact and law relating to number 2 above.

B. Relevant Complaint Allegations.

The Consolidated Complaint against Local 162, dated August 30, 2012 [GC-B Exh. 1(n)], in paragraph 6(k) alleges that since January 13, 2012, Roofers Local 162 "has failed and refused to bargain with the Employer concerning the terms and conditions of employment of the Unit." Paragraph 6(l) alleges that since July 14, 2012, "Respondent has failed and refused to schedule additional bargaining sessions with the Employer." The Complaint alleges that by this conduct, Roofers Local 162 failed and refused to bargain collectively in good faith with the employer in violation of Section 8(b)(3) of the Act. *Id.*

C. Background Facts.

1. AWF's Relationship with Roofers Local 162.

The background facts are not generally disputed. AWF is a long-time union construction contractor, having been a union shop for over 40 years. [JTX 105, ¶ 6]. When it began operating in Las Vegas, Nevada in June 2007, AWF entered into a voluntary collective bargaining agreement with Roofers Local 162 and signed a successor agreement effective from August 1, 2007 – July 31, 2010 ("Roofers Local 162:07-10 Agreement"). [ALJD 2:38 – 3:5; JT

Exh. 89], AWF believed the Agreement to be a voluntary agreement pursuant to Section 8(f) of the National Labor Relations Act.

After the Agreement expired, AWF did not reach an agreement with Local 162 on a successor agreement. [JTX 96, Bates 0546]. Pursuant to Section 8(f), on April 28, 2011, AWF notified Roofers Local 162 that it was terminating its collective bargaining agreement with Roofers Local 162. [JTX 1]. In response, Roofers Local 162 filed an unfair labor practice charge against AWF (Charge No. 28-CA-23502). [JTX 4; JTX 119]. The ULP alleged that AWF had refused to execute a written collective bargaining agreement that had been agreed to with Roofers Local 162 and had wrongfully repudiated its agreement and withdrawn recognition of Local 162. *Id.*

A hearing was held before Administrative Law Judge Lana Parke on October 24-25, 2011. [JTX 119, 0353-0359]. Judge Parke, after hearing all of the testimony, making credibility determinations, and reviewing all the evidence, issued a decision on December 28, 2011. [JTX 96, Bates 0540-0552]. Judge Parke found that the 2007-2010 Agreement was a Section 9(a) agreement. The ALJ also found that AWF had not agreed to the 2010-2012 Agreement and therefore was not required to sign the Roofers Local 162 2010-2012 Agreement. [JTX 96, Bates 0546; ALJD 5:31-33 and note 9]. The ALJ decision in the present case erroneously stated that AWF and Roofers Local 162 reached an agreement that AWF subsequently refused to sign.

ALJ Parke ordered that AWF recognize Local 162 and bargain for a new agreement. *Id.* Importantly, she did not order AWF to discontinue its relationship with SMWIA Local 88 and did not order that the employees who had voluntarily joined SMWIA Local 88 be returned to Roofers Local 162. *Id.*

2. AWF's Relationship with SMWIA Local 88.

AWF has had a bargaining relationship with the SMWIA Local 112 in New York for almost 40 years. [JT Exh. 113; ALJD 3:9-14). The SMWIA Local 112 agreement contains a "Two-Man Travel Rule" under which when performing work outside of SMWIA Local 112's jurisdiction, AWF is required to use members of the Local SMWIA where the work is performed. [JT Exh. 113, p.2 ; ALJD 3:20-35]. SMWIA filed a grievance based on the Two-Man Travel Rule, and when it was not resolved, SMWIA Local 88 filed a complaint with the Local Joint Adjustment Board. [JT Exh. 113, p. 4; ALJD 3:41-46)]. SMWIA Local 88 also made a request for information to AWF, which AWF declined to provide, because it had no duties toward Local 88, with whom it did not have a collective bargaining agreement at the time. SMWIA Local 88 filed an unfair labor practice charge based on the failure to provide information. [JT Exhs. 111-113; ALJD 3:41-46].

Local 88 prevailed before the Local Joint Administration Board (resulting in an over \$500,000 finding against AWF) and on the NLRB charge. [JT Exh. 113; ALJD 4:3-13]. At the invitation of the NLRB, Local 88 and AWF entered into the NLRB's Alternative Dispute Resolution Program, rather than filing exceptions to Judge Parke's decision in the Local 88/AWF matter [JTX 115; Tr. 355:18-19, 117:3-24]. The parties reached a settlement in the Board-ADR program. The Counsel for the Acting General Counsel and the Regional Director did not object to the settlement. [JTX 115]. The Board remanded the case to the Region for effectuation of the settlement agreement. [JTX 116].

Based on the Board-mediated settlement agreement, AWF and SMWIA Local 88 entered into a CBA entitled "Moisture Control Agreement" [JT Exh. 90] and signed the Local 88 Standard Form Union Agreement [JT Exh. 91], both effective May 1, 2011.

3. AWF's Attempts to Bargain with Local 162.

AWF made repeated requests to meet and bargain with Local 162 after Judge Parke's order in Case 28-CA-23502. AWF suggested nearly 30 different dates for bargaining that resulted in two meetings that were accepted and confirmed by the Roofers: July 14, 2012 and September 26, 2012. [JT Exh. 13-17, 19-20, 23, 26-35, 38, 46-47, 54-55, 60, 62, 64, 66, 76-88]. Roofers Local 162 cancelled the bargaining scheduled on February 22, 2012. [JT Exhs. 16-17; ALJD 6:27-28]. When the parties finally met on July 14, 2012, Local 162 engaged in obstructionist tactics, profanity, and ad hominem attacks [ALJD 6:35-39], which the ALJ decision acknowledges generally would have led to a finding of a Section 8(b)(3) violation. [ALJD 14:18-20].

III. Legal Arguments.

A. The ALJ's Decision Erred in Finding that AWF had Violated its Duty to Bargain and Failed to Recognize Roofers Local 162 by Assigning Work To SMWIA Local 88.

The ALJ's decision is based in many instances on the premise that the supposed 9(a) status of Roofers Local 162 means AWF violated Section 8(a)(5) in assigning work to SMWIA Local 88. AWF has been caught in the middle of a jurisdictional dispute between the Roofers and the SMWIA for the past four years. It has attempted to be responsive to all parties and has continued to meet its legal obligations to the different unions. A 10(K) hearing with AWF, Roofers Local 162, and SMWIA Local 88 was held on June 13, 2013 before a hearing officer in the Las Vegas, Nevada office to address the jurisdictional dispute. The 10(k) hearing—not the present case—is the appropriate place to decide issues relating to the jurisdictional claims of the competing unions.

The NLRB has repeatedly made clear that 9(a) status does not carry any weight in determining unions' disputed claims to work. *See, e.g., Laborers Local 1184 (High Light*

Electric), 355 NLRB No. 29 n. 8 (2010) (“Prior to the hearing in this case, the Employer recognized Local 1184 as a majority representative under Sec. 9(a), based on a card showing of majority support. The change in Local 1184’s representative status has no effect on our determination of the merits of the dispute.”); *Glaziers Dist. Council 16 (Service West)*, 356 NLRB No. 105 n. 11 (2011) (“Since approximately 1992, the Employer has recognized the Carpenters as a majority representative under Sec. 9(a). The change in the Carpenters’ representative status has no effect on our determination of the merits of the dispute.”). The ALJ considered none of the other factors described in those cases pertinent in a work assignment dispute. All such factors favor the assignment made by AWF, as will be shown in the upcoming 10(k) proceeding. The ALJ in the present case erred in the basic premise that AWF had refused to recognize Roofers Local 162 and had engaged in wrongdoing based on the fact that AWF assigned work to SMWIA Local 88 under its existing collective bargaining agreements with Local 88.

Moreover, the ALJ treated this as a situation in which SMWIA came in and stole unit work from Roofers Local 162, whereas the undisputed facts show instead that AWF’s preexisting relationship was with the SMWIA. SMWIA had a long-prior contract with AWF from New York. The SMWIA Agreement had a national scope, which a prior Board-approved settlement recognized as providing a duty in Las Vegas to deal with SMWIA Local 88 pursuant to *McKinstry v. Sheet Metal Workers*, 859 F.2d 1382 (9th Cir. 1988). [ALJD 3:9-34; JT Exhs. 111-113].

The Board approved the settlement in which AWF promised to enter into an agreement with SMWIA Local 88. [ALJD 4:17-27; JT Exhs. 114-115]. AWF could not under *Deklewa* lawfully recognize Roofers Local 162 to the exclusion of SMWIA Local 88 in the middle of

AWF's contract with SMWIA Local 88. *John Deklewa and Sons, Inc.*, 282 N.L.R.B. 1375 (1987), enf'd, 843 F.2d 770 (3d Cir.1988).

In Case 28-CA-23502, ALJ Parke was aware of the collective bargaining agreements between AWF and SMWIA Local 88 when she ordered AWF to bargain with Local 162. [Exh. 119]. **She did not order AWF to discontinue its collective bargaining agreement with SMWIA Local 88 or discontinue assigning work to Local 88.** [JTX 96, Bates 0540-0552]. Roofers Local 162 could have filed an NLRB petition over SMWIA's claim, but they did not do so. Thus AWF committed no misconduct by adhering to its contract with SMWIA Local 88, certainly none which would legally excuse Roofers' bargaining misconduct.

SMWIA has:

- (1) the prior bargaining relationship,
- (2) the employer's preference due to superior workmanship and efficiency,
- (3) a Board-sanctioned collective bargaining agreement, and
- (4) a successful collective bargaining relationship in practice.

This contrasts sharply with the Roofers Local 162, which have:

- (1) attempted to intervene into SMWIA's existing relationship with AWF,
- (2) only a threadbare claim of 9(a) status based merely on contract recitation with no other evidentiary support,
- (3) no current collective bargaining agreement,
- (4) a rocky past bargaining relationship, and
- (5) no preference by the employer.

Because the ALJ's decision that Roofers Local 162's duty to bargain in good faith was excused by AWF's actions was based on the faulty premise that AWF violated Section 8(a)(5) or otherwise engaged in misconduct in assigning work to SMWIA Local 88, the Board should not

adopt this section of the ALJ's decision. The Board should find that Local 162's failure to set bargaining dates, cancelling bargaining dates, insisting that AWF sign a collective bargaining agreement to which it has never agreed, and other actions violated the NLRA and were in abrogation of Roofers Local 162's duty to bargain in good faith, and as such Local 162 violated Section 8(b)(3).

In sum, the ALJ first erred in letting Roofers turn a ULP charge against them into a trial over AWF's work assignment decision, and then once off on this erroneous mission, erred in looking only at the supposed 9(a) status of one union and did not address the matter in the context of all the other facts that exist that support AWF's assignment decision.

B. The ALJ's Decision Erred in Finding that Actions by AWF Excused Roofers Local 162's Failure and Refusal to Bargain.

The ALJ's decision clearly found that "Roofers Local 162 would have generally violated the Act," through its conduct, but then the ALJ's decision erroneously concluded that Local 162 had not violated Section 8(b)(3) by refusing to bargain because of alleged violations by AWF of its duty to bargain by assigning work to SMWIA Local 88. This finding is contrary to settled law, as recently noted in *Beacon Sales Acquisition, Inc.*, 357 NLRB No. 75 (Aug. 26, 2011) ("even assuming that such conduct amounted to a violation of the Union's duty to bargain in good faith, the Respondent's own duty to meet and bargain in good faith remained intact. See *Plumbers Local 457 (Bomat Plumbing & Heating)*, 131 NLRB 1243, 1246 (1961), enf'd. 299 F.2d 497 (2d Cir. 1962) ('One unfair labor practice does not excuse another.').").

In *Beacon Sales Acquisition, Inc.*, the employer and the union agreed to use a mediator during contract negotiations. The union subsequently refused to bargain using a mediator. The employer refused to bargain without the mediator, and the union filed an unfair labor practice charge. *Id.* at pp. 3-4. The employer argued that its duty to bargain was negated by the union's refusal to bargain under the terms agreed upon by the union and the employer. The Board held

that even if the union violated its duty to bargain in good faith, that the employer still had a duty to bargain in good faith, and that it had violated that duty to bargain in good faith by suspending bargaining based on the union's refusal to use a mediator during bargaining sessions. *Id.* Similarly, Roofers Local 162 had a continuing obligation to bargain with AWF, and their duty was not excused by any alleged actions by AWF.

Like in life, in labor bargaining, two wrongs do not make a right. *See, e.g., Meier & Frank Co., Inc.*, 89 NLRB 1016, 1034 (1950) (“Such unfair labor practices by the Union, even if proved, would constitute no defense to the unfair labor practices charged against this Respondent. Even in labor relations two wrongs do not make a right.”). In accord are numerous other cases, including *Empire Terminal Warehouse Co.*, 151 NLRB 1359, 1374 (1965) (“even were Respondent correct in characterizing the Union's actions as an unfair labor practice, it was not legally entitled to combat it by committing another unfair labor practice, particularly when ready relief was so available to it under Section 10(1) of the Act. Two wrongs do not make a right under labor law, any more than they do elsewhere, and one unlawful act is not legal justification for another.”). As discussed in Section III(A), above, AWF has not engaged in any wrongdoing in assigning work to SMWIA Local 88. If AWF has committed any wrongdoing, it does not excuse Roofers Local 162's failure and refusal to bargain in good faith. The ALJ's decision found that Roofers Local 162 committed multiple acts that violated its duty to bargain in good faith, including but not limited to: delaying bargaining, cancelling bargaining, verbally abusing AWF's representatives at bargaining, etc. [ALJD 14:18-20]. It was error to conclude that any actions by AWF justified or excused Roofers Local 162's multiple refusals to bargain.

IV. Conclusion.

AWF is in the middle of a jurisdictional battle between the Roofers and the Sheet Metal Workers, which was addressed in a 10(k) hearing on June 13, 2013, at the NLRB. The Employer

has a collective bargaining agreement with SMWIA Local 88 and an expired collective bargaining agreement with Roofers Local 162. When AWF made repeated efforts to bargain with Roofers Local 162 over a successor agreement, Roofers Local 162 failed and refused to bargain in good faith. The ALJ decision found that Roofers Local 162 committed many actions that would have violated the Act, but erroneously excused the Roofers Local 162's acts due to alleged wrongful acts by AWF, which was based on an incorrect premise under the law.

Board law is clear that in bargaining, as in life, "two wrongs don't make a right." Roofers Local 162 violated its duty to bargain in good faith, and it should be held accountable for those actions. Further, the ALJ decision was in error and should not be adopted to the extent that it is based on the erroneous premise that the supposed 9(a) status of Roofers Local 162 means AWF violated Section 8(a)(5) or otherwise engaged in wrongdoing in assigning work to SMWIA Local 88. AWF has had collective bargaining relationships with both Roofers Local 162 and SMWIA Local 88, two unions claiming jurisdiction of the same work. The jurisdictional dispute will be resolved in a 10(k) hearing. The present case is not the proceeding to decide the proper assignment of work between the Roofers and the Sheet Metal Workers.

For all of the reasons stated above, the Decision of the Administrative Law Judge should not be adopted as it relates to Roofers Local 162's failure to bargain. The Board should find that Roofers Local 162 violated Section 8(b)(3) of the Act by its failure and refusal to bargain.

Respectfully submitted,



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CERTIFICATE OF SERVICE

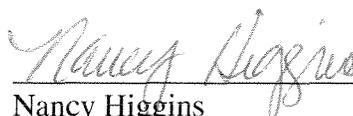
The undersigned hereby certifies that a true and correct copy of the foregoing Charging Party A.W. Farrell and Son, Inc.'s Brief in Support of Exceptions to the Decision of Administrative Law Judge was filed electronically via E-Gov with the National Labor Relations Board Office of Executive Secretary on June 27, 2013 with copy by electronic mail to:

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