

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

THE ARDIT COMPANY	:	
	:	
Respondent	:	Case No.: 9-CA-89159
	:	Case No.: 9-CA-107434
and	:	
	:	
INTERNATIONAL UNION OF BRICKLAYERS	:	
AND ALLIED CRAFT WORKERS, OHIO	:	
KENTUCKY ADMINISTRATIVE COUNCIL,	:	
LOCAL NO. 18	:	
	:	
Charging Party	:	

**THE ARDIT COMPANY’S BRIEF
TO THE NATIONAL LABOR RELATIONS BOARD**

Now comes The Ardit Company (“Ardit,” “the Company” or “Respondent”) and hereby files its Brief to the National Labor Relations Board (“the Board”). On July 8, 2013 Counsel for the General Counsel (“General Counsel”) issued an Order Consolidating Cases Consolidated Complaint and Notice of Hearing (“Complaint”) alleging violations of § 8(a)(1) and (5) of the National Labor Relations Act (“Act”). The parties waived a Hearing before an Administrative Law Judge and submitted this case directly to the Board because no oral testimony was necessary or desired by any of the parties. Accordingly, the parties filed a joint motion to the Board requesting that this case be transferred directly to the Board pursuant to Section 102.35(a)(9) of the Board’s Rules and Regulations and to accept the parties’ stipulated facts attached thereto. In so doing, the Board would make findings of fact and conclusions of law and issue a decision and order. Subsequently, on February 14, 2014 the Board issued an Order granting the parties’ Joint Motion and approved the Stipulation of Facts. The operative facts and

case law set forth below establish that Ardit has not violated the Act as is alleged in the Complaint.

I. ISSUES PRESENTED

(1) Whether Ardit violated Section 8(a)(1) and (5) of the Act when it unilaterally implemented new terms and conditions of employment upon the expiration of the 8(f) agreement with the union during the period of time between the holding of a representation election and the certification of the union as its employees' collective-bargaining representative when the new terms and conditions were announced prior to the time the union filed its petition for representation.

(2) Whether Ardit violated Section 8(a)(1) and (5) of the Act by its failure to respond to the union's May 3 and May 17, 2013 information requests.

(3) Whether Ardit violated Section 8(a)(1) and (5) of the Act when it, without prior notice to or bargaining with the union, laid employees off after the 8(f) agreement expired and following the representation election, but before the union was certified as its employees' exclusive collective-bargaining representative and where Ardit asserts said layoffs were due to lack of work.

II. FACTS

A. Background

Ardit is a commercial flooring contractor in the construction industry. In its capacity as a commercial flooring contractor, Ardit specializes in installing tile, terrazzo and stone and primarily obtains business through bids on projects. Although Ardit performs a small amount of work on private jobs, the majority of its jobs are public projects at universities and county and state governmental entities. Included in Ardit's work force are tile setters/layers, terrazzo

workers, tile finishers, terrazzo finishers, floor grinders and base grinders. The tile setters and terrazzo workers are involved in the actual installation of the floor and grinders and finishers are involved in the process once the floor has been poured. (Joint Motion and Stipulation of Facts, ¶ 2.)

Charging Party International Union of Bricklayers and Allied Craftworkers, Ohio Kentucky Administrative District Council, Local Union No. 18 (“Local 18” or “union”) is a labor organization within the meaning of Section 2(5) of the Act. (Id. at ¶ 3.)

Ardit was a member of the Tile, Marble and Terrazzo Contractors Association of Greater Cincinnati (Association) from about January 2, 2008 until it terminated its membership with the Association on May 31, 2011. During the period of time in which Ardit was a member of the Association, the Association negotiated and administered collective-bargaining agreements on Ardit’s behalf. It is in view of the foregoing that Ardit’s tile, marble and terrazzo installers and helpers, the bargaining unit at issue here, were subject to an 8(f) Agreement between Ardit and the union whose terms were effective through August 31, 2012. Prior to the expiration of the 8(f) agreement, Ardit notified the union in writing on May 31, 2011, that it was terminating the collective bargaining agreement whose terms expired on August 31, 2012. The Local 18 Agreement contains a traveling contractor’s clause in Article 38 requiring signatories of the Local 18 Agreement to follow the terms and conditions of the local agreement where the work is being performed. (Id. at ¶ 4 and Exhibits K & L.)

Ardit was also party to an 8(f) Agreement with Bricklayers and Allied Craftworkers Local No. 55 (“Local 55”) which expired by its terms and conditions on May 31, 2011 (“2011 Local 55 CBA”). (Id. at ¶ 5 and Exhibit M.) On February 10, 2011, Ardit sent correspondence to Local 55 lawfully terminating the 2011 Local 55 CBA which expired by its terms on May 31,

2011. The Company also withdrew any and all bargaining rights that its bargaining representative, the Associated General Contractors (“AGC”), had to bind the Company to any future collective bargaining agreements with Local 55 and/or The Southern Ohio District Council aka the Ohio Administrative District Council (“OADC”). (Id. at ¶ 6 and Exhibit N.) Being that the Company is located in central Ohio and performs the vast majority of its work in central Ohio, the express terms and conditions of the Local 18 agreement required Ardit to abide by the terms and conditions of the Local 55 agreement. (Id. at ¶ 4.)

On March 7, 2011, the Ohio Administrative District Council for the International Union of Bricklayers (OADC) filed a representation petition in which it sought to become Ardit’s employees’ 9(a) representative. (Id. at ¶ 7(a) and Exhibit O.) OADC subsequently became the certified collective bargaining representative on April 25, 2011. (Id. at ¶ 7(b) and Exhibit P.) Nevertheless, OADC later disclaimed interest in representing Ardit’s employees as reflected by the November 15, 2011 Notice of Disclaimer of Interest. (Id. at ¶ 7(c) and Exhibit Q.) Consequently, the Regional Director of Region Nine of the National Labor Relations Board revoked the above-noted certification on November 16, 2011. (Id. at ¶ 7(d) and Exhibit R.)

B. The Election and Implementation of New Terms and Conditions of Employment Upon the Expiration of the Local 18 8(f) Agreement

About November 17, 2011 Ardit advised its employees that it was going to implement new terms and conditions of employment following the expiration of the 8(f) agreement which expired by its terms on August 31, 2012. In the course of making that announcement during a meeting, Ardit told its employees that it was going to make changes to employee wages and health insurance, cease contributing to the union’s pension plan and implement flexible spending accounts, profit sharing and a 401(k) plan. The employees were given informational packets at such time about the foregoing changes. (Id. at ¶ 8.)

The union filed a representation petition on June 26, 2012. (Id. at ¶ 9(a) and Exhibit S.) Consequently, on July 13, 2012, the Regional Director for Region Nine of the National Labor Relations Board issued a Decision and Direction of Election which resulted in the holding of a representation election on August 10, 2012. On July 27, 2012, Ardit filed a Request for Review of the Region's July 13, 2012 Decision and Direction of Election and Order denying Ardit's post-hearing brief. On August 7, 2012, Ardit filed a Motion to Stay the Request for Review. However, the Board subsequently issued an Order on August 9, 2012, in which it denied Ardit's Request for Review of the Region's July 13, 2012 Decision and Direction of Election and its Motion to Stay. (Id. at ¶ 9(b) and Exhibits T, U, V, & W.) Of the 12 eligible voters, one vote was cast against the union and there were 8 determinative challenged votes. (Id. at ¶ 9(c) and Exhibit X).

The Region subsequently issued a Supplemental Decision and Order on August 31, 2012, in which it overruled the challenges to 6 votes and concluded that such ballots should be opened and counted. (Id. at ¶ 9(d) and Exhibit Y.) Ardit filed timely post-election objections on August 17, 2012, and maintained that two voters were challenged because of their alleged statutory supervisory status. On August 27, 2012, Ardit filed a Request for Review of the Region's August 13, 2012, Supplemental Decision. (Id. ¶ at 9(e) and Exhibits Z & AA). However, the Board subsequently issued an Order on October 18, 2012, in which it denied Ardit's Request for Review of the Region's August 13, 2012 Supplemental Decision and Order and its Motion to Stay. (Id. at ¶ 9(f) and Exhibit BB).

On September 1, 2012, Ardit implemented the new terms and conditions of employment pursuant to its November 17, 2011 announcement. In so doing, Ardit changed its employees' wages, made revisions to their health insurance, ceased contributing to the union's pension plan

and implemented flexible spending accounts, profit sharing and a 401(k) plan. Ardit posted a notice in its facility on September 4, 2012 in which it advised its employees that the above-referenced changes were made in accordance with its intention of doing so upon the expiration of the 8(f) agreement mentioned herein. Ardit further explained that it was no longer obligated to pay union wages and benefits upon the expiration of the 8(f) agreement. (Id. at ¶ 10(a) and Exhibit CC.)¹

On September 6, 2012, the Regional Director for Region Nine of the National Labor Relations Board issued a Supplemental Decision on Objections overruling Ardit's Objections in their entirety. (Id. at ¶ 11 and Exhibit DD.) On the same day, union Secretary Treasurer Fred R. Hubbard ("Hubbard") sent Michele Johnson² ("Johnson") a letter challenging Ardit's implementation of the new terms and conditions of employment and requesting that Ardit abide by the pre-existing terms and conditions of employment pending the certification results. (Id. at ¶ 12(a) and Exhibit EE.) Ardit did not respond to the union's September 6, 2012 letter. (Id. at ¶ 12(b).)

On September 20, 2012, Ardit filed a Request for Review of the Regional Director's September 6, 2012 Supplemental Decision on Objections along with a Motion to Stay its Request for Review. (Id. at ¶ 13(a) and Exhibits FF and GG.) Subsequently, the Board, on October 18, 2012, issued an Order denying both Ardit's Request for Review and its Motion to Stay. Id. at ¶ 13(b) and Exhibit HH.) On October 25, 2012, the ballots of the 6 challenged individuals found to be eligible voters in the Regional Director's August 13, 2012 Supplemental

¹ Ardit implemented the new terms and conditions noted above without prior notice to the union and/or without affording the union an opportunity to bargain over the changes and/or without first bargaining to impasse. The unilaterally implemented terms and conditions of employment relate to wages, hours, and other terms and conditions of employment of the bargaining unit described herein and are mandatory subjects for the purposes of collective bargaining. See, Joint Motion and Stipulation of Facts, ¶ 10(b) and (c).

² Michele Johnson is Ardit's President. Id. at ¶ 2(b).

Decision and Order were counted and added to the original tally of ballots. Of the 12 eligible voters, four votes were cast for the union and 3 votes were cast against the union, with 2 challenged remaining determinative challenged ballots. (Id. at ¶ 13(c) and Exhibit II.)

On November 13, 2012, a hearing was held to determine whether the 2 remaining challenges were valid, and on December 17, 2012, a hearing officer for Region Nine of the National Labor Relations Board issued a report recommending that Ardit's challenges be overruled and that the ballots be opened and counted. (Id. at ¶ 14(a) and Exhibit JJ.) Ardit filed timely exceptions to the Hearing Officer's Report, accompanied by a supporting brief. (Id. at ¶ 14(b) and Exhibit KK.) On February 4, 2013, the Regional Director for Region Nine of the National Labor Relations Board issued a Second Supplemental Decision and Order overruling the challenges to the ballots and finding that the ballots should be opened and counted. (Id. at 14(c) and Exhibit LL.) On March 1, 2013, Ardit filed a Request for Review of the Regional Director's Second Supplemental Decision and Order. (Id. at ¶ 14(d) and Exhibit MM.) On April 24, 2013, the Board issued an Order denying Ardit's March 1, 2013 Request for Review. (Id. at ¶ 14(e) and Exhibit NN.) On May 3, 2013, a second revised tally of ballots issued, showing that, of approximately 12 eligible voters, six cast a valid ballot for the union and three cast a valid ballot against the union, leaving no challenged ballots. (Id. at ¶ 14(f) and Exhibit OO.) On May 13, 2013, the Regional Director for Region Nine of the National Labor Relations Board issued a Certification of Representative certifying the union as the representative of the bargaining unit addressed herein. (Id. at ¶ 14 (g) and Exhibit PP.)

C. 2013 Layoffs Due to Lack of Work

In early 2013, Ardit laid-off the majority of its workforce due to lack of work. (Id. at ¶ 15.) Ardit's employees were working on a project located at 120 West Gay Street ("120 West Gay project") in Columbus, Ohio. Because the 120 West Gay project was rapidly winding down, the Company's manpower requirements were significantly less and Ardit subsequently laid off all of its terrazzo workers and two of its tile finishers. (Id. at ¶ 16.) Specifically, about February 2, 2013, Ardit, at its 120 West Gay project site laid off unit employee Joe Thompson. About March 4, 2013, Ardit, at its 120 West Gay project site laid off unit employees Justin Hipkins, Tom McAllister, and Rick Wilson. About March 5, 2013, Ardit, at its 120 West Gay project site laid off unit employees Tim Clemmons, Lee Clemmons, and Greg Salabritas. About March 6, 2013, Ardit, at its 120 West Gay project site laid off unit employees Horacio Guzman and Jose Ramirez. (Id. at ¶ 18(a).) Notably, while Ardit was a party to the Local 55 8(f) Agreement and the Local 18 8(f) Agreement, it laid off employees and did not provide notice to the union before doing so. (Id. at 18(b).)³

Normally, Ardit would send its terrazzo workers to another jobsite. However, Ardit submitted a bid for work on the Port Columbus International Airport but was not awarded the job, and a job Ardit did secure was unexpectedly postponed. Ardit was scheduled to begin work at The Ohio State University Medical Center Cancer and Critical Care Tower (aka "Project ONE") sometime in January 2013. Nevertheless, the University issued a "stop work-order" on Project ONE because it decided to redesign the project, floors included. Accordingly, Ardit was not able to send its workers to another jobsite. (Id. at ¶ 17 and Exhibit QQ.)

³ Ardit laid off the employees noted above without prior notice to the union and/or without affording the union an opportunity to bargain over the layoffs and/or without first bargaining to impasse. Id. at ¶ 18(c). The layoffs relate to wages, hours, and other terms and conditions of employment of the bargaining unit described herein and are mandatory subjects for the purposes of collective bargaining. Id. at 18(d).

D. Information Requests

About May 3, 2013, the union requested 12 pieces of information from Ardit. (Id. at ¶ 19(a) and Exhibit RR.) Items 1 through 6 of the May 3 information request are presumptively relevant as they pertain to employees with the bargaining unit described herein. (Id. at 19(b).) Items 7 through 12 of the May 3 information request are relevant and necessary as they relate to the unilateral changes made by Ardit on September 1, 2012, and will assist the union in making collective bargaining proposals. (Id. at 19(c).) On or about May 17, 2013, the union renewed its request for the information set forth in its May 3, 2013 correspondence. (Id. at 19(d) and Exhibit SS.) Ardit received both the May 3, 2013 and May 17, 2013 letters from the union, and, to date, has not responded to or provided the information requested by the union. (Id. at ¶ 19(d).)⁴

III. LAW AND ARGUMENT

John Deklewa & Sons, 282 NLRB 1375 (1987), *enfd.* 843 F.2d 770 (3rd Cir. 1988), is the seminal case pertaining to §8(f) pre-hire agreements in the construction industry. In *Deklewa* the Board, decided to apply the following principles in 8(f) cases:

- (1) a collective-bargaining agreement permitted by Section 8(f) shall be enforceable through the mechanisms of Section 8(a)(5) and Section 8(b)(3);
- (2) such agreements will not bar the processing of valid petitions filed pursuant to Section 9(c) and Section 9(e);
- (3) in processing such petitions, the appropriate unit normally will be the single employer's employees covered by the agreement; and
- (4) upon the expiration of such agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship.

Id. at 1377-1378.

⁴ Pursuant to the Board's Decision and Order in 9-CA-106395, the requested documents were submitted to the union's counsel on March 11, 2014.

If the Employer simply chooses to terminate the agreement at its conclusion, it must notify the union and the Association of his intention to terminate the contract and their bargaining rights in order to lawfully withdraw future bargaining rights from said Association. *Rome Electrical Systems*, (2007) 349 NLRB LEXIS 133. For instance, even when an 8(f) agreement expires and the employer furnishes timely notice of its intent to terminate the contract, the employer is nevertheless still bound to successive agreements negotiated by the Bargaining Association until the employer withdraws bargaining authority from the Association in a timely manner. *Cedar Valley Corp.*, (1991) 302 NLRB 823, 830, *enfd.* 977 F.2d 1211 (8th Cir. 1992). Moreover, it does not matter if the CBA and the Letter of Assent with the Bargaining Association each contain a different notice period required in order for the termination to be deemed lawful. Consequently, the employer is required to comply with both in order that the repudiation is timely and therefore lawful. *Rome Electrical Systems*, *supra*. As noted above, Ardit lawfully terminated the Local 55 and Local 18 Agreements. Ardit also properly withdrew any and all bargaining authority of the Associations. (Exhibits K & N.) Accordingly, Ardit was free to repudiate the Local 18 Agreement upon its expiration and was not statutorily obligated to bargain with the union.

A. Ardit Lawfully Implemented the Previously Announced Terms and Conditions of Employment Upon the Expiration of the Contract

Ardit was a member of the Tile, Marble and Terrazzo Contractors Association of Greater Cincinnati (Association) from about January 2, 2008 until it terminated its membership with the Association on May 31, 2011. During the period of time in which Ardit was a member of the Association, the Association negotiated and administered collective-bargaining agreements on Ardit's behalf. It is in view of the foregoing that Ardit's tile, marble and terrazzo installers and helpers, the bargaining unit at issue here, were subject to an 8(f) Agreement between Ardit and

the union whose terms were effective through August 31, 2012. Prior to the expiration of the 8(f) agreement, Ardit notified the union in writing on May 31, 2011, that it was terminating the collective bargaining agreement whose terms expired on August 31, 2012.

November 17, 2011 Ardit advised its employees that it was going to implement new terms and conditions of employment following the expiration of the 8(f) agreement which expired by its terms on August 31, 2012. In the course of making that announcement during a meeting, Ardit told its employees that it was going to make changes to employee wages and health insurance, cease contributing to the union's pension plan and implement flexible spending accounts, profit sharing and a 401(k) plan. The employees were given informational packets at such time about the foregoing changes.

The union filed a representation petition on June 26, 2012 and an election was conducted on August 10, 2012. On September 1, 2012, Ardit implemented the new terms and conditions of employment pursuant to its November 17, 2011 announcement. In so doing, Ardit changed its employees' wages, made revisions to their health insurance, ceased contributing to the union's pension plan and implemented flexible spending accounts, profit sharing and a 401(k) plan. Ardit posted a notice in its facility on September 4, 2012 in which it advised its employees that the above-referenced changes were made in accordance with its intention of doing so upon the expiration of the 8(f) agreement mentioned herein. Ardit further explained that it was no longer obligated to pay union wages and benefits upon the expiration of the 8(f) agreement. (Exhibit CC). The union was subsequently certified as the employees' 9(a) representative on May 13, 2013.

The decision to implement the November 17, 2011 announced changes was made well before Ardit was obligated to bargain with the union. Accordingly, Ardit did not violate §8(a)(5)

when it subsequently implemented the changes upon the expiration of the 8(f) agreement. See, *Starcraft Aerospace, Inc.*, 346 NLRB 1228 (2006) (If Employer makes decision to implement a change before being obligated to bargain with the union, the employer does not violate § 8(a)(5) of the Act by its later implementation of that change). See also, *Consolidated Printers, Inc.*, 305 NLRB 1061, (1992) (Employer did not violate §8(a)(5) of the Act when it implemented post-election layoffs because the Employer made the decision to do so well before the election and, as such, had no obligation to bargain with the union.) The critical fact is whether the Employer's decision to implement a change predates the election. See, *SGS Control Services, Inc.*, 334 NLRB 858, 861. Here, Ardit's November 2011 decision to implement the decision not only predates the August 10, 2012 election, it also predates the June 26, 2012 petition. Accordingly, when Ardit later implemented those changes upon the expiration of the 8(f) contract, it did not violate § 8(a)(5) of the Act.

General Counsel and/or the Charging Party will likely rely upon *Hargrove Elec., Co., Inc.*, 358 NLRB No. 147 slip op. (2012), in attempting to establish Ardit violated § 8(a)(1) and (5) of the Act. Nonetheless, the Company maintains that that the finding(s) of the Board are inapposite to the facts herein. In *Hargrove Elec.*, three separate Employers were parties to an 8(f) agreement. The Agreement's terms were effective from December 1, 2007 thru November 30, 2010. In February 2008, all three Employers sent letters to the union indicating that they would abide by the terms of the 8(f) Agreement thru the expiration date, but they would not be bound to any other subsequently approved agreements between the multi-employer bargaining association and the union. *Id.* at slip op. **6-7. The letter further indicated that the Employers would be implementing new terms and conditions of employment effective December 11, 2010. *Id.* at *7. Notwithstanding, the union became certified as the 9(a) representative for the

Employers employees *prior* to the expiration of the 8(f) Agreement. Id. As a result, the Employers began bargaining with the union for a new contract in August 2010. Id. On November 30, 2010 the Employers sent a ten (10) day notice of termination for the 8(f) agreement and subsequently implemented the new terms and conditions of employment on December 11, 2010 without bargaining to impasse. Id. at **7-8.

The Board affirmed the ALJ's decision that the Employers acted unlawfully by unilaterally changing the employees terms and conditions of employment upon the expiration of the 8(f) Agreement. See, *Hargrove Elec.*, *supra*, FN 1. The Board stated as follows:

In affirming the judge's finding that the Respondents acted unlawfully by unilaterally changing employees' terms and conditions of employment upon the expiration of the 2007–2010 contract, we rely particularly on the fact that the Respondents were obligated by the Act to bargain with the Union *at all times* from their announcements in February 2008 of the intended changes to their implementation in December 2010. Thus, at the time the Respondents announced their intended change, they were bound to the terms of the 2007–2010 8(f) agreement until its expiration. *John Deklewa & Sons*, 282 NLRB 1375 (1987), *enfd. sub nom. Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988). **During the term of that agreement, the Union was certified as the employees' exclusive bargaining representative.** From that point forward, the parties' relationship was governed by Sec. 9(a), and the Respondents were precluded from acting unilaterally at the expiration of the agreement. Further, although the Respondents rely on a handful of cases in which employers were permitted to finalize specific unilateral changes that had been firmly decided before 9(a) status attached, see, e.g., *Starcraft Aerospace, Inc.*, 346 NLRB 1228 (2006), and cases cited therein, those employers, unlike here, had taken the essential actions when *no bargaining obligation applied* to them. As a result, the Respondents' reliance on *Starcraft Aerospace*, *supra*, and similar cases is misplaced. Moreover, in these circumstances, we need not pass on whether the Respondents had reached a "firm decision" regarding the planned changes before the Union attained 9(a) status, or at any other time, because at *no* relevant time did the Respondents have the right to act unilaterally, regardless of the firmness of their decisions.

Id at *1. (*italics in original*). (*emphasis added*). Here, the union did not become the certified 9(a) representative of Ardit's employees during the term of the 8(f) Agreement. Accordingly, unlike the Employers in *Hargrove Elec.*, Ardit did not have any bargaining obligations with the

union at the time it implemented changes to the terms and conditions of employment. As a result, like the Employers in *Starcraft Aerospace, Inc.*, 346 NLRB 1228 (2006) and *Consolidated Printers, Inc.*, 305 NLRB 1061, (1992), Ardit was free to lawfully implement changes it had previously announced in November 2011 which was well before the union's June 26, 2012 petition and August 10, 2012 election. Again, as noted in *SGS Control Services, Inc.*, 334 NLRB 858, 861, the critical fact is whether the Employer's decision to implement a change predates the election. Here, it clearly did.

General Counsel and the Charging Party will also likely rely upon *Mike O'Connor Chevrolet*, 209 NLRB 701 (1974) and *W.A. Kruger*, 299 NLRB 914 (1990) in an effort to show a violation of the Act. Again, these cases are inapposite to the facts presented herein. The aforementioned cases stand for the proposition that an Employer violates § 8(a)(5) and (1) of the Act when it makes changes in the terms and conditions of employments during the pendency of objections to an election which eventually results in the certification of the union. Nevertheless, not only did the Employer in *Mike O'Connor* make the changes post-election, said changes were not announced until after the election, i.e., the Employer had not decided to change the terms and conditions of employment until after the election had been conducted. Ardit notified its employees that once the contract with Local 18 expired on May 31, 2012 the announced changes would go into effect. Thus, Ardit not only announced its intentions to change the terms and conditions of employment before the election, it did so before the union even filed a petition.

B. The Early Spring 2013 Layoffs Were Lawful

Ardit was forced to lay off its employees due solely to lack of work. Ardit's employees were working on the 120 West Gay project in Columbus, Ohio. Because the 120 West Gay project was rapidly winding down, the Company's manpower requirements were significantly

less and Ardit subsequently laid off all of its terrazzo workers and two of its tile finishers. Notably, while Ardit was a party to the Local 55 8(f) Agreement and the Local 18 8(f) Agreement, it laid off employees and without providing notice to the union before doing so.

Normally, Ardit would send its terrazzo workers to another jobsite. However, Ardit submitted a bid for work on the Port Columbus International Airport but was not awarded the job, and a job Ardit did secure was unexpectedly postponed. Ardit was scheduled to begin work Project ONE sometime in January 2013. However, on February 5, 2013 the University issued a “stop work-order” on Project ONE because it decided to redesign the project, floors included. (Exhibit QQ.) Accordingly, Ardit was not able to send its workers to another jobsite.

Normally, an Employer’s decision to lay off employees is a mandatory subject of bargaining. See, *Seaport Printing & AD Specialties, Inc.*, 351 NLRB 1269, 1269 (2007). Accordingly, in the absence of an agreed upon contractual provision an Employer is generally obligated to bargain with the union with respect to the layoff. Here, the terms of the expired Local 55 Agreement provide Ardit the ability to lay off employees without providing notice to the union. Specifically, Article IV, Section 7 states:

MANAGEMENT RIGHTS. The operation of the job and the direction of the working forces, including the right to hire, suspend and discharge for proper cause and the right to relieve employees from duty because of lack of work or for other legitimate reasons is vested exclusively in the Employer provided that this duty will not be used for the purpose of discriminating against any Employee as provided in the Agreement.

Furthermore, Article X, Section 10 states:

Employees being laid off or terminated shall be given one (1) hours notice by the Employer and shall be paid in full at the time of termination. Under the conditions of a temporary lay-off, the individuals may agree to receive their pay on the regular pay day. Employees leaving of their own accord shall be paid on the regular pay day.

(Exhibit M.) Simply put, Ardit's actions were not contrary to past practice with respect to layoffs or the terms and conditions of the expired Local 55 Agreement.

Additionally, there are certain compelling economic considerations that the Board has long recognized as excusing bargaining. Thus, an Employer is not obligated to bargain with a union with respect to layoffs if economic exigencies compelled the prompt action. See, *Seaport Printing & AD Specialties, Inc.*, at 1269. "Economic exigencies [are] extraordinary events which are an unforeseen occurrence, having a major economic effect requiring the company to take immediate action." *Id.* at 1269-1270, citing *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995). Here, Ardit's only upcoming job was halted as a result of a stop work order issued by the General Contractor at the instruction of the Project Owner. (Exhibit QQ.) Clearly the economic exigencies that compelled the layoffs were caused by unforeseeable external events beyond Ardit's control. Nothing on the part of Ardit precipitated the stop work order nor could Ardit have foreseen the Project Owner stopping work in order to conduct a rebranding effort which would potentially modify the project specifications. Bargaining is only required if the proposed subject of bargaining is amenable to resolution through bargaining. See, *First National Maintenance Corp., v. NLRB*, (1981) 452 U.S. 666, 678. No amount of bargaining with the union would solve the sudden lack of work precipitated by the stop work order. Accordingly, the unilateral layoffs were not violative of the Act.

C. Ardit Has Already Provided the Requested Information

Pursuant to the Board's Decision and Order in 9-CA-106395, Ardit has attempted to set negotiation dates with the union and on March 11, 2014 subsequently submitted the relevant information. The Company did not produce the requested information during the pendency of the proceedings in 9-CA-106395.

D. Affirmative Defenses

1. The Company would suffer manifest injustice if it were found to have retroactively violated section 8(a)(5) and (1) of the Act.

If the Board determines to exercise its right to overturn *Starcraft Aerospace, Inc.*, *supra*, it must apply the new rule prospectively as ill effects that would result from retroactivity outweigh other concerns. Admittedly, the Board's usual practice is to apply all new policies and standards to "all pending cases in whatever stage." See, *Levitz Furniture Co.*, 333 NLRB 717, 729 (2001). Specifically, the Board uses the following approach:

Under *Securities & Exchange Commission v. Chenery Corp.*, 332 U.S. 194, 203 (1947), the propriety of retroactive application is determined by balancing any ill effects of retroactivity against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.

Pursuant to this principle, the Board has stated that it will apply an arguably new rule retroactively to the parties in the case in which the new rule is announced and to parties in other cases pending at that time so long as this does not work a manifest injustice.

In determining whether the retroactive application of a Board rule will cause manifest injustice, the Board will consider the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application.

See, *Wal-Mart Stores, Inc.*, 351 NLRB 130, 134 (2007) (internal quotations omitted), citing *SNE Enterprises, Inc.*, 344 NLRB 673, 673 (2005) (citations omitted). Using the parameters set forth above, if the Board decides to overturn *Starcraft* it should only apply its new rule prospectively just as it did in *Levitz Furniture Co.*, *supra*.

In *Levitz*, the Board changed the rule with respect to when an employer could lawfully withdraw recognition unilaterally from an incumbent union. The old rule provided that an employer could unilaterally withdraw recognition on the basis of good faith doubt as to the unions continued majority. *Id.* at 725. The new rule provided that an employer could

unilaterally withdraw recognition “only on a showing that the union has, in fact, lost the support of the majority of the employees in the bargaining union.” *Id.* Notwithstanding, the Board decided to apply the old standard and determined that the withdrawal of recognition was lawful. *Id.* at 730. In determining to apply the new rule prospectively, rather than retroactively, the Board reasoned as follows:

Having ruled that employers may withdraw recognition unilaterally only by showing that unions have actually lost majority support, we must decide whether to apply the new rule retroactively, i.e., in all pending cases, or only prospectively. The Board's usual practice is to apply all new policies and standards to all pending cases in whatever stage. The propriety of retroactive application, however, is determined by balancing any ill effects of retroactivity against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.

We find that there would be ill effects from retroactivity and that they outweigh other concerns. *Celanese* was the law for nearly half a century. Employers clearly relied upon it in assessing whether it was lawful to withdraw recognition. That standard was significantly more lenient than the one we have announced in this decision. Under *Celanese*, employers did not have to show that unions had, in fact, lost majority support. [] Employers who withdrew recognition in reliance on *Celanese* and thereafter unilaterally changed the terms and conditions of employment for unit employees could be liable for significant amounts of make whole relief if we were to apply our new standard in pending cases.

Id. at 729 (internal quotations omitted). Similar to the employer in *Levitz*, Ardit exercised its rights to take certain action, relying upon long established Board precedent. In doing so, Ardit could be liable for significant amounts of make whole relief if the Board were to ultimately overrule *Starcraft* and apply a new standard in all pending cases. Additionally, *Hargrove Elec.* was decided *after* Ardit had implemented the new terms and conditions of employment.

Accordingly, the Company's third affirmative defense must not be rejected as it relied in good faith upon long established Board precedent permitting employers to finalize specific unilateral changes that had been firmly decided before 9(a) status attached. Applying any new standard retroactively would result in a manifest injustice which outweighs any other concerns.

2. The Board did not have a lawful quorum when it decided Hargrove Electric Co., Inc.

The Board could not lawfully act in the *Hargrove* matter as the new members were not validly appointed and, as such, the Board lacked a quorum to act. Specifically, the Board has no legal authority to function when it lacks a quorum of three members. See, *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010). Persons appointed to the Board in violation of the Appointments Clause of the U.S. Constitution do not count towards this necessary quorum. Cf. *Ryder v. United States*, 515 U.S. 177 (1995); *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993).

The Board lacked a quorum at the time *Hargrove* was decided because Sharon Block and Richard Griffin were not lawful members of the Board. On January 4, 2012, President Obama announced “recess” appointments for these individuals. However, the United States Senate was in session at the time of these purported appointments. The President did not obtain the advice and consent of the Senate that Article II, Section 2, Clause 2 of the U.S. Constitution requires. Consequently, the appointments of Block and Griffin to the Board are invalid under Articles I and II of the U.S. Constitution. See, *Noel Canning v. NLRB*, Case No. 12-1115 (D.C. Cir. 2013) (Court ruled that the Board currently lacks the requisite Board quorum because the appointments of members Sharon Block, Richard Griffin, and Terrence Flynn are unconstitutional and invalid.) See also, *NLRB v. New Vista Nursing and Rehab.*, 2013 U.S. App. LEXIS 9860.

3. The Board did not have a lawful quorum when it issued Orders denying Ardit’s Requests for Reviews and Motions to Stay.

For reasons noted above, the Board did not have a lawful quorum when it issued its Orders denying Ardit’s Request for Reviews and Motions to Stay the Request for Review until it

did have a lawful quorum and, as such, had no legal authority to issue said Orders. See, e.g. Exhibits T, U, V, W, Z, AA, BB, FF, GG, HH, MM & NN.

4. The Amended Complaint is *ultra vires*.

The Amended Complaint is *ultra vires* because the Acting General Counsel of the NLRB did not lawfully hold the office of Acting General Counsel at the time he directed that the Complaint be filed. Specifically, the Act provides that, “[i]n case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy.” See, 29 U.S.C. § 153(d). Furthermore, the statute places an express limitation on this authority to designate an Acting General Counsel: “[N]o person or persons so designated shall so act . . . for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate . . .” *Id.*

President Obama designated Lafe Solomon as Acting General Counsel but failed to submit a nomination to the Senate to fill the position of the General Counsel within 40 days of that designation. Accordingly, the Act prohibited Mr. Solomon from serving as Acting General Counsel more than forty (40) days after his appointment and, as such, he lacked authority to direct the First and Second Complaint to be filed against MWTTI in this matter. See also, *Noel Canning, supra*.

IV. CONCLUSION

For the reasons outlined above and in accordance with the evidence, Ardit did not violate § 8(a)(1) and 5 of the Act. Accordingly, the Ardit respectfully requests that the Board dismiss General Counsel’s Complaint in its entirety.

Dated at Dublin, Ohio on this 17th day of March, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 17, 2014, an electronic original of Ardit The Ardit Company's Brief was transmitted the National Labor Relations Board, office of the Executive Secretary, via the Department Of Labor, National Labor Relations Board electronic filing system and, further, that copies of the foregoing were transmitted to the following individuals by electronic mail:

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