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 ANSWERING BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE BOARD AND THE CHARGING PARTY'S BRIEF TO THE BOARD

I. INTRODUCTION

Contrary to Counsel for the General Counsel's ("General Counsel") assertions otherwise, The Ardit Company ("Ardit," "the Company" or "Respondent") did not violate of § 8(a)(1) and (5) of the National Labor Relations Act ("Act").[1]

II. ARDIT LAWFULLY IMPLEMENTED THE PREVIOUSLY ANNOUNCED TERMS AND CONDITIONS OF EMPLOYMENT UPON THE EXPIRATION OF THE 8(f) CONTRACT

The Company's 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

[1] The union incorporated, in its entirety, General Counsel's initial brief. See, union's Brief to the Board at p. 1. Nonetheless, the union proposed additional remedies under the Act. Rather than file two separate Answering Briefs, Respondent will address the union's proposed additional remedies in this Answering Brief.

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.

The General Counsel relies 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. See, General Counsel's Brief at pp. 5-7. Nevertheless, the Board's findings in *Hargrove* 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. However, the union became certified as the 9(a) representative for the Employers employees ***prior*** to the expiration of the 8(f) Agreement. Id. Notwithstanding, the Employers implemented new terms and conditions of employment, as previously indicated in their February 2008 correspondence, upon the expiration of the contract 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's 8(f) contract did not convert into a 9(a) agreement during the term of the agreement and, as such, did not have any bargaining obligations with the union at the time it implemented changes to the terms and conditions of employment. Thus, 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 the 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 also rely upon *Mike O'Connor Chevrolet,* 209 NLRB 701 (1974) and *Ramada Plaza Hotel,* 341 NLRB 310 (2004) (citing *Mike O'Connor*) in an effort to show a violation of the Act. See, General Counsel's Brief at pp. 6-7. 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 to the terms and conditions of employments during the pendency of objections to an election which eventually results in the certification of the union, i.e., the obligation to bargain before making changes commences on the date of the election, not the date of certification. Nevertheless, not only did the Employers in *Mike O'Connor* and *Ramada Plaza* make the changes post-election, said changes were not announced until after the election. Hence, the Employer had not decided to change the terms and conditions of employment until after the election had been conducted. Similarly, with respect to the purported violations of the Act regarding the employer's pre-election conduct in *Ramada Plaza*, the Board stated as follows:

> These actions by the Respondent constituted illegal grants of benefits inasmuch as they were made at a time when an election petition was pending and therefore, **it must be presumed, in the absence of evidence that they were part of an existing practice *or that they were planned beforehand*, as being designed to influence the outcome of the election.**

See, *Ramada Plaza* at 314. (emphasis added). The essential fact is whether the Employer's decision to implement a change predates the election. 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.

III. 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 if its tile finishers.

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 on Project ONE sometime in January 2013. However, on February 5, 2013 The Ohio State 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.

The General Counsel argues that Ardit's compelling economic circumstances related to the necessity of the February and March layoffs is "unavailing." See, General Counsel's Brief to the Board at p. 9. Specifically, General Counsel states as follows:

> Respondent is a commercial flooring contractor, specializing in the installation of tile, terrazzo and stone floors. While delays can happen in most industries, Respondent's line of work has a quantifiably defined ending date; for example, when a floor is completely installed, the project is finished. Moreover, Respondent can gauge the progress being made and estimate a completion date by visually assessing the amount of floor already installed, i.e. when Respondent has completed half of the installation on a particular project, it is in a position to estimate a future completion date based on the time that it took to complete the first half of the project. This point is crucial in that Respondent can predict the length of a project, by tracking progress as such is being made. Because Respondent can straightforwardly forecast a project completion date, the final project ending is not subsequently unforeseen such that Respondent would be compelled to take immediate action. Therefore, while Respondent places particular weight on the winding down of its 120 West Gay project, it cannot

> justifiably argue that the project completion was an unforeseen occurrence. Indeed, the record is devoid of any evidence indicating the date Respondent's 120 West Gay project ended. Nor was any evidence presented from which a finding could be made that the foregoing project's completion date was unforeseen.

Id. First, General Counsel's arguments are wholly unsupported and nothing more than conjecture. General Counsel appears to be holding itself out as an expert in the field of the terrazzo installation. To argue that Ardit can straightforwardly forecast a project completion date by merely visually assessing the amount of floor already installed is both arrogant and uninformed. To be candid, it is insulting to Ardit for General Counsel to maintain that it knows more about the terrazzo installation process than Ardit, an award winning leader in the terrazzo and tile installation in operation since 1921. Indeed, the Board has made it clear that it will not substitute its business judgment for that of an employer with respect to what constitutes sound management. See, *Dravo Lime Co*., 234 NLRB 213 fn 1 (1978).

Secondly the critical point is not that that completion date of the 120 West Gay project was unforeseen (as all projects ultimately come to an end), rather, the critical point is that Ardit had no place to send its employees once that project was completed due to unforeseen circumstances out of its control. To be sure, 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. 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. General Counsel further maintains that the March 2013 layoffs occurred 1 month after the stop work order and, if the stop work order was unforeseen it would have had to lay off its employees in February. See, General Counsel's Brief to the Board at p. 10. Again, work was still available on the 120 West Gay project in February. Once that project concluded Ardit was unable to send its employees to another jobsite due to the stop work order still in effect.

Next, General Counsel contends that Ardit's past practice of laying off employees during the term of the 8(f) without providing notice to the union is of no consequence. Id. General Counsel makes much of the fact that the "factual stipulation relied upon by [Ardit] does not state that the [Company] *never* provided notice to the Union when it laid off employees, or that the Union never challenged [Ardit's] failure to notify prior to laying off employees it simply states that [the Company] laid off employees without notifying the Union." Id. (emphasis in original). The stipulation speaks for itself. 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.

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.

More importantly, 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.

Accordingly, Ardit's actions were not contrary to past practice with respect to layoffs or the terms and conditions of the expired Local 55 Agreement.[2] In this sense, unilateral changes are not improper if only a mere continuation of the status quo. See, *Our Lady of Lourdes Health Center*, 306 NLRB 337, 339 (1992), citing *NLRB v. Katz*, 369 U.S. 737, 746 (1962).

IV. ADDITIONAL REMEDIES SOUGHT BY THE CHARGING PARTY

The union requested the following additional remedies:

> 1. The Respondent shall maintain the *status quo ante* by honoring and abiding by the terms and conditions of employment provided in the September 1, 2010 through August 31, 2012 Tile Layers, Terrazzo Workers, Marble Masons and Finishers Collective Bargaining Agreement until a new collective bargaining agreement is reached.
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> 2. The Respondent shall make whole all bargaining unit members for any loss of pay and other benefits that they suffered as a result of the Respondent's refusal to maintain the *status quo ante* and to continue in effect the terms and conditions of the September 1, 2010 through August 31, 2012 Tile Layers, Terrazzo Workers, Marble Masons and Finishers Collective Bargaining Agreement until a new collective bargaining agreement is reached.
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> 3. The Respondent shall submit to an audit and pay all contractually required fringe benefit fund contributions, liquidated damages thereon, interest, and attorney's fees and costs that have not been paid from September 1, 2012 until the

[2] 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. In this case, the Local 55 Agreement.

> date the Respondent rescinds its unilateral changes and begins honoring and abiding by the September 1, 2010 through August 31, 2012 Tile Layers, Terrazzo Workers, Marble Masons and Finishers Collective Bargaining Agreement and shall make the trustees of the fringe benefit funds and bargaining unit employees whole for any expenses resulting from the Respondent's failure to make such contributions.

Ardit maintains that the remedies sought by the union are not appropriate in this matter. For instance, Ardit would be in violation of the current prevailing wage with respect to the public project(s) it is currently performing in and around central Ohio. This was made known to charging party's counsel on or about February 19, 2014 and Region 9 representatives the following week. Secondly, any remedy with respect to payments/contributions to the pension fund should be left to the United States Federal Courts. The pension fund is a separate legal entity apart from the union and payments owed, if any, are governed by ERISA, not the Act.

V. 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 31st day of March, 2014.

Respectfully submitted,

/s/ Aaron Tulencik

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 31, 2014, an electronic original of The Ardit Company's Answering 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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