

In mid-May, two CMC employees were involved in a serious physical fight that resulted in the building's owner banning all CMC employees from the construction site. CMC tried but failed to convince the owner to allow its employees to finish the sheet metal work they had already started. Thereafter, CMC, Dominion, and the project's general contractor agreed to avoid any further delay by allowing Dominion to directly employ CMC's employees during the project, after which CMC would re-hire the employees. During the project, CMC would continue to provide project management, shop fabrication, supervision, and specialty sheet metal tools. On May 23, CMC sent an email to the Union, copying Dominion, thanking it for working with Dominion after CMC was banned from the project, and confirming that CMC would lay its project employees off so that Dominion could employ them directly. CMC noted in the email that CMC "should be able to rehire them right about the time Dominion finishes [the project]." Dominion then met with a Union business agent and signed the contract without specifically limiting its coverage to the instant project. Dominion asserts that it agreed to adopt the contract for the instant project only, whereas the Union claims that Dominion's signature requires it to apply the contract to all future construction projects during the contract's duration.

Over the next few days, Dominion hired some 18 CMC employees for the project, including CMC's sub-foreman. Dominion followed the contract during the project until the sheet metal installation work was completed on August 2. Thereafter, Dominion laid off the employees, who were then re-hired by CMC to work on other projects. The Union did not protest or request to bargain over Dominion's layoff of the sheet metal employees. Dominion has not employed any sheet metal employees since the project, but has subcontracted its sheet metal work to union and nonunion firms, consistent with its past practice.

The Union complained in February and March 2013 that Dominion's use of nonsignatory contractors violated the contract's subcontracting clause. On April 3, 2013, Dominion sent the Union a letter repudiating the contract because Dominion had "ceased employing any persons performing work covered by the Agreement" as of August 3, and had "no intention of hiring any such employees in the future." The Union filed a charge on July 22, 2013, alleging that Dominion repudiated its contract with the Union in violation of Section 8(a)(5).

ACTION

We conclude that, although Dominion was a successor to CMC, its April 2013 contract repudiation did not violate Section 8(a)(5) because Dominion had permanently ceased to employ any sheet metal employees by then and thus had no bargaining obligation to the Union. The Region should therefore dismiss the charge, absent withdrawal.

Initially, we agree that Dominion was a successor to CMC, as there existed a substantial continuity of operations between Dominion and CMC, and a majority of the employees hired by Dominion were employed by CMC.³ As the Region notes, Dominion's successorship status is not dependent on its purchase of CMC's business or assets.⁴

We conclude, however, that at the time of Dominion's contract repudiation it had no obligation to bargain with the Union notwithstanding its status as a successor to CMC. In this regard, the Board has long held that an employer has no Section 8(a)(5) duty to bargain in a unit consisting of fewer than two employees over time, i.e., a stable, one-person unit, and may lawfully repudiate an extant collective-bargaining agreement if the unit shrinks to less than two employees.⁵ The Board has explained that, since collective bargaining presupposes more than one employee who wishes to bargain, it has no authority to certify, or order bargaining with, a unit that has no "collective character."⁶ The Board applies this reasoning to collective-bargaining relationships established under both Sections 8(f) and 9(a).⁷ In determining whether there is a stable one-person unit, the Board takes into account the fluctuations typical in the construction industry to ascertain whether the purported one-person unit is a "stable" (i.e., long-term) complement of one or fewer employees or merely a temporary

³ See generally *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27 (1987); *NLRB v. Burns Int'l Sec. Servs., Inc.*, 406 U.S. 272 (1972).

⁴ See, e.g., *Harter Tomato Prods. Co.*, 321 NLRB 901, 902-903 (1996), *enfd.* 133 F.3d 934 (D.C. Cir. 1998) (successorship finding not dependent on successor's ownership of predecessor's facility, assets, or business).

⁵ See, e.g., *Kirkpatrick Elec. Co.*, 314 NLRB 1047, 1047 n.3 (1994) (no Section 8(a)(5) violation based on employer's repudiation of contract where unit permanently shrank to one employee); *Stack Elec.*, 290 NLRB 575, 577 (1988) (same; employer may withdraw recognition from a union, repudiate its contract, or unilaterally change employees' terms and conditions if there are one or fewer unit employees on a permanent basis); *Foreign Car Ctr., Inc.*, 129 NLRB 319, 319-20 (1960) (no Section 8(a)(5) violation where employer repudiated contract and refused to recognize and bargain with union in one-person unit).

⁶ *McDaniel Elec.*, 313 NLRB 126, 127 (1993) (internal quotation omitted).

⁷ See, e.g., *Kirkpatrick Elec. Co.*, 314 NLRB at 1047 n.3 & 1052 (Board affirmed ALJ's conclusion that employer had no bargaining obligation in permanent, one-person unit, even though union was certified as Section 9(a) representative).

occurrence.⁸ Thus, where there is a long-established employment pattern of a single employee or no employees, there is no bargaining obligation.⁹

Dominion has a long-established pattern of not employing sheet metal employees. It employed the unit employees for only three months between May and August 2012, and only as part of a coordinated effort to timely complete the renovation project after CMC was banned from the construction site. Dominion is not, and has never been, in the sheet metal business; it employed no sheet metal employees before May 2012, has employed none since August 2012, and purchased no sheet metal equipment or tools that would suggest it plans to expand into the business. In light of Dominion's history of subcontracting sheet metal work, and its return to that practice after the renovation project was completed, Dominion's temporary employment of a sheet metal unit for three months in 2012 is insufficient to establish a bargaining obligation with the Union.¹⁰

Arguably, Dominion had an obligation to bargain with the Union over the layoff, and absent the layoff, it would have continued to employ unit employees and have a bargaining obligation. However, the Union never sought bargaining over the layoff, and in any event, that decision was made outside of the 10(b) period and is thus no longer subject to challenge.

Accordingly, the Region should dismiss the charge, absent withdrawal.

/s/
B.J.K.

⁸ *McDaniel Elec.*, 313 NLRB at 127 (Section 8(a)(5) violation where employer repudiated contract but did not employ a stable one-person unit; Board noted employee complement increased from one employee at beginning of construction project to three employees).

⁹ *See Searls Refrigeration Co.*, 297 NLRB 133, 135 (1989) (employer performed no work in union's jurisdiction for two years and then employed one nonsupervisory individual on a part-time basis for only three months); *Stack Elec.*, 290 NLRB at 577-78 (employment patterns over the course of three-year period showed single-employee units with the exception of one two-week period).

¹⁰ *See id.*