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11 UNITED STATES OF AMERICA
12 NATIONAL LABOR RELATIONS BOARD
13 REGION 28

14 UNITED UNION OF ROOFERS,
15 WATERPROOFERS, AND ALLIED
16 WORKERS, LOCAL 162,

17 and

18 A.W. FARRELL & SON, INC.

19 A.W. FARRELL & SON, INC.

20 and

21 UNITED UNION OF ROOFERS,
22 WATERPROOFERS, AND ALLIED
23 WORKERS, LOCAL 162

24 and

25 SHEET METAL WORKERS
26 INTERNATIONAL ASSOCIATION, AFL-
27 CIO, LOCAL UNION NO. 88

28 Party in Interest.

Nos. 28-CB-080496; 28-CB-085690 and
28-CA-85434

**RESPONDENT, UNITED UNION OF
ROOFERS, WATERPROOFERS, AND
ALLIED WORKERS, LOCAL 162'S
ANSWERING BRIEF TO THE
EXCEPTIONS OF CHARGING PARTY
A.W. FARRELL & SON, INC.**

1 A.W. FARRELL has filed exceptions only in the “CB” cases involving Local 162. Farrell
2 claims Local 162 should have been found to have refused to bargain with Farrell in addition to
3 failing to provide information. These Exceptions (which should have been labeled cross-
4 exceptions) continue Farrell’s only theme. Farrell asserts it is entitled to sign contracts with two
5 different unions covering the same bargaining unit and then to split up the work thorough work
6 assignments to whomever it chooses. We do not dispute that many employers do have collective
7 bargaining relationships with different unions.

8 The obvious flaw in Farrell’s position is that under the National Labor Relations Act
9 representation is exclusive. This means that the employer cannot sign a collective bargaining
10 agreement or recognize different unions covering the same workforce or bargaining unit. There
11 can only be one union per bargaining unit.

12 For some reason Farrell cannot understand this. It seeks to excuse its conduct by claiming
13 that it was required to recognize Local 88 for the same unit where it validly recognized Local 162
14 in 2007.

15 The problem in Farrell’s position is obvious. It recognized Local 162, signed a valid
16 agreement and that agreement was subject to Section 9(a) majority status. It recognized Local
17 162 for 4 years (2007 to 2011) when it illegally withdrew recognition. Judge Parke ruled against
18 Farrell and found that the agreement was valid and that the recognition was valid. Farrell did not
19 raise a defense in the Judge Parke proceeding that its recognition of Local 162 was invalid
20 because it violated its agreement with the Sheet Metal Workers. Judge Parke found the
21 agreement was governed by Section 9(a) a finding Farrell has not challenged. Farrell has
22 recognized that Judge Parke’s decision is collateral estoppel¹ on this issue. That ends the matter
23 because Farrell has accepted that finding without filing exceptions. It now claims Local 162 had

24
25 ¹ Strictly speaking, collateral estoppel does not apply because there has been no final
26 decision by the Board. Farrell did not file exceptions to Judge Park’s findings. The Board
27 applies a different doctrine, Where an Administrative Law Judge’s decision is pending another
28 Administrative Law Judge can adopt the findings of another Administrative Law Judge. See
Grand Rapids Press, 327 NLRB 393, 394-95 (1995), enforced, 215 F.3d 1327 (6th Cir. 2000).
The findings are not collateral estoppel until adopted by the Board.

1 an obligation to bargain over a bargaining unit which no longer existed as to Local 162. That is
2 the sole basis of its Exceptions.

3 Farrell's exceptions thus have this fundamental flaw that they continue to rely on Farrell's
4 view that it was lawful to sign an agreement with the Sheet Metal Workers and thus Local 162's
5 asserted failure to bargain violates the Act. Here, as Local 162 has made plain in its own
6 exceptions, there was nothing to bargain about. Its bargaining unit as described by Judge Ringler
7 had been eviscerated. There was no unit to bargain about.

8 These exceptions revealed the fundamental flaw in Farrell's position. When Farrell
9 signed the agreement with the Sheet Metal Workers in April 2011, it made a fundamental legal
10 mistake. That was the responsibility of counsel in this case or otherwise makes no difference.
11 Someone thought they could sign an agreement with the Sheet Metal Workers because they
12 thought they could withdraw recognition from Roofers Local 162. They could not do so for the
13 bargaining unit of roofers in Las Vegas.

14 Farrell's assertion that Local 162 must bargain over a non-existent unit is functionally the
15 equivalent of insisting that Local 162 bargain over a non-mandatory subject of bargaining. *Borg-*
16 *Warner Corp.*, 356 U.S. 342 (1958). Farrell is using its bargaining position to change, actually
17 eviscerate the unit determined to be represented by Local 162. Cf. *Antelope Valley Press*, 311
18 NLRB 277 (1993)(employer may bargain to assign work to non-unit employees, here Farrell
19 insists on assigning work to same unit employees but insists the employees be represented by a
20 different union).

21 We also note that contrary to Farrell's position Local 162 did not refuse to bargain. It
22 scheduled meetings, requested information and met. Those meetings were fruitless for the
23 reasons expressed above.

24 Farrell's assertion that the recent 10(k) is the appropriate way to resolve the dispute
25 ignores subtle Board law that a 10(k) notice must be quashed with the dispute is essentially
26 representational. Farrell's beef illustrates exactly this problem for it claims that Sheet Metal
27 Workers Local 88 may represent the employees amounts to the same group of employees which
28 Roofers Local 162 has already been determined to be Section 9(a) representative.

1 The exceptions should be rejected.

2 Recently, the Board has made it plain that an employer cannot recognize two different
3 unions for the same bargaining unit. The Board’s recent decision in *Pacific Crane Maintenance*,
4 359 NLRB No. 136 (2013) illustrates exactly our point. In that case, the employer had
5 historically recognized the Machinists Union for a bargaining unit. It² then recognized another
6 union for the same bargaining unit. There, the employer claimed substantial business
7 justification. The Board rejected its claims. Here, Farrell has not claimed business justification.
8 It claims it is caught in a jurisdictional dispute. That jurisdictional dispute was of its own making
9 when it decided to withdraw recognition from Roofers Local 162 and did so unlawfully.

10 The remedy which the Board required in *Pacific Crane Maintenance* is a remedy which is
11 necessary here. The terms of the 2007-2010 or the terms of the 2010-2012 agreement must be
12 put into effect. The employees must be made whole. The Trust Funds must be made whole. The
13 agreement with Local 88 must be rescinded for the bargaining unit represented by Local 162.
14 The additional remedies sought by the Board including the dues reimbursement remedy against
15 Farrell must also be applied. *Pacific Crane Maintenance* is a guide to the appropriate resolution.
16 Farrell’s exceptions illustrate its mistaken legal theory and demonstrate the necessity of an
17 appropriate remedy. They support the dismissal of the complaint against Local 162.

18 In conclusion the Complaint against Local 162 should be dismissed. The Board should
19 adopt the appropriate remedy against Farrell.

20
21 Respectfully submitted,

22 Dated: July 11, 2013

Weinberg, Roger & Rosenfeld
A Professional Corporation

23 By: /s/ David A. Rosenfeld
24 DAVID A. ROSENFELD
25 Attorneys for Respondent UNITED UNION OF
26 ROOFERS, WATERPROOFERS, AND ALLIED
27 WORKERS, LOCAL 162

28 ² The employer was a joint employer but that status was irrelevant. The single employer was treated as one employer.

1 **PROOF OF SERVICE**
2 **(CCP §1013)**

3 I am a citizen of the United States and resident of the State of California. I am employed
4 in the County of Alameda, State of California, in the office of a member of the bar of this Court,
5 at whose direction the service was made. I am over the age of eighteen years and not a party to
6 the within action.

7 On July 11, 2013, I served the following documents in the manner described below:

8 **RESPONDENT, UNITED UNION OF ROOFERS, WATERPROOFERS, AND ALLIED**
9 **WORKERS, LOCAL 162'S ANSWERING BRIEF TO THE EXCEPTIONS OF**
10 **CHARGING PARTY A.W. FARRELL & SON, INC.**

- 11 (BY U.S. MAIL) I am personally and readily familiar with the business practice of
12 Weinberg, Roger & Rosenfeld for collection and processing of correspondence for
13 mailing with the United States Parcel Service, and I caused such envelope(s) with
14 postage thereon fully prepaid to be placed in the United States Postal Service at
15 Alameda, California.
- 16 (BY FACSIMILE) I am personally and readily familiar with the business practice of
17 Weinberg, Roger & Rosenfeld for collection and processing of document(s) to be
18 transmitted by facsimile and I caused such document(s) on this date to be transmitted by
19 facsimile to the offices of addressee(s) at the numbers listed below.
- 20 (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy
21 through Weinberg, Roger & Rosenfeld's electronic mail system from
22 kshaw@unioncounsel.net to the email addresses set forth below.

23 On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 11, 2013, at Alameda, California.

/s/ Katrina Shaw
Katrina Shaw