

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

JAMESTOWN FABRICATED STEEL AND SUPPLY, INC.

and

Case 03-CA-119345

**SHOPMEN'S LOCAL UNION NO. 470 OF THE INTERNATIONAL
ASSOCIATION OF BRIDGE, STRUCTURAL, ORNAMENTAL &
REINFORCING IRON WORKERS**

**GENERAL COUNSEL'S BRIEF IN SUPPORT OF CROSS-EXCEPTION AND
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE
LAW JUDGES'S DECISION**

I. STATEMENT OF THE CASE

On November 6, 2014, Administrative Law Judge Mark Carissimi ("ALJ") issued a decision ("ALJD") finding that Jamestown Fabricated Steel and Supply, Inc. ("Respondent") is a successor to Jamestown Fabricated Steel, Inc. ("JFS"), that since December 19, 2013 Shopmen's Local Union No. 470 of the International Association of Bridge, Structural, Ornamental and Reinforcing Iron Workers ("Union") was the exclusive bargaining representative of Respondent's production and maintenance employees, and that Respondent violated Section 8(a)(1) and (5) of the Act by refusing of recognize and bargain with the Union. (ALJD at 12).

The ALJ appropriately determined that it was "clear" that Respondent was a successor to JFS because of the "substantial continuity" between the operations of JFS and Respondent. (ALJD at 8). The ALJ appropriately determined that Respondent's bargaining obligation to the Union attached on December 19, 2013 because: (1) at that time, Respondent employed a substantial and representative complement of its employees, a majority of whom had been

employed by JFS and represented by the Union, and (2) on that date, the Union made a valid oral demand for recognition. (ALJD at 8-9)

The ALJ, citing UGL-UNICCO Service Co., 357 NLRB No. 76 (2011), appropriately applied the successor bar doctrine and found that Respondent was not permitted to refuse recognition of the Union because, upon the Union's valid oral demand for recognition to Respondent, the Union was entitled to a "reasonable period of time of bargaining without challenge to its majority status." (ALJD at 11). The ALJ further appropriately determined that at the time of the Union's valid oral bargaining request, Respondent had no knowledge of employee disaffection of the Union, and therefore, Respondent did not have "good faith, reasonable doubt that the Union lacked majority status at the time of the Union's demand for recognition." As such, Respondent's failure to recognize the Union violated Section 8(a)(1) and (5) of the Act. (ALJD at 10).

Alternatively, the ALJ appropriately determined that even if the Union did not make a valid oral demand for recognition, it made a valid written demand for recognition and bargaining later on December 19, and that any expressions of disaffection with the Union made by unit employees to Respondent were necessarily tainted due to Respondent's earlier proclamation to its employee that it would be a "nonunion" operation. (ALJD at 11-12).

The General Counsel cross-excepts to the ALJ's determination that the Union did not make a written demand for recognition and bargaining before Respondent became aware of evidence of employee disaffection. (ALJD at 11).

Respondent filed exceptions on December 3, 2014. In its exceptions, Respondent does not contest the ALJ's determination that it is a successor employer to Jamestown Fabricated Steel Inc. ("JFSI"). Further, Respondent does not contest the ALJ's finding that it had hired a

substantial and representative complement of employees as of December 19, 2013. Therefore Respondent inherited the bargaining obligations of JFSI when it received an effective demand for recognition from the Union. Cadillac Asphalt Paving, Co., 349 NLRB 6, 10 (2007). (ALJD 7-9).

Respondent excepts to a numerous factual and legal findings by the ALJ in his determination that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union. As discussed below, the ALJ's determinations pertaining to Respondent's exceptions are fully supported by the administrative record and Board precedent. As such, Respondent's exceptions lack merit and should be dismissed.

Further, the ALJ's determination in regards to the General Counsel's cross-exception is not supported by either the administrative record or Board precedent, and therefore the General Counsel's cross-exception should be upheld.

III. ARGUMENT

A. The ALJ properly determined that the Union issued an effective oral demand for recognition. (Exceptions 1-3)

Despite Respondent's claim to the contrary, the ALJ appropriately determined, and the record reflects, that it received, from the Union, an effective oral demand for recognition and bargaining on December 19, 2013. The ALJ determined, as supported by the consistent record testimony of both Union field representative Harry Ehre and Respondent co-owner Malachi Ives, that on that date, Ehre visited Respondent's steel fabrication shop located Jamestown, New York ("Jamestown shop"). Ehre saw Ives get out of his car. Ehre approached Ives, explained to him that he was a representative of the Union, and told him that he was hand-delivering a demand for recognition and bargaining. Ehre then handed Ives the written demand in an envelope. Ehre testified that he told Ives that the letter was "a demand for recognition." Ives

admitted that Ehire “handed me a letter and asked me to collective (sic) bargain.” Ives then responded by stating that he was “not a big union guy.” The two then engaged in a wide-ranging discussion regarding the benefits of unions and employee benefits. (ALJD 6, Tr. 130-134, 144).

As noted by the ALJ, the Board has consistently upheld the legitimacy of such oral bargaining demands. Hampton Lumber Mills-Washington, 334 NLRB 195 (2001). Further, “where an employer becomes aware, through direct or indirect means, that a third person purporting to act with the authority of the employees intends to bargain on their behalf” then the employer is on notice of a bargaining request. Marysville Travelodge, 233 NLRB 527, 533 (1977). The conversation between Ehire and Ives clearly put Respondent on notice of the Union’s intent to represent and bargain on behalf of Respondent’s employees. It is undisputed that Ehire identified himself to Ives, and explained that he was making a demand for recognition and bargaining. Ives clearly understood what Ehire said, as evidenced by his testimony and because he subsequently engaged in a discussion with Ehire about unions.

Respondent’s cites Sheboygan Sausage Co., 156 NLRB 1490 (1966) in support of its assertion that Ehire failed to adequately demand recognition and bargaining. In that case, a union, without any other communication with an employer, sent a four-line telegram, in caps and without punctuation, which simply stated “THE EMPLOYEES [of the employer] HAVE AUTHORIZED [the union] TO REPRESENT THEM AS THEIR BARGAINNG AGENT THE UNION REQUESTS RECOGNITION FROM [the employer].” The ALJ (in a decision upheld by the Board without comment) found that the telegram could not serve as the union’s demand for recognition and bargaining because the letter lacked clarity, especially in light of the union’s failure to otherwise communicate with the employer. As noted by the ALJ, Sheboygan Sausage is clearly distinguishable, as it deals with an initial organizing drive rather than a successor

situation. Further, while the union's failed demand for recognition in Sheboygan Sausage lacked clarity, in the instant matter, Ehire spoke with Ives in person, explained who he was, handed him a written demand for recognition and bargaining, and then explained that the Union was requesting recognition and bargaining. Ives obviously understood what Ehire said because he proceeded to discuss unions with him. The other cases cited by Respondent in its brief are not Board decisions, and the ALJ cited appropriate Board precedent in ruling that he is "obligated" to follow Board law. (ALJD 10).

Based on the above, the Union made an effective oral demand for recognition and bargaining when Ehire spoke with Ives and handed him the written demand on December 19, 2013. To the extent Respondent excepts to the ALJD due to the ALJ's findings that the Union failed to make an appropriate bargaining demand, Respondent's exceptions should be denied.

B. Because the Union made its oral demand for recognition and bargaining before Respondent obtained any evidence of employee disaffection, the ALJ appropriately determined that Respondent was required to recognize and bargain with the Union.
(Exception 3)

The ALJ, as supported by the record, appropriately determined that the Union made its oral demand for recognition and bargaining before Respondent became aware of evidence of employee disaffection.

The ALJ correctly found that after Ehire made the Union's demand for bargaining, he left the facility. Ives then went to his office, where he learned from employees Devan Marsh and Travis Tkach that they were frustrated with the Union. Testimony from both Marsh and Tkach supports the ALJ's finding that "this was the first time that [either employee] had expressed to Ives their feelings for the Union." Ives acknowledged that, solely based on these employee statements, he elected not to recognize the Union. (ALJD 6, Tr. 40-41, 73-74, 146-147).

Respondent's bargaining obligation attached the moment Ehire made the Union's oral demand for bargaining. *See* Cadillac Asphalt Paving, Co., *supra*. As such, the ALJ appropriately found that upon the Union's demand, the successor bar, as defined in UGL-UNICCO Service Co., 357 NLRB No. 76 (2011), granted the Union an irrebuttable majority status that could not be challenged by Respondent or the employees. The record clearly illustrates that the Union made its oral demand for recognition and bargaining *before* Respondent had any evidence of employee disaffection. Therefore, the ALJ appropriately determined that because the successor bar was in place at the time Respondent learned of evidence of employee disaffection, Respondent was barred from refusing recognition even when confronted with the evidence of disaffection. *Id.* (ALJD 11).

Respondent's reliance on Allentown Mack Sales and Service v. NLRB, 522 U.S. 359 (1998), is misplaced. As explained by the ALJ, in that case, the successor employer learned of evidence of employee disaffection both before and after its bargaining obligation with the union attached. The Supreme Court ruled that the employer properly relied on evidence of disaffection it learned of *before* the bargaining demand in refusing to recognize the union. In the instant matter, Respondent solely relied on evidence of disaffection it obtained *after* the bargaining demand attached. (ALJD 10).

As such, the ALJ properly determined that the Union made an effective oral demand for bargaining which Respondent, as a legal successor, was required to accept. Respondent's claims to the contrary lack merit, and therefore Respondent's exceptions in that regard should be denied. (ALJD 9-10).

C. The Union made an effective written demand for bargaining before the Respondent learned of any evidence of employee disaffection. (Cross Exception)

The ALJ improperly determined that Respondent did not receive a written demand for bargaining at the time Ehire handed the letter demanding recognition and bargaining to the Ives. (ALJD 6).

The decision in Regal Aluminum, 171 NLRB 1403 (1968) is instructive. In that case, the Board upheld an ALJ's determination that a union had effectively requested recognition and bargaining despite the fact that the employer did not open and refused acceptance of the demand letter. The ALJ relied on the fact that, prior to sending the letter, the union had put the employer on clear notice of the organizing drive, and therefore, it was "inferable that when [the union's] letter arrived at the plant...the purport of that communication was at once apparent to [the employer]." *Id.* at 1412; *see also* Midway Golden Dawn, 293 NLRB 152 (1989) (union made effective bargaining demand where employer refused to accept mail which it knew contained a bargaining demand).

In the instant matter, though Ehire handed the written demand for recognition and bargaining to Ives in an envelope, the record clearly illustrates that Ives was well aware of the content of the letter at the time he received it. Ehire testified that he explained to Ives that he was a representative of the Union and was hand-delivering a demand for recognition and bargaining. Ehire then handed Ives the written demand in an envelope. Ehire testified that he told Ives that the letter "was a demand for recognition." Ives testified that Ehire "handed me a letter and asked me to collective (sic) bargain." As such, the record reflects that the Union made an effective written demand when Ehire handed the envelope containing the bargaining demand to Ives. (Tr. 130-131, 132-133, 144).

Alternatively, even if it were determined that the Union's written bargaining demand was not effective until Ives saw the demand, the record reflects that Ives opened the envelope before hearing any evidence of disaffection. Ives testified as follows (emphasis added):

Q: When Mr. Tkach and Mr. Marsh were in your office did you tell them about the demand letter?

A: Yeah.

Q: Was that before or after they made the statements to you?

A: It was after. As -- I was opening it as they were walking in the door. (emphasis added) (Tr. 146-147).

Based on that testimony, Ives spoke with Ehire, learned the contents of the demand letter, and then opened the envelope containing the letter before becoming aware of any evidence of employee disaffection. As such, the written bargaining demand was effective.

Based on the above, the record reflects that the Union made an effective written demand for recognition and bargaining to Respondent before any evidence of employee disaffection. Further, as previously noted, there is no dispute that it was not until *after* Ehire gave Ives the written bargaining demand that Respondent became aware of evidence of employee disaffection.

Therefore, to the extent the ALJ ruled that the Union failed to make a written demand for recognition and bargaining before Respondent obtained evidence of employee disaffection, such a ruling should be reversed.

D. The ALJ appropriately determined that employee statements of disaffection were tainted, and therefore Respondent could not rely on those statements in refusing to recognize and bargain with the Union. (Exceptions 4-8)

Even assuming Respondent had learned of evidence of employee disaffection before its bargaining obligation attached, the ALJ, as supported by the record, properly determined that Respondent was still barred from relying on employee statements of disaffection in refusing to recognize and bargain with the Union because Respondent's actions tainted those employee

statements. Respondent's exceptions to the ALJ's determinations in that regard lack merit. (ALJD 11-12).

The ALJ found, as supported by the record, that on November 12, 2013, shortly before Respondent began operations and approximately one month before the alleged statements of disaffection, Ives met with Tkach. During that meeting, without prompt, Ives told Tkach that Respondent would be a non-union operation. The ALJ determined that Ives' statement tainted the employees' future statements of disaffection (ALJD 11; Tr. 28).

The ALJ's finding that Tkach's statements of disaffection were tainted by Respondent's conduct is fully supported by Board law and precedent. In Advanced Stretchforming, 323 NLRB 529 (1997), the predecessor terminated all of its unit employees on November 30, and told them that most would be hired by the successor but that there would be no union and no seniority. On December 1, the successor hired almost half of the unit employees, and refused to recognize the union based on alleged evidence of disaffection. In holding that the employer's actions constituted violations of Section 8(1)(1) and (5) of the Act, the Board found that "[a] statement to employees that there will be no union at the successor employer's facility blatantly coerces employees in their Section 7 rights to bargain collectively through representatives of their own choosing and constitutes a facially unlawful condition of employment." *Id.* at 530; *see also Massey Energy Co.*, 358 NLRB No. 159, 8 (September 28, 2012) (successor employer lost right to set initial terms and conditions of employment when it informed employees that it would operate without a union). In Phoenix Pipe & Tube, L.P., 302 NLRB 122 (1991), the Board upheld the ALJ's determination that the successor employer unlawfully failed to recognize and bargain with the incumbent union despite apparent statements of disaffection from several unit employees. In so finding, Chairman Stephens partially relied on the fact that many of the alleged

statements of disaffection occurred “during and after employment interviews in which they were told by the Respondent’s manager/interviewers that the Respondent would be opening the plant on a nonunion basis.” Id. at fn.2. Chairman Stephens found that “[a]n employee who wants a secure job at a plant that, he is told, is opening ‘non-union’ might well think it is in his interest to make it clear...that this is acceptable to him and he does not need a union.” Id. citing Fall River Dyeing Corp. v. NLRB, 482 U.S 27, 40 (1987). He further found that the employees’ statements under those circumstances are “a far cry from a forthright rejection of union representation.” Id.

Respondent’s argument that Tkach’s statement of disaffection was not tainted fails. The cases cited by Respondent in support of its exception are not relevant to the instant matter. In none of those cases did an employer tell an employee that the company would be non-union. In the instant matter, it is undisputed that Ives told Tkach that Respondent would be a non-union operation prior to his hire. As noted above, the Board has consistently held that nearly identical statements under similar circumstances necessarily taint any subsequent statements of that employee’s disaffection toward a union. Advanced Stretchforming, supra; Phoenix Pipe & Tube, L.P., supra; Massey Energy Co., supra.

Respondent’s exceptions to the ALJ’s determination that it was “reasonable to infer” that Marsh’s statements of disaffection were tainted also lack merit. The United States Supreme Court has recognized the Board’s authority to draw reasonable inferences from available evidence. Radio Officers Union v. NLRB, 347 U.S. 17, 48-52 (1954). Further, Board law is replete with examples of ALJs and the Board making reasonable inferences based on facts contained in the record. *See Massey Energy Co.*, 358 NLRB at 9 (Board infers that employer officials instructed its agents to discriminate against former union members in hiring despite “no direct evidence”).

In the instant matter, the ALJ, based on record evidence, reasonably inferred that Tkach told Marsh of Respondent's desire to remain non-union. Marsh and Tkach worked together under the predecessor, and clearly had a very good working relationship, as evidenced by the fact that Tkach contacted Marsh directly and asked him to apply for work at Respondent. Further, after Respondent hired Marsh, Tkach was the only other steel fabrication employee employed by Respondent. As such, the two were often in the shop together during the work day. In addition, the record reflects that, after Union representative Ehrie initially visited Respondent's facility, Tkach and Marsh discussed Ehrie's visit and then, together, spoke with Ives about what had occurred. Based on the above record evidence that Tkach and Marsh had a close working relationship and, on occasion, discussed the Union with each other, it was reasonable for the ALJ to assume that Marsh was aware of Ives' desire that Respondent remain a non-union workplace before his statement of disaffection. As such, Marsh's statement of disaffection toward the Union was tainted, and the ALJ properly determined that Respondent could not rely on the tainted statement in refusing to recognize and bargain with the Union. (ALJD 11-12; Tr. 30, 36-37, 53, 62, 71, 73).

Therefore, to the extent that Respondent excepts to the ALJ's determination that Respondent's actions tainted statements of disaffection by Tkach and Marsh, those exceptions should be denied.

E. Conclusion

For the reasons set forth above, record evidence and applicable precedent fully establishes that, as appropriately determined by the ALJ, Respondent violated Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union.¹ As such, Respondent's

¹ Therefore, to the extent Respondent excepts to the Conclusions of Law, the Remedy, and the Order contained in the ALJD, those exceptions should also be dismissed. *See* Respondent's Exceptions 9-13.

exceptions to the ALJ's appropriate factual and legal findings lack merit, and should be dismissed.

DATED at Buffalo, New York, this 18th day of December, 2014.

Respectfully submitted,

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