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Allied Mechanical Services, Inc. and Plumbers and Pipefitters Local 357, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO. Cases 7-CA-40907 and 7-CA-41390

September 28, 2007

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER
AND WALSH

On May 28, 2004, the National Labor Relations Board issued its Decision and Order in this case,¹ finding that, in 1998, the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to reinstate 10 strikers who made unconditional offers to return to work and by refusing to consider for employment and to hire 4 union members who applied for jobs. In that decision, the Board dismissed complaint allegations that the Respondent violated Section 8(a)(3) and (1) by refusing to consider and to hire 15 other job applicants. The Board also dismissed complaint allegations that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from Plumbers and Pipefitters Local 357, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (the Union), refusing to furnish it with information, and making unilateral changes.

On July 14, 2004, the General Counsel filed a motion for reconsideration, and on July 16, 2004, the Union filed a motion for reconsideration. The General Counsel's and the Union's motions request that the Board reconsider its finding that the Respondent did not violate Section 8(a)(5) and (1). The Respondent filed an opposition to the motions for reconsideration, the AFL-CIO filed an amicus brief in support of the motions for reconsideration, and the Respondent filed an opposition to the AFL-CIO's brief.

In finding that the Respondent's withdrawal of recognition from Local 357 on July 22, 1998, did not violate Section 8(a)(5) and (1), the Board relied on the judge's finding that Local 357 did not succeed to Local 337's bargaining rights² after Locals 337 and 513 merged to

form Local 357.³ The Board has held that an employer's obligation to recognize and bargain with an incumbent union continues following the union's merger or affiliation unless either (1) the union's members were not afforded an opportunity to vote, with adequate due process safeguards, regarding the merger or affiliation, or (2) the organizational changes resulting from the merger or affiliation were so dramatic that the postaffiliation union lacked substantial continuity with the preaffiliation union.⁴ The judge found, and the Board agreed, that the merger of Locals 337 and 513 to form Local 357 did not satisfy the first prong of this test, the "due process" standard, because Local 337's members were not given an opportunity to vote on the merger.⁵

In support of the motions for reconsideration, the General Counsel, the Union, and amicus AFL-CIO argue that the due process standard for union mergers is not viable in light of the Supreme Court's decision in *NLRB v. Financial Institution Employees Local 1182 (Seattle-First National Bank)*, 475 U.S. 192 (1986). In its opposition, the Respondent contends that the Board properly affirmed the judge's decision applying controlling Board precedent and that reconsideration of the Board's decision is unwarranted.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered its prior decision, the judge's decision, and the record in light of the General Counsel's and the Union's motions for reconsideration, the AFL-CIO's amicus brief, and the Respondent's opposition to the motions and its opposition to the amicus brief, and has decided to grant the motions for reconsideration and take further action for the reasons set forth below.

¹ The dismissals of the other 8(a)(5) allegations, regarding unilateral changes and refusal to provide information, were premised on the findings that the Respondent's withdrawal of recognition was lawful and that Local 357 did not succeed to Local 337's bargaining rights.

² See *Sullivan Bros. Printers, Inc.*, 317 NLRB 561, 562 (1995), *enfd.* 99 F.3d 1217 (1st Cir. 1996); *Minn-Dak Farmers Cooperative*, 311 NLRB 942, 944-945 (1993), *enfd.* 32 F.3d 390 (8th Cir. 1994); *May Department Stores Co.*, 289 NLRB 661 (1988), *enfd.* 897 F.2d 221 (7th Cir. 1990), *cert. denied* 498 U.S. 895 (1990); *F. W. Woolworth Co.*, 285 NLRB 854 (1987), *enfd. mem.* 892 F.2d 1041 (4th Cir. 1989).

³ The Respondent did not contend before the judge, nor does it argue to the Board, that the organizational changes resulting from the merger were so dramatic that Local 357 lacked substantial continuity with Local 337. The burden to make such a showing is on the party seeking to avoid its bargaining obligation. *CPS Chemical Co.*, 324 NLRB 1018, 1020 (1997), *enfd.* 160 F.3d 150 (3d Cir. 1998); *Sullivan Bros. Printers*, *supra*, 317 NLRB at 562; *Minn-Dak Farmers Cooperative*, *supra*, 311 NLRB at 945. Thus, the issue of whether Local 357 lacked substantial continuity with Local 337 is not before us.

¹ 341 NLRB 1084.

² In 1991, the Respondent agreed to recognize and bargain with Plumbers and Pipefitters Local 337, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO.

I. DUE PROCESS REQUIREMENT

In our recent decision in *Raymond F. Kravis Center for the Performing Arts*, 351 NLRB No. 19 (2007), we found that the Board's due process requirement for union affiliations and mergers could not be sustained in light of the Supreme Court's decision in *Seattle-First*, supra. In *Seattle-First*, the Court held that the Board lacked authority to discontinue an employer's obligation to recognize a union as a result of its affiliating with another union, unless the Board determined that the affiliation raised a question concerning representation. In *Kravis*, supra, we found that failure to provide union members an opportunity to vote, with adequate due process safeguards, regarding a merger or affiliation does not raise a question concerning representation. We, therefore, overruled our prior precedent and held that, following a union merger or affiliation, an employer's obligation to recognize and bargain with the union continues regardless of whether the merger or affiliation was conducted in a manner that complied with due process requirements prescribed in our previous cases. Consequently, in view of our decision in *Kravis*, we grant the General Counsel's and Local 357's motions for reconsideration and, contrary to our prior decision in this case, reverse the judge's finding that the lack of a membership vote on the union merger relieved the Respondent of its obligation to recognize and bargain with Local 357.⁶

II. ALTERNATIVE RATIONALES

The judge set forth alternative rationales for his dismissal of the allegations that the Respondent violated Section 8(a)(5). In our prior decision, we adopted his

⁶ Application of our ruling in *Kravis* to the present case is consistent with the principle that a decision changing existing law or policy is given retroactive effect unless retroactive application would cause "manifest injustice." *NLRB v. Bufo Corp.*, 899 F.2d 608, 611 (7th Cir. 1990). Since the Supreme Court's 1986 decision in *Seattle-First*, the Board, aside from its prior decision in the present case, has refrained from relying on a union's failure to meet the due process standard as a basis for finding that the employer lawfully withdrew recognition from the union. Indeed, in a number of cases, the Board expressly noted, but declined to pass on, the question of whether it possessed authority to impose the due process requirement in light of *Seattle-First*. *Sullivan Bros. Printers, Inc.*, supra, 317 NLRB at 562 fn. 2; *Paragon Paint Corp.*, 317 NLRB 747, 748 (1995), enfd. mem. 90 F.3d 591 (D.C. Cir. 1996); *May Department Stores Co.*, supra, 289 NLRB at 665 fn. 16; *Hammond Publishers, Inc.*, 286 NLRB 49, 50 fn. 8 (1987). Thus, the Respondent could not have justifiably relied on the due process standard as a well-settled requirement when it withdrew recognition from Local 357 in 1998. Accordingly, application of our ruling in *Kravis* to the present case would not cause manifest injustice. Further, in view of *Seattle-First*'s holding that the Board lacks authority to discontinue an employer's obligation to recognize a union because of the union's affiliation with another union unless the Board finds that the affiliation raised a question concerning representation, we cannot refrain from applying *Kravis* in the present case.

dismissal of these allegations solely on the basis of his finding that the union merger failed to satisfy the due process standard, and we found it unnecessary to pass on his other rationales, to which the General Counsel and the Union also excepted. Therefore, we must address these rationales here. Initially, we shall set forth the facts underlying the alleged 8(a)(5) violations and the related legal issues.

III. FACTS

Local 337 began organizing the Respondent's plumbers and pipefitters in 1990. On April 24, 1990, Local 337 demanded recognition from the Respondent, claiming that it represented a majority of the unit employees and offering to demonstrate proof of majority status to an agreed-upon third party. On December 13, 1990, the General Counsel issued a complaint alleging that, by April 24, 1990, a majority of unit employees had designated Local 337 as their collective-bargaining representative, but that the Respondent had committed numerous violations of Section 8(a)(1) and (3) which were so serious that the possibility of conducting a fair election was slight. Accordingly, the complaint alleged that the employees' sentiments regarding representation would be better protected by ordering the Respondent to recognize and bargain with Local 337.⁷ On July 30, 1991, the parties resolved the complaint by entering into an informal settlement agreement in which the Respondent agreed, among other things, to "recognize and, upon request, bargain" with Local 337 "as the exclusive collective bargaining representative of the [unit] employees . . . with respect to rates of pay, wages, hours, and other terms and conditions of employment" and "if an understanding is reached, embody it in a signed collective-bargaining agreement."

The parties thereafter engaged in bargaining but never reached a contract. In fact, they had a contentious relationship that resulted in a number of unfair labor practice complaints. In one such case, concerning events occurring in 1995-1996, the Board found, among other things, that the Respondent violated Section 8(a)(5) by making unilateral changes, bypassing Local 337, refusing to furnish information, and by engaging in overall bad-faith bargaining.⁸

⁷ This allegation sought a *Gissel* bargaining order. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

⁸ *Allied Mechanical Services*, 332 NLRB 1600 (2001). In that case, the Board also found that, in 1996, the Respondent violated Sec. 8(a)(3) and (1) by threatening to discharge and by discharging striking employees and by refusing to reinstate strikers who made unconditional offers to return to work. In a prior case, *Allied Mechanical Services*, 320 NLRB 32 (1995), enfd. 113 F.3d 623 (6th Cir. 1997), the Board found that, in 1993, the Respondent violated Sec. 8(a)(3) and (1) by refusing to reinstate strikers who made unconditional offers to return to work.

As noted above, on March 1, 1998, Local 337 merged with Local 513 to create Local 357. Following that merger, the Respondent and Local 357 met for bargaining nine times. On June 29, 1998, Local 357 requested information, which the Respondent supplied only in part.⁹ On July 22, 1998, the Respondent withdrew recognition from Local 357, stating that the parties had an 8(f) relationship that it was free to terminate, and that the Respondent had no obligation to bargain with Local 357, as it had been formed from a merger of Local 337 and another local. On August 1, 1998, the Respondent, without notice to Local 357, revised its job application procedure to require applicants to apply in person at its Kalamazoo office.

IV. 8(f) RELATIONSHIP

A. Judge's Decision

Apart from his finding that the union merger did not satisfy the due process requirement, the judge also found that the Respondent and Local 337 had an 8(f) relationship, which freed the Respondent to withdraw recognition from Local 357, Local 337's putative successor. In finding that the parties had an 8(f) relationship, the judge noted that, under *John Deklewa & Sons*,¹⁰ a collective-bargaining relationship in the construction industry is presumed to be governed by Section 8(f), and the party asserting a 9(a) relationship has the burden of proving it. The judge rejected the General Counsel's contention that a 9(a) relationship was shown by the parties' 1991 settlement agreement, because that agreement did not expressly recite that Local 337 represented a majority of the unit employees and because it made no reference to Section 9(a). Additionally, in finding that the parties had not intended to enter into a 9(a) relationship, the judge noted that the only written recognitional proposal that Local 337 made during its bargaining with the Respondent stated that the Respondent recognized Local 337 "consistent with Section 8(f)" of the Act.

The judge also rejected the General Counsel's contention that, because Local 337 demanded recognition from the Respondent as a majority representative and the Gen-

eral Counsel's 1990 complaint alleged that Local 337 represented a majority of the unit employees, the Respondent necessarily acceded to Local 337's majority status by entering into the 1991 settlement agreement resolving the complaint. The judge reasoned that the complaint had not alleged that the Respondent's failure to grant Local 337's demand for recognition constituted a violation of Section 8(a)(5). Rather, the complaint sought a bargaining order as a remedy for alleged 8(a)(3) violations. Additionally, the settlement agreement did not withdraw the Respondent's answer, which had denied the allegation that Local 337 represented a majority of unit employees.

B. Legal Principles

In determining whether the relationship between the Respondent and Local 337 was governed by Section 8(f) or Section 9(a), it is useful to review the distinctions between the two types of relationships. In *Madison Industries*,¹¹ the Board recently described the respective rights and obligations created by 8(f) and 9(a) relationships as follows:

Section 8(f), subparagraph (1) permits unions and employers in the construction industry to enter into collective-bargaining agreements without the union having to establish that it has the support of a majority of the employees in the covered unit. The provision therefore creates an exception to Section 9(a)'s general rule requiring a showing of majority support of unit employees for the union. Section 8(f) also creates an exception to the general rule that an employer and a union lacking majority support of unit employees commit unfair labor practices by entering into a bargaining relationship with respect to those employees.

The distinction between a union's representative status under Section 8(f) and under Section 9(a) is significant because an 8(f) relationship may be terminated by either the union or the employer upon the expiration of their collective-bargaining agreement. *John Deklewa & Sons*, 282 NLRB 1375, 1386-1387 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988). By contrast, a 9(a) relationship (and the associated obligation to bargain) continues after contract expiration, unless and until the union is shown to have lost majority support. *Levitz Furniture Co.*, 333 NLRB 717 (2001). Similarly, an 8(f) contract does not bar a representation petition under Section 9, while a contract

Additionally, in 1997, the General Counsel issued a complaint alleging that the Respondent violated Sec. 8(a)(5) by engaging in unilateral actions and refusing to provide information. As to that 1997 complaint, the parties entered into an informal settlement agreement on February 5, 1998, under which the Respondent agreed to bargain with Local 337, furnish relevant information, and not make unilateral changes.

⁹ The Respondent failed to provide Local 357 with lists of (a) all of the Respondent's licensed plumbers within Michigan, with current wages; (b) all of the Respondent's welders who were carbon-steel certified, and (c) all of the Respondent's welders who were stainless-steel certified

¹⁰ 282 NLRB 1375 (1987), enfd. sub. nom. *Iron Worker Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988)

¹¹ 349 NLRB No. 114 (2007)

made with a 9(a) representative does bar such a petition. *Deklewa*, supra at 1387.

The *Deklewa* Board recognized that a Congressional objective in enacting this provision in Section 8(f) was to “lend stability to the construction industry while fully protecting employee free choice principles.” Id. at 1388. In furtherance of this objective, *Deklewa* adopted a rebuttable presumption that a bargaining relationship in the construction industry was established under Section 8(f), and placed the burden of proving that the relationship instead falls under Section 9(a) on the party making that assertion. Id. at 1385, fn. 41. In so doing, however, *Deklewa* did not foreclose an 8(f) representative from achieving 9(a) status.^[12]

In *Golden West Electric*,¹³ the Board summarized the standards under which a construction industry union can prove that a construction industry employer has voluntarily recognized the union as a 9(a) majority representative of the employees in question:

[A] union can establish voluntary recognition by showing its express demand for, and an employer’s voluntary grant of, recognition to the union as bargaining representative based on a contemporaneous showing of union support among a majority of employees in an appropriate unit. *Brannan Sand & Gravel Co.*, 289 NLRB 977, 979–980 (1988); *American Thoro-Clean*, 283 NLRB 1107, 1108–1109 (1987). Further in *J & R Tile*, 291 NLRB 1034, 1036 (1988), the Board held that, to establish voluntary recognition, there must be positive evidence that a union unequivocally demanded recognition as the employees’ 9(a) representative and that the employer unequivocally accepted it as such.^[14]

In *Stanton Fuel & Material*,¹⁵ the Board held that 9(a) status may be established solely by the terms of a written agreement if the agreement unequivocally indicates that: (1) the union requested recognition as the majority or 9(a) representative of the unit employees; (2) the employer recognized the union as the majority or 9(a) bargaining representative; and (3) the employer’s recognition was based on the union’s having shown, or having offered to show, evidence of its majority support. Further, as the Board observed in *Madison Industries*, “[t]he parties’ failure to specifically refer to Section 9(a) in the

recognition clause of their agreement is not necessarily fatal to finding that a 9(a) relationship exists, provided that the rest of the agreement conclusively notifies the parties that a 9(a) relationship is intended.”¹⁶ The Board added:

[I]n determining whether the presumption of 8(f) status has been rebutted, the Board first considers whether the agreement, examined in its entirety, “conclusively notifies the parties that a 9(a) relationship is intended.” *Oklahoma Installation*, supra, 219 F.3d at 1165. Where it does so, the presumption of 8(f) status has been rebutted. *Stanton Fuel*, supra, 335 NLRB at 720. Where the parties’ agreement does not do so, the Board considers any relevant extrinsic evidence bearing on the parties’ intent as to the nature of their relationship. Id., fn. 15.^[17]

C. Analysis

In light of the foregoing principles, we find, contrary to the judge, that under the specific facts of this case, particularly the parties’ 1991 settlement agreement and the relevant extrinsic evidence, together, show that the Respondent and Local 337 intended to establish, and did establish, a 9(a) relationship. On April 24, 1990, Local 337 demanded recognition as the majority representative of the unit employees and offered to demonstrate proof of majority status. The Respondent subsequently agreed to recognize and to bargain with Local 337 in settlement of a complaint that alleged that a majority of unit employees had designated Local 337 as their collective-bargaining representative and that sought a *Gissel* bargaining order in place of an election because a fair election was unlikely. Given Local 337’s claim of majority status and the *Gissel* bargaining order sought by the complaint, the bargaining relationship established by settlement of the complaint logically would be premised on the notion that Local 337 represented a majority of unit employees. Indeed, a settlement agreement establishing only an 8(f) relationship would make little sense, as it would bear no relationship to the allegations of the complaint.

Further, the settlement agreement incorporated language indicative solely of a 9(a) relationship. As noted above, the settlement agreement required the Respondent to “recognize and, upon request, bargain” with Local 337 “as the exclusive collective bargaining representative of the [unit] employees . . . with respect to rates of pay,

¹² 349 NLRB No. 114, slip op at 2–3, footnotes omitted.

¹³ 307 NLRB 1494 (1992).

¹⁴ 307 NLRB at 1495.

¹⁵ 335 NLRB 717, 719–720 (2001). Chairman Battista and Member Schaumber did not participate in *Stanton Fuel* and no party here has sought its reversal. Accordingly, they express no opinion on whether that case was correctly decided.

¹⁶ 349 NLRB No. 114, slip op at 3, citing *NLRB v Triple C Maintenance*, 219 F.3d 1147, 1155 fn. 3 (10th Cir. 2000); *NLRB v Oklahoma Installation Co.*, 219 F.3d 1160, 1165 (10th Cir. 2000)

¹⁷ 349 NLRB No. 114, slip op. at 3.

wages, hours, and other terms and conditions of employment “ and “if an understanding is reached, embody it in a signed collective-bargaining agreement.” This language is virtually identical to the order language customarily used to remedy 9(a) withdrawal of recognition violations. Further, this language differs significantly from orders for 8(f) withdrawal of recognition violations, which, reflecting the more circumscribed obligations imposed by an 8(f) relationship, require the respondent merely to “recognize the Union as the *limited* exclusive collective-bargaining representative” and comply with the collective-bargaining agreement.¹⁸ Thus, the settlement agreement imposed obligations on the Respondent beyond those of an 8(f) relationship, in that it did not merely require the Respondent to comply with a collective-bargaining agreement and bargain with Local 337 as the employees’ limited representative. Rather, the settlement agreement required the Respondent, without limitation, to recognize and bargain with Local 337 concerning wages, hours, and other terms and conditions of employment and, further, to sign a contract if an agreement was reached. Thus, given that (a) Local 337 demanded recognition as the employees’ majority representative and offered to demonstrate proof of majority status; (b) the settlement agreement resolved a complaint alleging that Local 337 represented a majority of the unit employees and sought a *Gissel* bargaining order because a fair election could not be held; and (c) the settlement agreement imposed obligations on the Respondent to recognize and bargain with Local 337 that went beyond obligations that could be imposed by an 8(f) relationship and are characteristic of 9(a) relationships, it is clear that the parties intended to establish a 9(a) relationship.¹⁹

¹⁸ Compare, e.g., par. 2(a) of the order in *Flying Foods*, 345 NLRB No. 10 (2005), enfd 471 F.3d 178 (D.C. Cir. 2006), where the employer in a 9(a) relationship unlawfully withdrew recognition from the union, with par. 2(a) of the order in *Willis Roof Consulting*, 349 NLRB No. 24 (2007), where the employer repudiated an 8(f) contract and withdrew recognition from the union. In *Flying Foods*, supra, par. 2(a) of the order is virtually identical to the language in the settlement agreement at issue here. Conversely, in *Willis Roof*, supra, par. 2(a) of the order merely required the employer to “recognize the Union as the *limited* exclusive collective-bargaining representative of the [unit] employees” and comply with the terms and conditions of the collective-bargaining agreement. (Emphasis added.)

¹⁹ The judge’s rationale to the contrary is misplaced. As noted above, the parties’ failure to specifically refer to Sec. 9(a) in the 1991 settlement agreement is not necessarily fatal to a finding that a 9(a) relationship exists, provided that the rest of the agreement, in light of the relevant extrinsic evidence, conclusively notifies the parties that a 9(a) relationship is intended. *Madison Industries*, supra, 349 NLRB No. 114, slip op. at 3. The fact that the complaint seeking a *Gissel* bargaining order did not allege an 8(a)(5) violation is of no consequence. *Steel-Fab, Inc.*, 212 NLRB 363 (1974) (*Gissel* bargaining order need not be premised on 8(a)(5) violation, as such an order remedies 8(a)(1) violations that have dissipated union’s majority and prevented the holding of

Even more important in our consideration of the nature of the parties’ bargaining relationship is the impact of the Board’s decision in *Allied Mechanical Services*, 332 NLRB 1600 (2001). In that case, which also involved the Respondent, Local 337, and the bargaining unit at issue here, the Board found that the Respondent violated Section 8(a)(5) in 1995–1996 by making unilateral changes, bypassing Local 337, refusing to furnish information, and engaging in overall bad-faith bargaining. The Respondent and Local 337 did not have a collective-bargaining agreement during that period. Thus, the Board’s finding of the 8(a)(5) violations in that case necessarily was premised on the existence of a 9(a) relationship between the Respondent and Local 337, because an 8(f) relationship imposes no enforceable duties in the absence of a collective-bargaining agreement. In other words, the Board necessarily determined that the bargaining relationship between the Respondent and Local 337 was governed by Section 9(a). Therefore, relitigation of the nature of the parties’ bargaining relationship in any subsequent case between them is barred under the principles of *res judicata* and collateral estoppel.

As the Board observed in *Siemens Building Technologies*,²⁰ “[t]he Board has held on numerous occasions that absent newly discovered or previously unavailable evidence or special circumstances, a respondent in a proceeding alleging a violation of Section 8(a)(5) of the Act is not entitled to relitigate issues that were litigated in a prior proceeding.”²¹ In *Siemens*, the Board rejected, on the basis of collateral estoppel, the respondent’s contention that it was not a successor employer to Monroe County when it took over operations of the county’s power plant, because the Board, in a prior decision, had determined that the respondent was a successor regarding that power plant.²² Similarly, in *Carlow’s Ltd.*,²³ the Board found foreclosed, by *res judicata*, the respondent’s defense that it had no responsibilities under the expired collective-bargaining agreement, because the issue had

a fair election). Nor, given the terms of the settlement agreement and the circumstances under which it was reached, are the denials in the Respondent’s answer of any particular significance. Further, Local 337’s written proposal, in subsequent contract negotiations, for an 8(f) recognition clause sheds little light on the nature of the relationship created under the settlement agreement, as the record does not reveal Local 337’s reasons for offering this proposal, and parties routinely offer concessions in negotiations to obtain other desired benefits. Moreover, any probative value of this contract proposal is largely negated by the fact that Local 337 also made a request, albeit orally, for 9(a) recognition during negotiations

²⁰ 346 NLRB No. 9 (2005).

²¹ *Id.*, slip op. at 5 (citing cases).

²² *Id.*, slip op. at 1 fn. 1.

²³ 315 NLRB 27 (1994)

already been determined in a contempt proceeding in the court of appeals.

In the present case, the Respondent has not asserted any newly discovered or previously unavailable evidence or special circumstances to justify relitigation of the Board's prior determination that the Respondent had a 9(a) relationship with Local 337. Accordingly, under the specific facts of this case, including the Board's prior decision finding that the Respondent committed violations of Section 8(a)(5), which was necessarily premised on the existence of a 9(a) relationship with Local 337, we find that the Respondent and Local 337 had a 9(a) relationship. Therefore, contrary to the judge, we find no merit in the Respondent's contention that it was free to withdraw recognition from Local 357, refuse to provide it information, and make unilateral changes on the basis that it had an 8(f) relationship with Local 337.

V. THE RESPONDENT BARGAINED FOR A REASONABLE PERIOD OF TIME

A. Judge's Decision

As another alternative basis for his dismissal of the 8(a)(5) allegations, the judge found that, even if the Union were a 9(a) representative of the unit employees, the General Counsel still had made no valid argument that the Respondent's withdrawal of recognition was unlawful. The General Counsel had argued that recognition could be withdrawn only after the parties had bargained for a reasonable period of time, and the judge noted that this position was "radically inconsistent with current law that an employer may withdraw recognition from an established Section 9(a) representative only by a showing of a good faith doubt of a union's majority status or by a showing that the union did not, in fact, represent a majority."²⁴ Nevertheless, the judge found that the Respondent had bargained with the Union for a reasonable period, observing that the General Counsel failed to argue otherwise.²⁵

B. Parties' Arguments

The General Counsel contends that the judge misunderstood his argument. The General Counsel asserts that he was not contending that an employer is free simply to withdraw recognition once parties have bargained for a reasonable period of time. Rather, the General Counsel contends that the Respondent was not entitled to withdraw recognition, because it did not establish that the Union lacked majority support or that the Respondent had a good-faith doubt of majority status based on objective evidence.

The Respondent contends that it did have a good-faith doubt of the Union's majority status based on two objective factors: (1) there was no evidence that the Union ever represented a majority of unit employees, as no demonstration of majority status was ever made; and (2) the only visible union activity was conducted solely by a handful of salts. Further, these salts were the only employees at union meetings and the only employees who struck or picketed.

C. Analysis

Contrary to the judge, we find that the Respondent was not free to withdraw recognition simply because it had bargained with Local 337 for a reasonable period of time. Because the Respondent had recognized and agreed to bargain with Local 337 under a settlement agreement, Local 337 possessed an irrebuttable presumption of majority status for a reasonable period of time.²⁶ Although the reasonable period had expired by the time that the Respondent withdrew recognition, that fact alone did not privilege the Respondent's withdrawal of recognition.²⁷ Rather, at that point, the presumption of majority support became rebuttable. Under the law at the time that the Respondent withdrew recognition, the Respondent could rebut the presumption of majority support and withdraw recognition by showing either that the Union had actually lost the support of a majority of the bargaining unit employees or that the employer had good-faith doubt or uncertainty, based on objective considerations, of the Union's continued majority status.²⁸

The Respondent failed to make such a showing. The Respondent's contention that the Union never demonstrated majority support is misplaced, because, as shown above, the Respondent's recognition and agreement to bargain with Local 337 under a settlement agreement created a presumption of majority support. Additionally, contrary to the Respondent's contention, the fact that only the salts engaged in union activities does not amount to an objective consideration that would support a good-faith doubt or uncertainty regarding employees' support for union representation.²⁹ Accordingly, we find, contrary to the judge, that the Respondent was not free to withdraw recognition simply because it had bargained

²⁶ *Straus Communications*, 246 NLRB 846 (1979), *enfd.* 625 F.2d 458 (2d Cir. 1980). The same rule applies when an employer voluntarily recognizes a union outside of a settlement agreement *MGM Grand Hotel*, 329 NLRB 464, 466 (1999).

²⁷ *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990).

²⁸ *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998). The Board changed this rule in *Leviz*, 333 NLRB 717 (2001), but made the change applicable only prospectively.

²⁹ *Cf. Henry Bierce Co.*, 328 NLRB 646 (1999) (reasonable uncertainty not shown by union inactivity), *affd. mem. in part, remanded* 234 F.3d 1268 (6th Cir. 2000).

²⁴ 341 NLRB at 1098

²⁵ *Id.* at 1099.

with Local 337 for a reasonable period of time, and we additionally find that the Respondent failed to show good-faith doubt or uncertainty, based on objective considerations, of the union's continued majority status.

VI. DISPOSITION OF THE ALLEGED VIOLATIONS

As noted above, the complaint alleged that the Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from Local 357, refusing to furnish it with requested information, and making unilateral changes. The record shows that the Respondent withdrew recognition from Local 357 on July 22, 1998, failed to provide certain information regarding unit employees that Local 357 requested on June 29, 1998,³⁰ and, without notice to Local 357, revised its job application procedure on August 1, 1998, to require applicants to apply in person at its Kalamazoo office.

We have rejected all of the judge's reasons for finding that the Respondent was free to withdraw recognition from Local 357: that the union members were not provided an opportunity to vote, with adequate due process safeguards, on the merger that created Local 357; that the General Counsel failed to establish that the Respondent and Local 357 had a 9(a) bargaining relationship; and that the Respondent had bargained for a reasonable period of time with Local 337. Additionally, we have found no merit to the Respondent's contention that it lawfully withdrew recognition because it had good-faith doubt or uncertainty, based on objective considerations, of the union's continued majority status. Accordingly, we find that the Respondent violated 8(a)(5) and (1) of the Act by withdrawing recognition from Local 357 on July 22, 1998.

With respect to the other 8(a)(5) allegations, the Respondent filed no exceptions to the judge's finding that it acted unilaterally by changing hiring procedures. While the Respondent did except to the judge's finding that it withheld requested, relevant information, it presented no argument regarding this issue. Further, the requested information, which concerned unit employees, was presumptively relevant.³¹ Accordingly, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by revising its job application procedure on August 1, 1998, without notice to Local 357 and by failing to provide to Local 357 certain information regarding unit employees that it requested on June 29, 1998.

REMEDY

Having found that the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5)

and (1) of the Act, we shall order it to cease and desist from engaging in such conduct and to post an appropriate notice. We shall also order the Respondent to take certain affirmative action designed to effectuate the policies of the Act.

To remedy its unlawful withdrawal of recognition from the Union, we shall order the Respondent to recognize and bargain with the Union as the exclusive representative of the employees in the unit described below with respect to wages, hours, and other terms and conditions of employment and, if an agreement is reached, embody it in a signed document.

For the reasons set forth in *Caterair International*, 322 NLRB 64 (1996), we find that the foregoing affirmative bargaining order is warranted in this case as a remedy for the Respondent's unlawful withdrawal of recognition from the Union. See, e.g., *Parkwood Developmental Center*, 347 NLRB No. 95, slip op. at 3-4 (2006); *Alpha Associates*, 344 NLRB No. 95, slip op. at 6-7 (2005). The Board has previously held that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." *Caterair International*, 322 NLRB at 68.

In several cases, however, the United States Court of Appeals for the District of Columbia Circuit has required the Board to justify, on the facts of each case, the imposition of an affirmative bargaining order. See, e.g., *Vincent Industrial Plastics, Inc. v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000); *Lee Lumber & Bldg. Material Corp. v. NLRB*, 117 F.3d 1454, 1462 (D.C. Cir. 1997); and *Exxel/Atmos, Inc. v. NLRB*, 28 F.3d 1243, 1248 (D.C. Cir. 1994). In *Vincent Industrial Plastics*, supra, the court stated that an affirmative bargaining order "must be justified by a reasoned analysis that includes an explicit balancing of three considerations: (1) the employees' § 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violations of the Act." 209 F.3d at 738.

Consistent with the court's requirement, we have examined the particular facts of this case and we find that a balancing of the three factors warrants an affirmative bargaining order.³²

³² Chairman Battista and Member Schaumber do not agree with the view expressed in *Caterair International*, supra, that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) violation." They agree with the United States Court of Appeals for the District of Columbia Circuit that a case-by-case analysis is required to determine if the remedy is appropriate. *Alpha Associates*, 344 NLRB No. 95, slip op. at 6 fn. 14 (2005). They recognize, however, that the view expressed in *Caterair International*, supra, represents extant Board law. *Flying Foods*, 345 NLRB No. 10, slip op. at 10 fn. 23

³⁰ See fn. 9, above

³¹ *Postal Service*, 350 NLRB No. 43, slip op. at 44 (2007)

(1) An affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the Respondent's unlawful withdrawal of recognition and resulting refusal to bargain with the Union. The Respondent withdrew recognition from the Union without an objective basis for a good-faith doubt about majority status, much less a showing that the Union had actually lost majority support. The Respondent's unlawful conduct demonstrated a disregard for the employees' Section 7 right to select union representation, and the Respondent's conduct would tend to unfairly undermine continuing support for the Union. This is particularly true given the background of the Respondent's repeated unfair labor practices during the entire period that the employees have been represented by the Union and its predecessor. As noted above, the Respondent's opposition to Local 337's 1990 organizing campaign resulted in issuance of an unfair labor practice complaint alleging violations of Section 8(a)(1) and (3) so serious that the possibility of conducting a fair election was thought to be slight. While the parties settled that complaint, subsequent cases resulted in findings that the Respondent unlawfully refused to reinstate strikers in 1993; unlawfully made unilateral changes, bypassed the union, refused to furnish information, engaged in overall bad-faith bargaining, threatened to discharge and discharged striking employees, and refused to reinstate strikers in 1995-1996; and unlawfully refused to hire union-affiliated job applicants and to reinstate strikers in 1998. Thus, the Respondent's disregard of employees' Section 7 rights is manifest, and an affirmative bargaining order is needed to compel the Respondent to respect those rights.

At the same time, an affirmative bargaining order, with its attendant bar to raising a question concerning the Union's continuing majority status for a reasonable time, does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation, as the order is not of indefinite duration but for a reasonable period of time sufficient to allow the good-faith bargaining that the Respondent's unlawful withdrawal of recognition cut short. It is only by restoring the status quo ante and requiring the Respondent to bargain with the Union for a reasonable period of time that employees' Section 7 right to union representation is vindicated. It will also give employees an opportunity to fairly assess the Union's effectiveness as a bargaining representative and determine whether continued representation by the Union is in their best interests.

(2005) Regardless of which view is applied to the instant case, Chairman Battista and Member Schaumber agree that an affirmative bargaining order is warranted here.

(2) An affirmative bargaining order also serves the Act's policies of fostering meaningful collective bargaining and industrial peace. It removes the Respondent's incentive to delay bargaining in the hope of discouraging support for the Union, and it ensures that the Union will not be pressured to achieve immediate results at the bargaining table—results that might not be in the employees' best interests. It fosters industrial peace by reinstating the Union to its rightful position as the bargaining representative chosen by a majority of the employees. Also, as mentioned, providing this temporary period of insulated bargaining will also afford employees a fair opportunity to assess the Union's performance in an atmosphere free of the effects of the Respondent's unlawful withdrawal of recognition and refusal to bargain.

(3) As an alternative remedy, a cease-and-desist order alone would be inadequate to remedy the Respondent's withdrawal of recognition and refusal to bargain with the Union because it would allow another challenge to the Union's majority status before the employees had a reasonable time to regroup and bargain with the Respondent through their chosen representative in an effort to reach a collective-bargaining agreement. Such a result would be especially unfair where the Respondent's unlawful refusal to recognize and bargain with the Union has continued since 1998 and has likely undermined employee support for continued union representation, particularly given the Respondent's prior history of unfair labor practices. Allowing another challenge to the Union's majority status before a reasonable period for bargaining has elapsed also would be unfair in light of the fact that the litigation of the Union's charges took several years and, as a result, the Union needs to reestablish its representative status with unit employees. Indeed, permitting a decertification petition to be filed immediately might very well allow the Respondent to profit from its own unlawful conduct. We find that these considerations outweigh the affirmative bargaining order's temporary suspension of the decertification rights of employees who oppose continued union representation.

For all the foregoing reasons, we find that an affirmative bargaining order with its temporary decertification bar is necessary to fully remedy the violation in this case.

ORDER

The National Labor Relations Board orders that the Respondent, Allied Mechanical Services, Inc., Kalamazoo, Michigan, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Withdrawing recognition from Plumbers and Pipefitters Local 357, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of

the United States and Canada, AFL-CIO (the Union) as the exclusive collective-bargaining representative of the following appropriate unit:

All full-time and regular part-time plumbers, plumber apprentices, pipe fitters, pipe apprentices, welders, plumbing and pipe fitting service employees and shop employees employed by the Respondent at and out of its facility located at 2211 Miller Road, Kalamazoo, Michigan; but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act and all other employees.

(b) Refusing to timely furnish the Union with information requested and needed in the performance of its duties as exclusive collective-bargaining representative.

(c) Refusing to bargain with the Union as the exclusive collective-bargaining representative of its employees in an appropriate bargaining unit by unilaterally revising its job application procedure to require applicants to apply in person at its Kalamazoo office.

(d) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain collectively with the Union as the exclusive bargaining representative of the employees in the above-mentioned unit concerning wages, hours, and other terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement.

(b) Furnish to the Union in a timely manner the information requested by the Union on June 29, 1998.

(c) Rescind its unilaterally instituted requirement that applicants apply in person at its Kalamazoo office, and notify the Union and the unit employees in writing that it has done so.

(d) Within 14 days after service by the Region, post at its Kalamazoo, Michigan facility copies of the attached notice marked "Appendix."³³ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered,

³³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 29, 1998.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 28, 2007

Robert J. Battista, Chairman

Peter C. Schaumber, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT withdraw recognition from Plumbers and Pipefitters Local 357, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (the Union) as the exclusive collective-bargaining representative of the following appropriate unit:

All full-time and regular part-time plumbers, plumber apprentices, pipe fitters, pipe apprentices, welders,

plumbing and pipe fitting service employees and shop employees employed by the Employer at and out of its facility located at 2211 Miller Road, Kalamazoo, Michigan; but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act and all other employees.

WE WILL NOT refuse to timely furnish the Union with information requested and needed in the performance of its duties as exclusive collective-bargaining representative.

WE WILL NOT refuse to bargain with the Union as the exclusive collective-bargaining representative of our employees in an appropriate bargaining unit by unilaterally revising our job application procedure to require applicants to apply in person at our Kalamazoo office.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act

WE WILL recognize and, on request, bargain with the Union as the exclusive bargaining representative of the employees in the above-mentioned unit concerning wages, hours, and other terms and conditions of employment, and put in writing and sign any agreement reached.

WE WILL furnish to the Union in a timely manner the information requested by the Union on June 29, 1998.

WE WILL rescind our unilaterally instituted requirement that applicants apply in person at our Kalamazoo office, and notify you and the Union in writing that we have done so.

ALLIED MECHANICAL SERVICES, INC.