

Nos. 10-1328, 10-1385

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

ALLIED MECHANICAL SERVICES, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

**UNITED ASSOCIATION OF JOURNEYMEN AND
APPRENTICES OF THE PLUMBING AND PIPEFITTING
INDUSTRY OF THE UNITED STATES AND CANADA,
ALF-CIO, LOCAL UNION 357**

Intervenor

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF ORDERS OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

Pursuant to Rule 28(a)(1) of the Rules of this Court, counsel for the National Labor Relations Board (“the Board”) certify the following:

A. Parties and Amici:

1. Allied Mechanical Services, Inc. was the respondent before the Board and is the petitioner/cross-respondent herein.
2. The Board is the respondent/cross-petitioner herein.
3. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Local Union 357 was the charging party before the Board, and has intervened on the side of the Board.
4. The Board’s General Counsel was a party before the Board.

B. Rulings Under Review: The rulings under review are a Decision and order of the Board issued on May 28, 2004 and reported at 341 NLRB 1084, a Supplemental Decision and Order of the Board issued on September 28, 2007 and reported at 351 NLRB No.5, and a three-member Board Order Denying Motion for Reconsideration, issued on October 14, 2010 and reported at 356 NLRB No.1, which incorporates by reference a two-member Board order denying motion for reconsideration issued on May 30, 2008 and reported at 352 NLRB No. 83.

C. Related Cases: This case has previously been before the Court styled as Case Nos. 08-1213 & 08-1240. Pursuant to the Board's motion, this Court remanded those cases in light of *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010), holding that the two-member Board did not have authority to issue decisions when there were no other sitting Board members.

There is a related case pending in this Court: *Allied Mechanical Services, Inc. v. NLRB*, D.C. Cir Nos. 08-1244 & 08-1254.

Respectfully submitted,

s/ Linda J. Dreeben

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Dated at Washington, D.C.,
this 21st day of June 2011.
Allied-28(a)(1)

TABLE OF CONTENTS

Headings	Page(s)
Statement of subject matter and appellate jurisdiction	1
Statement of the issues presented	2
Applicable statutes	2
Statement of the case.....	2
Statement of the facts	7
I. The Board’s findings of fact.....	7
A. Local 337 demands recognition as the representative of Allied’s employees and offers to demonstrate its majority status; the Regional Director issues a complaint in <i>Allied-I</i> alleging that a majority of Allied’s employees had designated Local 337 as their exclusive collective-bargaining representative and seeking a <i>Gissel</i> bargaining order	7
B. Allied resolves the complaint by entering into a Regional Director approved-settlement agreement, whereby it agrees to recognize, and bargain with, Local 337 as the exclusive collective-bargaining representative of its employees.....	9
C. <i>Allied-II</i> : Allied refuses to reinstate employees who struck in 1992 and 1993.....	9
D. <i>Allied-III</i> : In 1995, and 1996, Allied commits several 8(a)(5) violations and refuses to reinstate strikers; on December 26, 1996, two employees strike to protest Allied’s unfair labor practices	10

E. The instant case: In 1997, the Sixth Circuit enforces the Board’s order in <i>Allied-II</i> requiring Allied to offer nine strikers reinstatement and to make them whole; although Allied offers reinstatement to those strikers, it fails to pay them backpay at that time and continues to refuse to reinstate the summer-of-1996 strikers; in late July 1997, eight employees strike over Allied’s misconduct	12
F. On March 1, 1998, the UA consolidates Local 337 with Local 513 to create Local 357; on March 2, 1998, the Union makes an unconditional offer to return to work on behalf of the eight summer-of-1997 strikers and two employees who had struck in December 1996; Allied refuses to reinstate them	14
G. Four union members apply for jobs with Allied; Allied does not even consider them, and instead hires nonunion applicants	15
H. In the summer of 1998, Allied fails to furnish information to the Union, and then withdraws recognition from the Union	17
II. The Board’s conclusions and order	18
Summary of argument	20
Argument	22
I. The Board is entitled to summary enforcement of its uncontested findings that Allied violated Section 8(a)(3) and (1) of the Act by refusing to consider and hire 4 job applicants because of their union membership and by refusing to reinstate 10 strikers upon their unconditional offer to return to work	22
II. The Board reasonably found that Allied and Local 337 had a Section 9(a) bargaining relationship, so that Allied violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from, and refusing to furnish information to, the Union and unilaterally changing its job-application procedure	24
A. Standard of review	24
B. Overview of uncontested and contested issues	25

TABLE OF CONTENTS

Headings – Cont’d	Page(s)
C. General principles governing 9(a) collective-bargaining relationships	26
D. Construction-industry employers can have 9(a) relationships or can enter into collective-bargaining agreements with unions that do not enjoy majority status.....	28
E. The Board reasonably found that Allied had a Section 9(a) relationship with the Union	33
1a. The 1991 settlement agreement in <i>Allied-I</i> , which resolved a complaint seeking a <i>Gissel</i> remedial bargaining order, demonstrates that Allied recognized Local 337 as the 9(a) representative.....	33
1b. This Court’s <i>Nova Plumbing</i> decision does not preclude enforcement of the Board’s decision here.....	37
1c. The Board’s holding does not implicate the broader concerns <i>Nova Plumbing</i> voiced about the possibility of employer-union collusion	45
1d. Allied’s remaining attacks on the Board’s 9(a) finding lack merit.....	50
2a. The Board’s decision in <i>Allied-III</i> precludes Allied from arguing that the parties merely had an 8(f) relationship.....	53
2b. There is no merit to Allied’s claims that the Board improperly invoked collateral estoppel.....	56
Conclusion	65

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Alexander v. Sandoval</i> , 532 U.S. 275 (2001).....	38,49
<i>Allied Mechanical Services, Inc.</i> , 320 NLRB 32 (1995), <i>enforced</i> , 113 F.3d 623 (6th Cir. 1997)	9,10,12,16,18,36,40,46,49
* <i>Allied Mechanical Services, Inc.</i> , 332 NLRB 1600 (2001)	5,10,11,12,33,53,54,55,56,57-63
<i>Auciello Iron Works, Inc. v. NLRB</i> , 517 U.S. 781 (1996).....	27
<i>BPH & Company, Inc. v. NLRB</i> , 333 F.3d 213 (D.C. Cir. 2003)	52
<i>Bryant & Stratton Business Institute, Inc. v. NLRB</i> , 140 F.3d 169 (2d Cir. 1998).....	44
<i>Cedar Valley Corp.</i> , 302 NLRB 823 (1991), <i>enforced</i> , 977 F.2d 1211 (8th Cir. 1992)	60-61
<i>Clarence Spight Equipment Leasing Co.</i> , 312 NLRB 147 (1993)	61
<i>Consolidated Edison Co. of NY, Inc. v. Bodman</i> , 445 F.3d 438 (D.C. Cir. 2006)	56
<i>Coulter's Carpet Service, Inc.</i> , 338 NLRB 732 (2002)	60

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>Country Ford Trucks, Inc. v. NLRB</i> , 229 F.3d 1184 (D.C. Cir. 2000).....	25
<i>Critical Mass Energy Project v. Nuclear Regulatory Commission</i> , 975 F.2d 871 (D.C. Cir. 1992).....	49
<i>Davis Supermarkets, Inc. v. NLRB</i> , 2 F.3d 1162 (D.C. Cir. 1993).....	47
<i>Decorative Floors, Inc.</i> , 315 NLRB 188 (1994).....	32
<i>Fall River Dyeing & Finishing Corp. v. NLRB</i> , 482 U.S. 27 (1987).....	64
* <i>Flying Foods Group, Inc.</i> , 345 NLRB 101, <i>enforced</i> , 471 F.3d 178 (D.C. Cir. 2006).....	30
<i>Ford Motor Co. v. NLRB</i> , 441 U.S. 488 (1979).....	24
<i>Gary's Electrical Service Co.</i> , 326 NLRB 1136 (1998).....	60
<i>Gibson Greetings, Inc. v. NLRB</i> , 53 F.3d 385 (D.C. Cir. 1995).....	23
<i>Glens Falls Contractors Association</i> , 341 NLRB 448 (2004).....	60
<i>Gourmet Foods, Inc.</i> , 270 NLRB 578 (1984).....	47

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>Grondorf, Field, Black & Co., Inc. v. NLRB</i> , 107 F.3d 882 (D.C. Cir. 1997).....	23
<i>HCL, Inc.</i> , 343 NLRB 981 (2004)	60
<i>Halle Enterprises, Inc. v. NLRB</i> , 247 F.3d 268 (D.C. Cir. 2001)	24
<i>Hoult v. Hoult</i> , 157 F.3d 29 (1st Cir. 1998).....	56
<i>International Ladies' Garment Workers' Union v. NLRB</i> , 366 U.S. 731 (1961).....	26
<i>International Union of Petroleum & Industrial Workers v. NLRB</i> , 980 F.2d 774 (D.C. Cir. 1992)	23
<i>In Re Keaty</i> , 397 F.3d 264 (5th Cir. 2005)	55
* <i>John Deklewa & Sons</i> , 282 NLRB 1375 (1987), enforced sub. nom, <i>International Ass’n of Bridge, Structural & Ornamental Iron Workers, Local 3</i> , 843 F.2d 770 (3d Cir. 1988)	28,29,30,31,32,38
<i>Levitz Furniture Co.</i> , 333 NLRB 717 (2001)	28
<i>M&M Backhoe Service, Inc. v. NLRB</i> , 469 F.3d 1047 (D.C. Cir. 2006).....	48,49

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>*Mammoth of California, Inc. v. NLRB</i> , 673 F.2d 1091 (9th Cir. 1982)	48
<i>Marlene Industries Corp. v. NLRB</i> , 712 F.2d 1011 (6th Cir. 1983)	54
<i>*Moisi & Son Trucking, Inc.</i> , 197 NLRB 198 (1972)	26
<i>Morse Shoe, Inc.</i> , 227 NLRB 391 (1976), <i>enforced</i> , 591 F.2d 542 (9th Cir. 1979)	26
<i>NLRB v. Creative Food Design</i> , 852 F.2d 1295 (D.C. Cir. 1988)	27
<i>NLRB v. Curtin Matheson Scientific, Inc.</i> , 494 U.S. 775 (1990)	25,28
<i>NLRB v. Fleetwood Trailer Co., Inc.</i> , 389 U.S. 375 (1967)	23
<i>*NLRB v. Gissel Packing Co., Inc.</i> , 395 U.S. 575 (1969)	5,21,26,27,36,46,47,49,50,53
<i>NLRB v. Katz</i> , 369 U.S. 736 (1962)	25
<i>NLRB v. Southwest Security Equipment Corp.</i> , 736 F.2d 1332 (9th Cir. 1984)	25
<i>*NLRB v. Triple C Maintenance, Inc.</i> , 219 F.3d 1147 (10th Cir. 2000)	28,30,32,38,39

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>NLRB v. UFCW, Local 23</i> , 484 U.S. 112 (1987).....	43
<i>NLRB v. United Insurance Co.</i> , 390 U.S. 254 (1968).....	24
* <i>National Post Office Mail Handlers v. APWU</i> , 907 F.2d 190 (D.C. Cir. 1990).....	54,63
<i>New Process Steel, L.P. v. NLRB</i> , 130 S.Ct. 2635 (2010).....	6
<i>Nova Plumbing, Inc. v. NLRB</i> , 330 F.3d 531 (D.C. Cir. 2003).....	21,22,37,38,39,40,41,45,48,49,63
* <i>Oklahoma Installation Co.</i> , 325 NLRB 741 (1988) <i>enforcement denied on other grounds</i> , 219 F.3d 1160 (10th Cir. 2000)	26,38
* <i>Poole Foundry & Machine Co. v. NLRB</i> , 192 F.2d 740 (4th Cir. 1951)	48,52
<i>Progressive Electric, Inc. v. NLRB</i> , 453 F.3d 538 (D.C. Cir. 2006)	22
<i>Raymond F. Kravis Center</i> , 351 NLRB 143 (2007), <i>enforced</i> , 550 F.3d 1183 (D.C. Cir. 2008).....	5
<i>Reno Hilton Resorts v. NLRB</i> , 196 F.3d 1275 (D.C. Cir. 1999).....	44

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases – Cont’d	Page(s)
<i>Securities Industries Association v. Board of Governors of the Federal Reserve System</i> , 900 F.2d 360 (D.C. Cir. 1990)	55
<i>Sheeran v. American Commercial Lines, Inc.</i> , 683 F.2d 970 (6th Cir. 1982)	25
<i>Sheet Metal Workers International Association Local 19 v. Herre Brothers, Inc.</i> , 201 F.3d 231 (3d Cir. 1999).....	32,33,39
<i>Sheet Metal Workers' International Association, Local Union No. 2 v. McElroy's, Inc.</i> , 500 F.3d 1093 (10th Cir. 2007)	61
* <i>Spawr Optical Research, Inc. v. Baldrige</i> , 649 F.Supp. 1366 (D.D.C. 1986)	55,58
* <i>Staunton Fuel & Material, Inc.</i> , 335 NLRB 717 (2001)	26,32,45
<i>The 3E Company, Inc.</i> , 322 NLRB 1058 (1997), <i>enforced mem.</i> , 132 F.3d 1482 (D.C. Cir. 1997)	22
<i>Universal Camera Corp. v. NLRB</i> , 340 U.S. 474 (1951).....	24
<i>Williams v. NLRB</i> , 105 F.3d 787 (2d Cir. 1996).....	44

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Cases – Cont’d **Page(s)**

**Willis Roof Consulting, Inc.*,
 349 NLRB No. 24, 2007 WL 324556 (Jan. 31, 2007).....31

Statutes: **Page(s)**

National Labor Relations Act, as amended
 (29 U.S.C. § 151 et seq.)

Section 7.....63
 Section 8(a)(1) (29 U.S.C. § 158(a)(1))..... 2,3,4,7,11,18,19,22
 Section 8(a)(3) (29 U.S.C. § 158 (a)(3)).....2,3,6,18,22
 Section 8(a)(5) (29 U.S.C. § 158(a)(5))..... 2,3,4,7,10,11,19,25,29,62
 Section 8(f) (29 U.S.C. § 158(f)) 3,5,18,20,21,22,25,29,63
 Section 9(a) (29 U.S.C. § 159(a)) 2,3,5,6,7,11,18,20,21,22,24,25,26-64
 Section 10(a) (29 U.S.C. § 160(a)) 1
 Section 10(e) (29 U.S.C. § 160(e)) 1,24
 Section 10(f)(29 U.S.C. 160(f)) 1

Miscellaneous **Page(s)**

105 Cong.Rec. 14204-05(daily ed. Aug.11, 1959) , reprinted in II NLRB,
 Legislative History of the Labor-Management Reporting and Disclosure Act,
 1959 pp1577-78 (1959).....62

105 Cong.Rec. 9117 (daily ed. June 8, 1959), reprinted in III Legislative
 History of the Labor-Management Reporting and Disclosure Act, 1959 at
 1289 (1959)62

18 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Fed. Prac. &
 Proc. Juris. 2d* §§4402 pp.8-9 (“*Fed. Prac. & Proc. Juris.2d*”)53

18 *Fed. Prac. & Proc. Juris.2d* §4404 p.58.....63

* Authorities upon which we chiefly rely are marked with asterisks.

TABLE OF AUTHORITIES

Miscellaneous – Cont’d	Page(s)
*18 <i>Fed. Prac. & Proc. Juris.2d</i> §4405 pp.85-86.....	56
*18 <i>Fed. Prac. & Proc. Juris.2d</i> §4419 p.500.....	55,58
18B <i>Fed. Prac. & Proc. Juris.2d</i> §4475 pp.468-80.....	54
32 Charles Alan Wright & Charles H. Koch, Jr., <i>Fed. Prac. & Proc. Judicial Review</i> §8255 pp.447-48, 451.....	54

* Authorities upon which we chiefly rely are marked with asterisks.

GLOSSARY

1. “Allied” the Respondent, Allied Mechanical Services, Inc.
2. “*Allied-I*” a case involving Allied that resulted in the July 30, 1991 Regional Director-approved recognition/settlement agreement
3. “*Allied-II*” the Board’s Decision and Order in *Allied Mechanical Services*, 320 NLRB 32 (1995), *enforced*, 113 F.3d 623 (6th Cir. 1997)
4. “*Allied-III*” the Board’s Decision and Order in *Allied Mechanical Services*, 332 NLRB 1600 (2001)
5. “CPX” the Union’s exhibits at the unfair labor practice hearing
6. “D&O” the Board’s May 28, 2004 Decision and Order reported at 341 NLRB 1084.
7. “GC” the Board’s General Counsel
8. “GCX” the General Counsel’s exhibits at the unfair labor practice hearing
9. “Local 337” the local union that merged in 1998 with another union to form the Union-Intevenor in this case
10. “Local 357” the Intervenor, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Local Union 357
11. “ODM” the Board’s two-Member May 30, 2008 Order denying Allied’s motion for reconsideration reported at 352 NLRB No.83

12. “2dODM” the Board’s three-member October 14, 2010 Order denying Allied’s motion for reconsideration reported at 356 NLRB No.1
13. “RD” the Regional Director
14. “RX” Allied’s exhibits at the unfair labor practice hearing
15. “SuppD&O” The Board’s September 28, 2007 Supplemental Decision and Order reported at 351 NLRB No. 5.
16. “the Act” The National Labor Relations Act
17. “the Board” The National Labor Relations Board
18. “the Union” the Intervenor, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Local Union 357
19. “Tr.” the transcript of the unfair labor practice hearing

Allied-proofglossary

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Intervenor

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case is before the Court on the petition of Allied Mechanical Services, Inc. (“Allied”) to review, and on the cross-application of the National Labor Relations Board (“the Board”) to enforce, two Board Decisions and Orders issued against it. The Board’s Decision and Order, issued on May 28, 2004, is reported at 341 NLRB 1084 (A.59-101);¹ the Board’s Supplemental Decision and Order, issued on September 28, 2007, is reported at 351 NLRB 79 (A.107-16). The Board denied Allied’s motion for reconsideration on May 30, 2008 (A.117-21).

The Board had jurisdiction over the unfair labor practice proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§151, 160(a)) (“the Act”). The Board’s Orders are final under Section 10(e) and (f) of the Act (29 U.S.C. §160(e) and (f)). This Court has jurisdiction over this proceeding pursuant to Section 10(e) and (f).

The petition for review and the cross-application for enforcement were timely filed on October 15, 2010 and November 10, 2010, respectively;

¹ “A.” references are to the Joint Appendix. “Add.” References are to ten pages of the record that were inadvertently omitted from the Joint Appendix. Thos missing pages are included in an addendum attached to this brief for the convenience of the Court. References preceding a semicolon are to the Board’s findings; those following are to the supporting evidence.

the Act places no time limit on the institution of proceedings to review or enforce Board orders. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Local Union 357 (“the Union” or “Local 357”) has intervened on the side of the Board.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Board is entitled to summary enforcement of its uncontested findings that Allied violated Section 8(a)(3) and (1) of the Act by refusing to consider and hire 4 job applicants because of their union membership and by refusing to reinstate 10 strikers upon their unconditional offer to return to work.

2. Whether the Board reasonably found that Allied and Local 337 had a Section 9(a) bargaining relationship, so that Allied violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from, and refusing to furnish information to, the Union and unilaterally changing its job-application procedure.

APPLICABLE STATUTES

Relevant statutory provisions are contained in the attached addendum.

STATEMENT OF THE CASE

This case, which has a complicated history spanning many years, in part highlights the fact that building-and-construction-industry employers and unions have different rights and responsibilities depending upon whether their relationship is governed by Section 8(f) or Section 9(a) of the Act (29 U.S.C. §158(f) or 159(a)). In a nutshell, an 8(f) relationship imposes no enforceable duties under the Act in the absence of a collective-bargaining agreement, whereas an employer with a 9(a) relationship remains obligated to recognize, and bargain with, a union even absent a collective-bargaining agreement, unless the 9(a) employer rebuts the union's continuing presumption of majority status.

Based on the Union's unfair labor practice charges, the Board's General Counsel issued complaints against Allied alleging that it violated Section 8(a)(5) and (1) of the Act (29 U.S.C. §158(a)(5) and (1)) by, among other things, withdrawing recognition from the Union. The complaints also alleged that Allied violated Section 8(a)(3) and (1) of the Act (29 U.S.C. §158(a)(3) and (1)) by refusing to hire, and consider for hire, job applicants because of their union membership and by refusing to reinstate strikers.

(A.64;366-73,377-83,391-96.)

After a hearing, an administrative law judge found that Allied was entitled to withdraw recognition from, and to refuse to bargain with, the Union for three separate reasons: (1) Allied had a Section 8(f)--rather than a Section 9(a)--relationship with UA Local 337 (“Local 337”), the local union that merged in 1998 with another local to form the Union-Intervenor in this case; (2) Local 337’s members had never been given the opportunity to vote on the merger, and therefore the Union-Intervenor could not be said to have succeeded to Local 337’s bargaining rights; and (3) Allied had bargained for a reasonable period of time. (A.71-74.) Accordingly, the judge recommended that the Section 8(a)(5) allegations be dismissed.

(D&O1099.) On the other hand, the judge found that Allied unlawfully refused to reinstate 10 strikers and failed to hire, and consider for hire, 10 union job applicants. (A.74.)

After the parties filed exceptions to the judge’s decision, the Board issued its decision, finding that Allied violated the Act by refusing to reinstate 10 strikers and by refusing to hire, and consider for hire, 4 union applicants. (A.60.) The Board upheld the judge’s dismissal of the Section 8(a)(5) allegations, but solely on the basis that the absence of a union membership vote on Local 337’s merger meant that Local 357 could not be deemed to have succeeded to Local 337’s bargaining rights. (A.59-60.)

Upon motions by the General Counsel and the Union, the Board reconsidered its dismissal of the Section 8(a)(5) allegations, and on September 28, 2007, the Board issued its Supplemental Decision and Order finding that Allied had in fact violated Section 8(a)(5) and (1) of the Act. (A.107-16.) Relying on its then-recently issued decision in *Raymond F. Kravis Center*, 351 NLRB 143 (2007), *enforced*, 550 F.3d 1183 (D.C. Cir. 2008), the Board found that the absence of a union membership vote on Local 337's merger did not privilege Allied to withdraw recognition from, and to refuse to bargain with, the Union. (A.107-08.)

The Board then considered Allied's additional defenses to the bargaining allegations. (A.108-12.) For two reasons, the Board rejected Allied's claim that it merely had a Section 8(f) relationship with the Union. First, the Board found that Allied had entered into a 1991 recognition/settlement agreement with Local 337 to resolve a complaint that sought a *Gissel* remedial bargaining order,² and that the 1991 recognition/settlement agreement and the relevant extrinsic evidence together showed that the parties had established a 9(a), instead of an 8(f), relationship. (A.110-11,118.) Second, the Board found that its prior decision in *Allied*

² See *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575 (1969) ("*Gissel*").

Mechanical Services, Inc., 332 NLRB 1600 (2001), collaterally estopped Allied from making the argument that the parties merely had an 8(f) relationship, because that 2001 decision was necessarily premised on the existence of a 9(a) relationship between Allied and Local 337. (A.111-12,118.) Turning to whether Allied permissibly withdrew recognition from this 9(a) bargaining relationship, the Board found that Allied had failed to carry its burden of showing that it had a good-faith doubt of the Union's majority status at the time it withdrew recognition. (A.112-13.)

Allied then filed a motion for reconsideration of the Board's Supplemental Decision and Order, which a two-member Board denied on May 30, 2008. (A.117-21.) Allied petitioned for review, and the Board cross-applied for enforcement, of the orders in D.C. Circuit Nos. 08-1213 and 08-1240. On June 17, 2010, the Supreme Court issued *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010) ("*New Process*"), holding that the two-member Board did not have authority to issue decisions when there were no other sitting Board members. Pursuant to the Board's motion, this Court remanded the case in light of *New Process* on September 20, 2010.

On October 14, 2010, a three-member panel issued an order reported at 356 NLRB No. 1, denying Allied's motion for reconsideration "for the

reasons set forth” in the May 30, 2008 Order “which is incorporated . . . by reference.” (A.1104.)

At this late stage of the case, the areas remaining in dispute have narrowed considerably. Allied does not challenge the Board’s Section 8(a)(3) findings in its brief to this Court. While Allied does challenge the Board’s Section 8(a)(5) findings, it no longer contends that it was entitled to withdraw recognition from, and refuse to furnish information to, the Union and make unilateral changes because it allegedly had a good-faith doubt of the Union’s majority status. Nor does Allied seek to justify its actions on the ground that it had no duty to recognize the Union because the Union did not succeed to Local 337’s bargaining rights. Instead, Allied merely claims that it never had a 9(a) bargaining relationship with Local 337 and, therefore, none of its actions can be found to have violated Section 8(a)(5) and (1) of the Act.

STATEMENT OF THE FACTS

I. The Board’s Findings of Fact

- A. Local 337 Demands Recognition as the Representative of Allied’s Employees and Offers To Demonstrate Its Majority Status; the Regional Director Issues a Complaint in *Allied-I* Alleging that a Majority of Allied’s Employees Had Designated Local 337 as Their Exclusive Collective-Bargaining Representative and Seeking a *Gissel* Bargaining Order**

Allied fabricates and installs heating, plumbing, and air-conditioning systems in the construction industry in Michigan. (A.64;378-79(¶2), 386(¶2).) In 1990, Local 337 began a drive to organize Allied's plumbers and pipefitters. On April 24, 1990, Local 337 demanded that Allied recognize it as the collective-bargaining representative of Allied's employees, and offered to demonstrate proof of its majority status to a mutually agreed upon third party. (A.65,108;708.)

On December 13, 1990, the Board's General Counsel issued a complaint ("the 1990 complaint") in another case ("*Allied-I*") alleging that:

(a) Allied's plumbers, pipefitters, apprentices, and certain other employees constituted an appropriate collective-bargaining unit under the Act;

(b) by April 24, 1990, a majority of Allied's unit employees had designated Local 337 as their exclusive collective-bargaining representative;

and (c) Allied had committed such serious unfair labor practices that the possibility of conducting a fair election was slight and that the employees' sentiments regarding union representation, having been expressed through authorization cards, would be better protected by the entry of an order requiring Allied to recognize and bargain with Local 337 than by traditional remedies.

Accordingly, the complaint sought a remedial bargaining order. (A.108,65-66;405,407-09(¶¶ 8, 9,10-18),410.)

B. Allied Resolves the Complaint by Entering into a Regional Director-Approved Settlement Agreement, Whereby It Agrees To Recognize, and Bargain with, Local 337 as the Exclusive Collective-Bargaining Representative of Its Employees

On July 30, 1991, the Board's Regional Director ("the RD") approved an informal settlement agreement entered into by Allied and Local 337, which resolved the *Allied-I* complaint. That settlement agreement, which contained a nonadmissions clause, required Allied to, among other things, recognize and, upon request, bargain in good faith with Local 337 as the exclusive collective-bargaining representative of Allied's unit employees and to embody any understanding that is reached in a signed collective-bargaining agreement. (A.108,110-11,66;417-19.)

C. *Allied-II*: Allied Refuses To Reinstate Employees Who Struck in 1992 and 1993

On October 16, 1992, six Allied employees engaged in an economic strike. *Allied Mechanical Services, Inc.*, 320 NLRB 32, 32-34 (1995)(“*Allied-II*”), *enforced*, 113 F.3d 623 (6th Cir. 1997). On June 24, 1993, four more Allied employees went on strike. *Ibid.* Although 9 of the 10 strikers made unconditional offers to return to work by July 6, 1993, Allied refused to reinstate them. *Id.* at 32-34, 37.

Based on Local 337's charges, the RD issued a complaint in *Allied-II* alleging that Allied's refusal to reinstate the strikers was unlawful. *Id.* at 36. After a hearing, the Board found that Allied violated the Act by failing to reinstate nine economic strikers. *Id.* at 33-34, 40. Accordingly, the Board ordered Allied to, among other things, offer the nine strikers reinstatement and to make them whole for any loss of earnings suffered as a result of Allied's discrimination against them. *Id.* at 34. Allied then sought review of the Board's *Allied-II* decision in the Sixth Circuit.

D. *Allied-III*: In 1995, and 1996, Allied Commits Several 8(a)(5) Violations and Refuses To Reinstate Strikers; on December 26, 1996, Two Employees Strike To Protest Allied's Unfair Labor Practices

During 1995 and 1996, Allied implemented a new disability plan, changed its apprenticeship program, and granted merit raises without giving notice to, or bargaining with, Local 337. Allied also declined Local 337's request to bargain over changes it was proposing to its health insurance plan, and instead met directly with its employees regarding the proposed changes. *Allied Mechanical Services, Inc.*, 332 NLRB 1600, 1609-12 (2001) ("*Allied-III*" or "the 2001 case"). On various dates in 1995 and 1996, Local 337 asked Allied for information about a variety of matters, but Allied delayed providing, or outright refused to provide, some of the requested information. *Id.* at 1606, 1609-12. Allied also declined to respond to certain union

bargaining requests. *Id.* at 1606, 1610, 1613-14. Allied also stated that, if employees struck, it would assume they had quit; it informed its insurance company that certain strikers had quit; and it refused to reinstate six employees who had struck in the summer of 1996. *Id.* at 1605-09.

Based upon Local 337's unfair labor practice charges, the RD issued a consolidated complaint in *Allied-III*, alleging that Local 337 was the Section 9(a) representative of Allied's unit employees, and that Allied had committed multiple violations of the Act, including the acts described in the preceding paragraph of this brief. (A.119;515-24,Add.1.) Allied filed an answer denying that Local 337 was the 9(a) representative of its employees and that it had violated the Act. (A.119;603(¶9),606(¶¶43,44),517(¶9), 521(¶¶43,44).)

On December 23, 1996, Local 337 informed Allied that Jon Kinney and Tobin Rees were beginning a strike to protest Allied's unfair labor practices. (A.67;725-28,813,822-24,Add.2.) When Allied asked which unfair labor practices, Local 337 pointed to Allied's continuing refusal to bargain in good faith and to the matters contained in the recently issued *Allied-III* complaint. (A.67;728-31,Add.3-4.)

After a hearing, the Board found in *Allied-III* that Allied violated Section 8(a)(5) and (1) of the Act in 1995 and 1996 by, for example, failing

to bargain in good faith with Local 337; unilaterally changing the employees' wages, benefits, and other terms and conditions of employment; refusing to furnish information to Local 337; and bypassing Local 337 and dealing directly with employees. *Allied-III*, 332 NLRB at 1600, 1614-15. The Board also found that Allied violated the Act by threatening to discharge, and discharging, strikers and by failing and refusing to reinstate six strikers upon their unconditional offers to return to work. *Id.* at 1614.

E. The Instant Case: In 1997, the Sixth Circuit Enforces the Board's Order in *Allied-II* Requiring Allied To Offer Nine Strikers Reinstatement and To Make Them Whole; Although Allied Offers Reinstatement to Those Strikers, It Fails To Pay Them Backpay at that Time and Continues To Refuse To Reinstatement the Summer-of-1996 Strikers; in Late July 1997, Eight Employees Strike Over Allied's Misconduct

On May 16, 1997, the Sixth Circuit enforced the Board's 1995 *Allied-II* order, which required Allied to offer the nine *Allied-II* strikers reinstatement and to make them whole for their losses. *See Allied Mechanical Services, Inc. v. NLRB*, 113 F.3d 623. Allied then offered reinstatement to the nine strikers named in the decision. Eight of the nine strikers accepted and returned to work at Allied on July 9, 1997. However, Allied at that time did not pay them any backpay. (A.67;731-32,854,970.)

When the strikers returned to work, they discovered that Allied had implemented a new mileage-reimbursement policy. (A.67;555,738-39,849-

51,967,969.) Allied had never proposed that policy to Local 337 during their bargaining sessions, and Allied had instituted the policy without notice to Local 337. (A.67;738-39,969.)

On July 22, 1997, Local 337 renewed its earlier requests for a comprehensive list of all employees Allied had hired, or was in the process of hiring, and their respective dates of hire. Local 337 explained that the list Allied had previously furnished was incomplete. (A.67-68;546-54,740-45.)

The eight reinstated strikers and Local 337 then discussed Allied's conduct, including Allied's failure to pay them backpay under the Sixth Circuit's decree, Allied's continuing failure to reinstate the six summer-of-1996 strikers, Allied's mistreatment of certain employees, and Allied's failure to furnish information to Local 337. (A.67-68;544,732-35,845-47,852-55,866-69,895-97,915,966-67.) By letter dated July 23, 1997, Local 337 informed Allied that Jim Bronkhorst, Ken Falk, Ted Fuller, Grant Maichele, Marty Preston, Max Roggow, Brian Rowden, and Steve Titus--the eight strikers who had returned to work on July 9, 1997, pursuant to the Sixth Circuit's May 16, 1997 decree--would begin an unfair labor practice strike on July 25. (A.67;544,732-33.)

On July 25, 1997, the eight employees mentioned in the Union's letter went out on strike carrying signs that stated: "Allied . . . has committed unfair labor practices in violation of federal law." (A.68;545,732-33,736-37,785,855,866-67,869,876,895-96,949.) The eight strikers stopped picketing a week later, but did not offer to return to work until March 2, 1998. (A.67-68;736,847-48,968,Add.5.)

F. On March 1, 1998, the UA Consolidates Local 337 with Local 513 To Create Local 357; on March 2, 1998, the Union Makes an Unconditional Offer To Return To Work on Behalf of the Eight Summer-of-1997 Strikers and Two Employees Who Had Struck in December 1996; Allied Refuses To Reinstate Them

On March 1, 1998, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO merged Local 337 with Local 513 to create a new local union named Local 357, and members of Local 337 automatically became members of Local 357. (A.59,109;563-69,802-04,811.) The union members were not afforded an opportunity to vote on the merger. (A.68;769,812.)

Local 337 Business Manager Robert Williams, who had administered Local 337's collective-bargaining agreement and handled Local 337's grievances before the merger, became the business manager of Local 357

after the merger and continued to administer Local 337's collective-bargaining agreement and grievances. (A.68;801,808-09.) By letter dated March 2, 1998, Local 357 Business Manager Williams notified Local 337's members that the local union office would continue to operate in much the same manner as before. (A.68;570.) Local 337's collective-bargaining agreement with signatory employers remained in effect after the merger, and Local 357's dues structure remained the same as Local 337's. (A.805,807.)

On March 2, 1998, the Union made an unconditional offer to return to work on behalf of several strikers, including the eight employees who had gone out on strike in the summer of 1997 and the two employees who had struck in December 1996. (A.69-70;786-787,Add.5.) When Allied did not respond, the Union repeated its unconditional offer to return to work twice more that same month. (A.748,Add.6-7.) Allied never offered those strikers reinstatement. (A.69-70;379(¶10),380(¶¶12,13),387(¶10),388(¶¶12,13).)

G. Four Union Members Apply for Jobs with Allied; Allied Does Not Even Consider Them, and Instead Hires Nonunion Applicants

Union members Scott Calhoun, Terri Jo Conroy, Harold Hill and Jeff Kiss, applied for plumbing and pipefitting jobs with Allied between July 28

and July 30, 1998, listing union organizers as references. (A.60-61;420-23,430,440-41,457-58,467-68,623,751-53,784,799-800,838-39,916-17,939-40,979-81.) Hill and Kiss had previously worked for Allied, and Hill had previously participated in a union strike against Allied. (A.61;836-37,840, *Allied-II*, 320 NLRB at 32.)

In mid-July 1998, Allied began interviewing applicants because it had a number of jobs scheduled to start in August. (A.61,78;918-20.) Between August 5 and August 31, 1998, Allied hired, or made job offers to, six nonunion plumber and pipefitter applicants. (A.61;573-77,582,586-88,591-92,620-62,983-85,993-96,998-99.) Although Allied's hiring policy stated that Allied will consider *all* current applications when hiring and that applications are considered "current" for 30 days, Allied did not consider union applicants Calhoun, Conroy, Hill, and Kiss for those or any other positions. (A.61,77;618,628-29,757,800,839,919-20,971-74,997,1002,Add.9.) Nor did Allied consider or hire them, or any of the other 17 union applicants who applied for jobs in 1998, even though it hired, or made job offers to, 22 of 24 nonunion plumbing and pipefitting applicants between the first week of August 1998 and early 1999. (A.61,78,84-85,93;420-514,576-94,620-27,918-26,933-38,943-46,982-99,997,1000-03.)

On August 1, 1998, Allied, without notice to, or bargaining with, the Union, revised its job-application procedure to require applicants to apply in person at its office in Kalamazoo, Michigan, rather than permit them to fax or mail their applications. (A.70,109;381(¶¶19,21),389(¶¶19,21),628,917, 927.) Prior to that time, union members had been faxing or mailing job applications to Allied. (A.751-52,916-17,927,932,941-42,991-92.)

H. In the Summer of 1998, Allied Fails To Furnish Information to the Union, and then Withdraws Recognition from the Union

After Local 337 merged with Local 513 to create Local 357, Allied held nine bargaining sessions with the Union. (A.69,109;809-10.) By letter dated June 29, 1998, the Union requested information so that it could “carry on constructive negotiations and . . . properly represent” Allied’s employees. (A.69;556.) The Union’s letter requested, among other things, a list of Allied’s licensed plumbers within the State of Michigan and their current wage rates; a list of Allied’s welders who were carbon-steel certified; and a list of Allied’s welders who were stainless- steel certified. (A.69,109;556, 557(¶¶15,16,17.) Allied never furnished the Union with that information. (A.109n.9; 559-62,1073-74.)

By letter dated July 22, 1998, Allied claimed that it had bargained in good faith with the Union pursuant to the 1991 recognition/settlement agreement in *Allied-I*, but that the Union had not. (A.69;571-72.) Allied then announced that it was withdrawing recognition from the Union and that it would not bargain any more with the Union because, among other reasons: (1) the bargaining process created by the settlement agreement was a voluntary 8(f) relationship that Allied was free to unilaterally terminate; (2) even if it was a Section 9(a) relationship, Allied currently had a good-faith doubt of the Union's majority status; and (3) Allied had no legal obligation to bargain with the newly created Local 357. (A.69,109;380(¶16),389(¶16),571-72.)

II. THE BOARD'S CONCLUSIONS AND ORDERS

The Board (Chairman Battista and Members Schaumber and Meisburg) found that Allied violated Section 8(a)(3) and (1) of the Act (29 U.S.C. §158(a)(3) and (1)) by refusing to reinstate 10 strikers (Jim Bronkhorst, Ken Falk, Ted Fuller, Jon Kinney, Grant Maichele, Marty Preston, Tobin Rees, Max Roggow, Brian Rowden, and Steve Titus) upon their unconditional offers to return to work and by refusing to consider for

employment, and refusing to hire, Scott Calhoun, Terri Jo Conroy, Harold Hill, and Jeff Kiss because of their union membership. (A.60.)

In its Supplemental Decision and Order, the Board (Chairman Battista and Members Schaumber and Walsh) further found that Allied violated Section 8(a)(5) and (1) of the Act (29 U.S.C. §158(a)(5) and (1)) by withdrawing recognition from the Union, refusing to furnish the Union with relevant information, and unilaterally revising its job-application procedure to require applicants to apply in person at its Kalamazoo office. (A.113.)

The Board's Orders require that Allied cease and desist from the unfair labor practices found, and from in any other manner interfering with, restraining, or coercing employees in the exercise of their statutory rights. (A.62-63,114-16.) Affirmatively, the first Board Order requires Allied to offer Bronkhorst, Falk, Fuller, Kinney, Maichele, Preston, Rees, Roggow, Rowden, and Titus full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions; to offer employment to Calhoun, Conroy, Hill, and Kiss; and to make the discriminatees whole for their losses. (A.63.)

The Board's Supplemental Order requires Allied to recognize and, on request, bargain collectively with the Union as the exclusive bargaining

representative of the unit employees and to embody any understanding that is reached in a signed agreement; to furnish the Union in a timely manner the information that the Union requested on June 29, 1998; and to rescind its unilaterally instituted requirement that applicants apply in person at Allied's Kalamazoo, Michigan office and to notify the Union and employees in writing that this has been done. (A.115.)

SUMMARY OF ARGUMENT

The Board is entitled to summary enforcement of its findings that Allied violated the Act by refusing to consider and hire 4 union job applicants and by refusing to reinstate 10 strikers, because Allied does not contest those unfair labor practice findings in its brief to this Court.

For two reasons, the Board reasonably found that Allied had a Section 9(a) bargaining relationship with Local 337 rather than a Section 8(f) relationship, so that Allied violated the Act when it admittedly withdrew recognition from, and refused to furnish information to, the Union and unilaterally changed its application procedure.

First, the Board found that Allied's recognition/settlement agreement with Local 337 and the relevant extrinsic evidence together demonstrated that Allied recognized Local 337 as the 9(a) representative of its employees. Allied recognized Local 337 as part of a Regional Director-approved

settlement agreement that resolved a *Gissel* bargaining order complaint. Although Allied claims that it merely recognized Local 337 as the 8(f) representative of its employees, Allied's recognition agreement replicated the language of the complaint, which unquestionably sought the establishment of a 9(a) relationship, and the recognition agreement also used the language contained in Board Orders remedying Section 9(a) withdrawal-of-recognition violations, rather than the more limited remedial language used in Section 8(f) cases.

Second, the Board reasonably found that one of its prior decisions involving Allied collaterally estopped Allied from arguing that the parties did not have a 9(a) relationship, because that prior decision was necessarily premised on the existence of a 9(a) relationship between Allied and Local 337.

Contrary to Allied's claim, this Court's decision in *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (2003), does *not* preclude enforcement of the Board's decision here. Although Allied claims that *Nova Plumbing* stands for the broad proposition that an employer's agreement to recognize a union as the 9(a) representative of its employees is void and unenforceable unless there has been an actual showing of majority support among those employees, *Nova Plumbing*, by its terms, stands for the more limited

proposition that “standing alone . . . contract language and intent [to form a 9(a) relationship] cannot be dispositive *at least where . . . the record contains strong indications that the parties had only a section 8(f) relationship.*” *Id.* at 537 (emphasis added). The record in the instant case does *not* contain “strong indications” that Local 337 lacked majority support.

Allied’s attack on the Board’s use of collateral estoppel is equally unavailing. The Board was free to apply collateral estoppel *sua sponte*, and all the prerequisites for applying collateral estoppel are satisfied here.

ARGUMENT

I. THE BOARD IS ENTITLED TO SUMMARY ENFORCEMENT OF ITS UNCONTESTED FINDINGS THAT ALLIED VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY REFUSING TO CONSIDER AND HIRE 4 JOB APPLICANTS BECAUSE OF THEIR UNION MEMBERSHIP AND BY REFUSING TO REINSTATE 10 STRIKERS UPON THEIR UNCONDITIONAL OFFER TO RETURN TO WORK

As shown, the Board found that Allied violated Section 8(a)(3) and (1) of the Act (29 U.S.C. §158(a)(3) and (1)) by refusing to consider and hire four job applicants because of their union membership. (A.60,107.)³ As

³ See *Progressive Electric, Inc. v. NLRB*, 453 F.3d 538, 546 (D.C. Cir. 2006) (employer violates the Act by refusing to hire, or consider for hire, applicants because of their union affiliation); *The 3E Company, Inc.*, 322 NLRB 1058, 1061-62 (1997)(refusal to consider), *enforced mem.*, 132 F.3d 1482 (D.C. Cir. 1997).

also shown, the Board further found that Allied violated the Act by refusing to reinstate 10 strikers upon their unconditional offers to return to work.⁴

(A.60.) In its brief, Allied does not seek review of those unfair labor practice findings. Accordingly, the Board is entitled to summary enforcement of the portions of its orders relating to those unfair labor practice findings. *See Grondorf, Field, Black & Co., Inc. v. NLRB*, 107 F.3d 882, 885 (D.C. Cir. 1997); *Int'l Union of Petroleum & Indus. Workers v. NLRB*, 980 F.2d 774, 778 n.1 (D.C. Cir. 1992).

⁴ *See NLRB v. Fleetwood Trailer Co., Inc.*, 389 U.S. 375, 378 (1967) (employer violates the Act by refusing to reinstate strikers, absent a legitimate and substantial business justification); *Gibson Greetings, Inc. v. NLRB*, 53 F.3d 385, 389 (D.C. Cir. 1995)(same).

II. THE BOARD REASONABLY FOUND THAT ALLIED AND LOCAL 337 HAD A SECTION 9(a) BARGAINING RELATIONSHIP, SO THAT ALLIED VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY WITHDRAWING RECOGNITION FROM, AND REFUSING TO FURNISH INFORMATION TO, THE UNION AND UNILATERALLY CHANGING ITS JOB-APPLICATION PROCEDURE

A. Standard of Review

The Board's factual findings are "conclusive" if they are supported by substantial evidence on the record as a whole. 29 U.S.C. §160(e). A reviewing court may not displace the Board's choice between two fairly conflicting views of the facts, even if the court "would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 488 (1951). This Court gives "substantial deference" to the inferences that the Board draws from the facts. *Halle Enterprises, Inc. v. NLRB*, 247 F.3d 268, 271 (D.C. Cir. 2001). The Board's construction of the Act is entitled to affirmance if it is "reasonably defensible," even if the Court would have preferred another view of the statute. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496-97 (1979). The Board's application of the law to the facts, even in areas outside its expertise, is reviewed under the substantial evidence standard. *NLRB v. United Insurance Co.*, 390 U.S. 254, 260 (1968).

B. Overview of Uncontested and Contested Issues

Section 8(a)(5) of the Act (29 U.S.C. §158(a)(5)) makes it an unfair labor practice for an employer “to refuse to bargain collectively with the representative[] of [its] employees,” if it has a Section 9(a) relationship with its employees’ exclusive representative. Accordingly, an employer that has a 9(a) relationship with a union violates the Act if it withdraws recognition from, and refuses to bargain with, the union, makes unilateral changes in mandatory subjects of bargaining, and refuses to furnish relevant information to the union. *See generally NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778 (1980); *NLRB v. Katz*, 369 U.S. 736, 742-43 (1962); *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1188, 1191-92 (D.C. Cir. 2000); *NLRB v. Southwest Security Equipment Corp.*, 736 F.2d 1332, 1337-38 (9th Cir. 1984); *Sheeran v. American Commercial Lines, Inc.*, 683 F.2d 970, 977 (6th Cir. 1982).

In the present case, Allied does not dispute that it has withdrawn recognition from, and refused to furnish relevant information to, the Union and unilaterally changed its job-application procedure. Allied defends its actions by claiming that it was free to repudiate its collective-bargaining relationship with the Union, because it merely had a Section 8(f) relationship

with the Union. As we now show, Allied's contention lacks merit; the Board reasonably found that Allied had a 9(a) relationship.

C. General Principles Governing 9(a) Collective-Bargaining Relationships

An employer can lawfully incur a 9(a) bargaining obligation, i.e., a bargaining obligation with a majority union, in different ways. For example, an employer becomes obligated to recognize and bargain with a union that has won a Board-conducted election. *Gissel*, 395 U.S. at 596. Although an employer that has not committed unfair labor practices has the right to insist on a Board election, the employer may waive that right and voluntarily recognize a union that bases its claim to representative status on the possession of union authorization cards. *Id.* at 579, 597.⁵

⁵ Outside the construction industry, it is an unfair labor practice for an employer to recognize and enter into a collective-bargaining agreement with a minority union, i.e., a union that actually lacks majority support. *Int'l Ladies' Garment Workers' Union v. NLRB*, 366 U.S. 731, 732, 737-38 (1961). Where a union requests 9(a) recognition from a nonconstruction-industry employer, the employer may either demand an actual showing of majority support or choose to accept the union's claim of majority support and recognize the union. When the employer recognizes the union as the 9(a) representative of its employees based on the union's assertion of majority status without verifying its majority, the employer may not repudiate the relationship on the ground that the union did not have majority support when the employer recognized it, unless the employer raises that defense within six months of the grant of recognition. See *Staunton Fuel & Material, Inc.*, 335 NLRB 717, 719 nn.10,14 (2001); *Oklahoma Installation Co.*, 325 NLRB 741, 742 (1988), *enforcement denied on other grounds*, 219 F.3d 1160 (10th Cir. 2000); *Moisi & Son Trucking, Inc.*, 197 NLRB 198,

Moreover, an unwilling employer can incur a 9(a) bargaining obligation as a result of unfair labor practice proceedings. Thus, in *Gissel*, 395 U.S. at 610, 614-15, the Supreme Court held that the Board has authority to order an employer to bargain with a union as a remedy for the employer's unfair labor practices if (1) a majority of the employees in an appropriate unit once supported the union and (2) "the Board finds that the possibility of erasing the effects of [the employer's] past [unfair labor] practices and of ensuring a fair election . . . by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through [union authorization] cards would, on balance, be better protected by a bargaining order"

Once a union has achieved 9(a) status as a bargaining representative, it enjoys a presumption of majority status. That presumption is ordinarily irrebuttable for one year following recognition or during the term of a collective-bargaining agreement of three years or less; thereafter the presumption becomes rebuttable. *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 786 (1996); *NLRB v. Creative Food Design*, 852 F.2d 1295, 1300 (D.C. Cir. 1988). At the time of the events in question, an employer in a

198 n.2, 199-200, 203-04 (1972); *Morse Shoe, Inc.*, 227 NLRB 391, 392-95 (1976), *enforced*, 591 F.2d 542 (9th Cir. 1979).

9(a) relationship could rebut the presumption of majority status--and thereby lawfully withdraw recognition from the union--by showing either that the union did not in fact enjoy majority support, or it had a good-faith doubt of the union's majority status. Absent such a showing, an employer's withdrawal of recognition and refusal to bargain were unlawful. *See NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778, 785 (1990).⁶

D. Construction-Industry Employers Can Have 9(a) Relationships or Can Enter into Collective-Bargaining Agreements with Unions that Do Not Enjoy Majority Status

Unions and construction-industry employers may also have 9(a) relationships and enter into 9(a) collective-bargaining agreements. *See, for example, NLRB v. Triple C Maintenance, Inc.*, 219 F.3d 1147, 1152-56 (10th Cir. 2000) (“*Triple C Maintenance*”). This is because unions do not have less favored status with respect to construction-industry employers than they possess with respect to employers outside the construction industry. *John Deklewa & Sons*, 282 NLRB 1375, 1387 n.53 (1987), *enforced sub. nom.*,

⁶ In *Levitz Furniture Co.*, 333 NLRB 717, 717 (2001), the Board eliminated the good-faith doubt defense for an employer's withdrawal of recognition from an incumbent union. The Board also held, however, that it would apply its decision only prospectively (*Id.* at 729), and so *Levitz* is not applicable here.

International Ass'n of Bridge, Structural & Ornamental Iron Workers, Local 3, 843 F.2d 770 (3d Cir. 1988)(“*Deklewa*”).

However, because of the construction industry’s unique nature, Congress granted construction-industry employers and unions a right not enjoyed by their nonconstruction-industry counterparts. Thus, Section 8(f), by its terms, permits, but does not require, a construction-industry employer to enter into a collective-bargaining agreement (“an 8(f) agreement”) with a union that does not enjoy majority status. 29 U.S.C. §158(f).

An 8(f) collective-bargaining agreement is enforceable during its term. *Deklewa*, 282 NLRB at 1377-78, 1385. However, a construction-industry employer merely incurs *limited* Section 8(a)(5) obligations by entering into an 8(f) collective-bargaining agreement. *Id.* at 1387. Because it is not an unfair labor practice for a construction-industry employer to enter into a collective-bargaining agreement with a minority union, a union enjoys *no* presumption of majority status once its 8(f) agreement expires. *Id.* at 1377-78, 1386-87. Accordingly, as soon as its 8(f) agreement expires, an 8(f) employer may withdraw recognition from, and refuse to bargain with, the union. *Ibid.* Moreover, because an 8(f) union does not enjoy a presumption of majority status even during the term of an 8(f) agreement, employees may vote to oust the union even during the term of an 8(f)

agreement, thereby voiding the agreement and the bargaining relationship. *Id.* at 1377, 1385-87. In sum, absent a current collective-bargaining agreement between the parties, an 8(f) employer is free to withdraw recognition from, and refuse to bargain with, the union, whereas a 9(a) employer remains obligated to recognize, and bargain with, the union, unless the 9(a) employer rebuts the presumption of majority status. *Id.* at 1386 n.48, 1387; *Triple C Maintenance*, 219 F.3d at 1152.

It is thus not surprising that, as the Board explained here (A.111,118-19&n.10), the language customarily contained in Board orders remedying 9(a) withdrawal-of-recognition violations “differs significantly” from the language contained in Board orders remedying 8(f) withdrawal-of-recognition violations. When an employer with a 9(a) relationship breaches its bargaining obligations, by, for example, unlawfully withdrawing recognition from a union, the Board requires the employer to recognize, and upon request, bargain with the union as the exclusive representative of employees in an appropriate unit with respect to wages, hours, and working conditions and to embody any understanding in a signed agreement. (A.110-11&n.18.) *See, for example, Flying Foods Group, Inc.*, 345 NLRB 101, 111(¶2(a)), *enforced*, 471 F.3d 178 (D.C. Cir. 2006).

By contrast, as the Board noted (A.111,119n.10), when an employer with an 8(f) relationship breaches its obligations by withdrawing recognition and repudiating an 8(f) collective-bargaining agreement during its term, the Board issues a much narrower order than it does in Section 9(a) cases in recognition of the “more circumscribed obligations imposed by an 8(f) relationship.” Thus, as the Board noted (A.111&n.18), the customary remedial order for the 8(f) withdrawal of recognition violation merely requires the employer to cease and desist from withdrawing recognition from the union as the limited exclusive collective-bargaining representative of the unit employees during the term of the collective-bargaining agreement, to “recognize the [u]nion as the *limited* exclusive collective-bargaining representative,” and to comply with the collective-bargaining agreement and any automatic renewal or extension thereof. *See, for example, Willis Roof Consulting, Inc.*, 349 NLRB No. 24, 2007 WL 324556 *3, *4 (¶¶1(a),2(a)) (Jan. 31, 2007)(emphasis added).⁷

⁷ Similarly, the Board did not order the employer in *Deklewa* to affirmatively recognize the union to remedy the employer’s unlawful withdrawal of recognition during the term of its 8(f) collective-bargaining agreement, because, as the Board explained, an 8(f) employer has no obligation to continue recognizing and bargaining with a union once its 8(f) agreement expires, and the employer’s 8(f) agreement had expired by the time the Board issued its decision in *Deklewa*. *See Deklewa*, 282 NLRB at 1389, 1390. Instead, the Board merely ordered the employer to cease and

A bargaining relationship in the construction industry is presumed to be an 8(f) relationship, and the party asserting the existence of a 9(a) relationship has the burden of proving it. *Deklewa*, 282 NLRB at 1385 n.41. To establish that a construction-industry employer has recognized a union as the 9(a) representative of its employees, there must be unequivocal evidence that the union requested recognition as the majority or 9(a) representative of the employer's employees; that the employer recognized the union as the majority or 9(a) representative of its employees; and that the employer's recognition was based on the union's having shown, or having offered to show, evidence of its majority status. *See Staunton Fuel & Material, Inc.*, 335 NLRB 717, 717, 719-20 (2001); *Decorative Floors, Inc.*, 315 NLRB 188, 188-89 (1994); *Triple C Maintenance*, 219 F.3d at 1152-56 (citing cases); *Sheet Metal Workers Int'l Ass'n Local 19 v. Herre Bros., Inc.*, 201 F.3d 231, 241-42 (3d Cir. 1999) ("*Herre Bros.*"). An explicit reference to Section 9(a) in the recognition agreement is not required so long as the remainder of the recognition language establishes that the parties intended

desist from "withdrawing recognition *during the term of a collective bargaining agreement*" and to make whole the unit employees for any losses they may have suffered as a result of the employer's failure to adhere to its collective-bargaining agreement "*until it expired.*" *Id.* at 1390 (emphasis added).

9(a) to apply. *Triple C Maintenance*, 219 F.3d at 1155-56 n.3; *Sheet Metal Workers' Int'l Ass'n Local 19 v. Herre Bros., Inc.*, 201 F.3d at 242.

E. The Board Reasonably Found that Allied Had a Section 9(a) Relationship with the Union

The Board found that Allied had a 9(a) relationship with Local 337 based on two independent grounds. (A.118.) First, the Board found that the 1991 recognition/settlement agreement and the relevant extrinsic evidence demonstrated that the parties had established a 9(a) relationship. (A.110-11,118-19.) Second, the Board found that its prior decision in *Allied Mechanical Services, Inc.*, 332 NLRB 1600 (2001), collaterally estopped Allied from making the argument that the parties merely had an 8(f) relationship, because that 2001 decision was necessarily premised on the existence of a 9(a) relationship. (A.118,119-21,111-12.) We discuss each of those rationales and Allied's responses thereto in turn.

1a. The 1991 settlement agreement in *Allied-I*, which resolved a complaint seeking a *Gissel* remedial bargaining order, demonstrates that Allied recognized Local 337 as the 9(a) representative

The Board reasonably found (A.110) that the 1991 recognition/settlement agreement and the relevant extrinsic evidence together demonstrate that the parties “intended to establish, and did establish, a 9(a) relationship.” The fact that the settlement agreement’s

recognition-and-bargaining-provisions were “identical, in all relevant respects, [to] the complaint’s request for relief” constitutes powerful evidence that Allied recognized Local 337 as the 9(a) representative of its employees, because the complaint’s language “clearly contemplated a 9(a) relationship, as it was designed to bestow on [Local 337] the same status it would have enjoyed following an election victory and to require [Allied] to bargain toward a collective-bargaining agreement.” (A.118-19.)⁸

⁸ Thus, as the Board noted (A.119;417,419), Allied agreed in the Settlement Agreement to:

recognize and, upon request, bargain in good faith 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, 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[.]

Similarly, the complaint--that the recognition/settlement agreement resolved--had stated (A.118-19;409-10):

WHEREFORE, it is prayed that Respondent be ordered to:

* * *

2. Take the following affirmative action:

* * *

(f) Recognize and, upon request, bargain in good faith with the Charging Union as the exclusive collective bargaining representative of the employees in the Unit respecting rates of pay, wages, hours, and other terms and conditions of

The Board's finding that Allied granted 9(a) recognition to Local 337 is buttressed by the fact that Allied's recognition/settlement agreement contains the language that is used in Board orders remedying withdrawal-of-recognition violations in Section 9(a) cases--rather than the more limited language contained in Board orders remedying withdrawal-of-recognition violations in Section 8(f) cases. (A.110-11.) Thus, as shown, when remedying violations in Section 9(a) cases, the Board orders an employer to recognize, and, upon request, bargain with, the union as the exclusive collective-bargaining representative of the unit employees with respect to wages, hours, and other terms and conditions of employment and to embody any understanding that is reached in a signed agreement. That is precisely the language Allied agreed to in the recognition/settlement agreement. Allied's recognition/settlement agreement certainly does not contain the more limited language used in Board orders remedying violations in Section 8(f) cases. (A.119n.10,111.)

The circumstances surrounding Allied's grant of recognition provide additional support for the Board's finding that Allied recognized Local 337

employment; and if an understanding is reached, embody it in a signed agreement.

as the majority or 9(a) representative of its employees. Allied does not contest the Board's findings (A.110;407(¶9),409-10(¶¶18, and pp.5-6),417-19,708) that it recognized, and agreed to bargain with, Local 337 to settle a *Gissel* complaint after Local 337 requested recognition as the majority representative of Allied's employees and offered to demonstrate proof of its majority status. As the Board explained (A.110), "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" given Local 337's claim of majority status, the complaint's allegation that a majority of the unit employees had designated Local 337 as their collective-bargaining representative, and the complaint's seeking a *Gissel* bargaining order to remedy Allied's unfair labor practices.⁹ Indeed,

⁹ Thus, the *Allied-I* complaint stated:

9. By on or about April 24, 1990, a majority of the employees in the Unit had designated the Charging Union as their exclusive representative for the purposes of bargaining collectively with [Allied] concerning rates of pay, wages, hours, and other terms and conditions of employment.

18. The acts described above [i.e. the unfair labor practices] are so serious and substantial in character that the possibility of erasing the effects of these unfair labor practices and of conducting a fair election after the use of traditional remedies is slight and the employees' sentiments regarding representation, having been

as the Board noted (A.110), “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” it settled.

1b. This Court’s *Nova Plumbing* decision does not preclude enforcement of the Board’s decision here

Allied argues at length (Br.4,16,25-42) that the Board’s order is unenforceable under this Court’s decision in *Nova Plumbing, Inc. v. NLRB*, 330 F.3d 531 (2003) (“*Nova Plumbing*”), because, according to Allied (Br.4,16), *Nova Plumbing* stands for the proposition that an employer’s agreement to recognize a union as the majority or 9(a) representative “is

expressed through authorization cards, would, on balance, be better protected by the entry of a remedial order, requiring Respondent [Allied] as of April 24, 1990, to recognize and bargain with the Charging Union as the exclusive collective bargaining representative of its employees in the Unit described above . . . than by traditional remedies.

* * *

WHEREFORE, it is prayed that Respondent be ordered to:

* * *

2. Take the following affirmative action

* * *

(f) Recognize and, upon request, bargain in good faith with the Charging Union as the exclusive collective bargaining representative of the employees in the Unit respecting rates of pay, wages, hours, and other terms and conditions of employment; and if an understanding is reached, embody it in a signed agreement.

(A.407,409,410.)

void and unenforceable unless there has been an actual showing of majority support among the unit employees.”¹⁰

Contrary to Allied’s claim (Br.25), however, this case is not “controlled by” *Nova Plumbing*. It is well settled that courts are “bound by holdings, not language.” *Alexander v. Sandoval*, 532 U.S. 275, 282 (2001). And, put simply, *Nova Plumbing* nowhere held that an employer’s agreement to recognize a union as the 9(a) representative is void and unenforceable unless there has been an actual showing of majority support among the unit employees.

Rather, *Nova Plumbing*, by its terms, stands for the more limited proposition that, “[s]tanding alone, . . . contract language and intent [to form a 9(a) relationship] cannot be dispositive [in determining whether a

¹⁰ Allied complains (Br.27-28) that it has never seen actual proof that Local 337 enjoyed majority support, though it does not, and cannot, deny that Local 337 offered to demonstrate proof of its majority status when it demanded recognition. As shown (pp.26-27, note 5), however, a nonconstruction-industry employer may recognize a union based on the union’s assertion of majority support without extrinsic proof of the union’s majority status. The Board has explained that a rule that a construction-industry employer may not lawfully recognize a union as the 9(a) representative of its employees unless the union makes an actual showing of majority support “would contravene *Deklewa*’s admonition that unions in the construction industry should not be treated less favorably than those outside the construction industry.” *Oklahoma Installation Co.*, 325 NLRB at 742. Thus, a construction-industry employer *may* be deemed to have granted 9(a) recognition “without extrinsic proof of majority status.” *Triple C Maintenance*, 219 F.3d at 1153-56, 1157-60.

construction industry employer has a 9(a) relationship with a union] *at least where, as here, the record contains strong indications that the parties had only a section 8(f) relationship.*” *Nova Plumbing*, 330 F.3d at 537.

(emphasis added). Thus, the *Nova Plumbing* Court characterized its holding as follows: “Because the Board relied solely on a contract provision suggesting that the company and the union intended a 9(a) relationship *despite strong record evidence that the union may not have enjoyed majority support* as required by section 9(a), we hold that the Board failed to protect the employees’ section 7 rights ‘to bargain collectively through representatives of their own choosing.’” *Id.* at 533 (emphasis added). The limited nature of the Court’s holding is confirmed in yet another portion of the opinion. Thus, in distinguishing the Tenth Circuit’s decision in *Triple C Maintenance* and the Third Circuit’s decision in *Herre Bros*, the *Nova Plumbing* Court pointed out that “neither appears to involve a situation suggesting that the union was not in fact supported by a majority of workers.” *Id.* at 538.

Nova Plumbing does not preclude enforcement of the Board’s decision here, because there are *not* “strong indications” that Local 337 lacked majority support. In *Nova Plumbing*, the Court found that there were “strong indications” that the parties had only a Section 8(f) relationship--and

that the union lacked majority support--in light of employer *and union* testimony to that effect and the apparent failure of the Board to clearly contend that the union actually had majority support. *Id.* at 537-38.

However, unlike *Nova Plumbing*, there is absolutely no employer or union testimony to the effect that employees did not support Local 337 at the relevant time. Thus, unlike *Nova Plumbing*, where the employer's president credibly testified that he did not believe that the union had majority support when he entered into the agreement (*id.* at 538), the Allied official who signed the settlement agreement recognizing Local 337 did *not* testify in this case that he did not believe that a majority of his employees supported Local 337 when that union demanded recognition and when he signed the recognition settlement agreement. Unlike *Nova Plumbing*, where the union representative testified that he could only remember three employees who signed union authorization cards (*id.* at 538), no union official testified in this case that he had only obtained cards from a *minority* of the employees. And, unlike *Nova Plumbing*, it certainly cannot be said here that the Board has failed to contend that Local 337 enjoyed majority support. Thus, as shown, the *Allied-I* complaint, which the 1991 Regional Director-approved recognition/settlement agreement resolved, explicitly asserted that a majority

of Allied's employees *had* designated Local 337 as their exclusive collective-bargaining representative. (A.407(¶9).)

There is no merit to Allied's claims (Br.39) that the parties' behavior "confirms" that the settlement agreement merely created an 8(f) relationship. Thus, Allied fails to cite any contemporaneous behavior by any party that even suggests that the parties had only a Section 8(f) relationship upon entering into the settlement agreement. For example, Allied points out (Br.28) that the Union had lost an election in 1986. However, the loss of an election in 1986 hardly demonstrates that the Union lacked majority support *five years later* when the parties entered into the 1991 settlement agreement. Allied's reliance on such stale evidence stands in marked contrast to the nature of the record in *Nova Plumbing*, where the Court rejected the 9(a) claim by citing contemporaneous evidence relating to the union's majority status *at the time* the parties entered into the contract purportedly granting 9(a) recognition.¹¹

¹¹ Thus, the *Nova Plumbing* Court pointed out that the union representative who approached employees to sign cards in connection with the agreement testified that he could only remember three employees signing cards. *Id.* at 538. The Court also cited testimony establishing that employees reacted negatively as soon as they were told that *Nova* had reached an agreement with the union. *Id.* at 537, 538. No comparable evidence exists here.

Similarly, the Board was hardly precluded from finding that Allied had recognized the Union as the 9(a) representative in 1991 merely because, *four years after* the parties entered into the settlement agreement, Local 337 made a 1995 bargaining proposal containing an 8(f) recognition clause. (Br.9,39.) Evidence about what happened in 1995 is not even remotely contemporaneous with the grant of recognition in 1991 pursuant to the settlement agreement. And, as the Board noted (A.111 n.19), that 1995 contract proposal “sheds little light on the nature of the relationship created under the [1991] 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.” As the Board also noted (A.111 n.19), any probative value of that proposal “is largely negated by the fact that Local 337 also made a request, albeit orally, for 9(a) recognition during negotiations.”

Nor does Allied’s answer to the complaint that led to the settlement agreement “confirm” that the Union had not been designated by a majority of the employees to be their collective-bargaining representative. Thus, contrary to Allied’s claim (Br.7,32) that it denied the complaint allegation regarding the union’s majority status, Allied did *not* specifically deny the allegation that a majority of its employees had designated Local 337 as their

exclusive collective-bargaining representative. Paragraph 9 of the *Allied-I* complaint stated (A.407(¶9)):

9. By on or about April 24, 1990, a majority of the employees in the Unit had designated the Charging Union as their exclusive representative for the purposes of bargaining collectively with Respondent concerning rates of pay, wages, hours, and other terms and conditions of employment.

Unlike its responses to 11 other paragraphs of the complaint, however, Allied did not specifically deny paragraph 9's allegation of majority status as being untrue. Instead, Allied answered paragraph 9 as follows:

9. Respondent [Allied] has no factual basis upon which to admit or deny the allegation but demands that General Counsel submit specific proof that an uncoerced majority existed on such date.

(Compare A.407(¶9) with A.413(¶9).)

Equally unavailing is Allied's claim (Br.40-41) that "the Board's failure to seek revocation" of the 1991 settlement agreement--once Allied claimed *in 1993* (Br. 40) that the settlement agreement had not established a 9(a) relationship--confirms that the parties had merely created a Section 8(f) relationship. Thus, *the Board* could not have sought to revoke the agreement; *the Board* plays no role in deciding whether to accept, or set aside, an informal settlement agreement entered into prior to the opening of a hearing. *See NLRB v. UFCW, Local 23*, 484 U.S. 112, 125-26, 130 (1987)(pre-hearing complaint and settlement determinations are

prosecutorial decisions exclusively within the control of the General Counsel). And it is well settled that the General Counsel's prosecutorial decisions are "not binding on the Board." *Bryant & Stratton Business Institute, Inc. v. NLRB*, 140 F.3d 169, 185 (2d Cir. 1998)(citation omitted). *Accord Williams v. NLRB*, 105 F.3d 787, 790-91 n.3 (2d Cir. 1996).

And the *General Counsel's* failure to seek revocation of the settlement agreement does not confirm the existence of an 8(f) relationship either. A decision not to set aside a settlement agreement, like any prosecutorial decision, "is made for many reasons, sometimes for reasons unrelated to the merits of the charge," and Allied "offers nothing to show that the General Counsel's decision was based on an affirmative finding" that the settlement agreement had merely created an 8(f) relationship. *Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1281 (D.C. Cir. 1999). If anything, the evidence cited (Br.40) by Allied demonstrates that the General Counsel continued to believe that the settlement agreement *had* established a 9(a) relationship, because he continued to issue complaints alleging precisely that. (A.608-09(¶¶8,9),517(¶¶8,9),539(¶¶8,9).)

1c. The Board's holding does not implicate the broader concerns *Nova Plumbing* voiced about the possibility of employer-union collusion

Nor does the Board's holding here implicate any of the broader concerns that the *Nova Plumbing* Court expressed about the possibility for employer-union collusion under *Staunton Fuel*'s doctrinal framework. *Nova Plumbing*, 330 F.3d at 536-37. The *Nova Plumbing* Court voiced the concern that if contract language and intent "standing alone" could establish a Section 9(a) relationship, then construction-industry employers and unions would be able to "collud[e] at the expense of employees and rival unions" by entering into contracts under 9(a) that would foist minority unions on employees. *Id.* The Court also pointed out that such 9(a) collective-bargaining agreements would also prevent the employees (and other parties) from ridding themselves of the unwanted minority unions that had unfairly been foisted upon them, because the 9(a) agreements would "trigger the three-year 'contract bar'" rule that precludes employees (and other parties) from decertifying a union during the term of a contract of three years or less. *Id.* at 537.

Whatever the merits of the *Nova Plumbing* Court's views about the possibility for collusion under the Board's doctrinal framework when, as in *Nova Plumbing*, an employer recognizes a union and enters into a 9(a)

collective-bargaining agreement in the absence of a *Gissel* complaint, such concerns are entirely unwarranted when, as in this case, an employer grants the 9(a) recognition as part of a Regional Director-approved settlement agreement that resolves a *Gissel* complaint. After all, an employer named as the respondent in a complaint seeking a *Gissel* bargaining order, by definition, is alleged to have committed unfair labor practices in an effort to keep his employees *unrepresented* and the union *out* of his establishment.¹² Accordingly, it would be illogical to conclude that there is any serious possibility that such an antiunion employer would “collude with” a minority union to foist that union on his employees as their 9(a) representative.

The fact that 9(a) recognition is extended only after the issuance of a *Gissel* complaint makes it even more unlikely that the grant of 9(a) recognition will be the result of collusion between the employer and a minority union. As this Court has recognized, the General Counsel does not issue a complaint seeking relief unless he first determines that the unfair labor practice charge appears to have merit and that relief is appropriate, and

¹² Thus, the *Allied-I* complaint alleged, among other things, that Allied had told job applicants that they would have to resign union membership to obtain employment with it, threatened employees with job loss and closure of the business if they chose to be represented by Local 337, and laid off union supporters. (A.408-09.) As part of the settlement resolving the complaint, Allied promised not to do those things and to pay backpay to employees named in the complaint. (A.417-19.)

that determination is made only after he conducts an investigation to ascertain, analyze, and apply relevant facts and law. *See Davis Supermarkets, Inc. v. NLRB*, 2 F.3d 1162, 1179 (D.C. Cir. 1993). Prior to the events at issue, the Board had acknowledged that it lacked authority to impose a *Gissel* bargaining order on behalf of a minority union. *See Gourmet Foods, Inc.*, 270 NLRB 578, 585 (1984). Accordingly, the General Counsel (via the Regional Director) would not have alleged (A.407(¶9),409(¶18),409-10)) that a majority of Allied's unit employees had designated Local 337 as their exclusive collective-bargaining representative through authorization cards and that a *Gissel* bargaining order was warranted without first investigating Local 337's claim of majority status and satisfying himself that a *Gissel* bargaining order was appropriate under Board law.¹³

The fact that the employer's grant of 9(a) recognition occurs as part of a Regional Director-approved settlement--rather than pursuant to a private agreement between just the employer and union--makes it still more unlikely that the grant of 9(a) recognition will be the result of collusion between an

¹³ Any claim that the Regional Directors merely engage in perfunctory investigations of unfair labor practice charges is belied by the small percentage of charges they find to have merit. For example, only 38.7 percent of the unfair labor practice charges filed during fiscal year 2007 were found to have merit. *See* 72d NLRB Ann.Rep. 7 (2007).

employer and a minority union at the expense of employees. Thus, the courts have repeatedly recognized that a Regional Director's approval of an informal settlement agreement "clearly manifests an administrative determination by the Board that . . . remedial action is necessary to safeguard the public interests intended to be protected by the . . . Act." *Mammoth of California, Inc. v. NLRB*, 673 F.2d 1091, 1094 (9th Cir. 1982) (quoting *Poole Foundry & Machine Co. v. NLRB*, 192 F.2d 740, 741, 743 (4th Cir. 1951) (finding that regional director's approval of settlement agreement manifests same administrative determination even when a complaint had not issued)). Allied's recognition of Local 337 was not the result of a private settlement between just those two parties. Rather, the Regional Director *approved* the settlement agreement that contained the grant of majority recognition. (A.417.)

Finally, the *Nova Plumbing* Court's concern about the possibility of employees being barred from filing a decertification petition is absent here because the grant of recognition was not contained in a collective-bargaining agreement.¹⁴

¹⁴ In *M&M Backhoe Service, Inc. v. NLRB*, 469 F.3d 1047, 1050 (D.C. Cir. 2006), a case where a union claimed that it had converted an admitted 8(f) relationship to a 9(a) relationship, a different panel of this Court characterized *Nova Plumbing*'s holding in much more expansive terms, ignoring *Nova Plumbing*'s limiting language quoted above. The

In sum, *Nova Plumbing* does not preclude enforcement of the Board's decision. Rather, this Court's enforcement of the Board's decision would merely stand for the limited proposition that, even absent the production of authorization cards at a hearing, the Board may find--based on the language of a recognition agreement contained in a Regional Director-approved settlement agreement that resolved a *Gissel* complaint--that a construction-industry employer has granted 9(a) or majority recognition to the union that demanded such recognition and offered to prove its majority status, at least where, as here, there are not strong indications that the union lacked majority support.

M&M Backhoe Service Court's characterization of *Nova Plumbing* was clearly dicta, however, because the evidence showed that all of the employer's employees had signed cards the week that the union demanded recognition as the 9(a) representative. The *M&M Backhoe Service* Court certainly was not faced with the peculiar factual scenario presented in this case, and therefore its decision does not control the result here. See *Alexander v. Sandoval*, 532 U.S. 275, 282-84 (2001) (rejecting party's contention that the issue had been resolved by prior cases because the holdings of those cases did not in fact resolve the issue); *Critical Mass Energy Project v. Nuclear Regulatory Commission*, 975 F.2d 871, 879 (D.C. Cir. 1992) (general expressions in an opinion that go beyond the case "ought not to control the judgment in a subsequent suit when the very point is presented for decision")(citation omitted).

1d. Allied's remaining attacks on the Board's 9(a) finding lack merit

Alternatively, Allied appears to contend that it cannot be deemed to have recognized Local 337 as the 9(a) representative even under extant Board law. Allied claims (Br.36) that the Board failed to recognize that it was able to resolve the *Allied-I Gissel* complaint by exercising its option, as a construction-industry employer, to enter into a Section 8(f) relationship with Local 337. Thus, Allied's attack on the Board's finding amounts to a claim that Local 337 settled for something less (i.e., an 8(f) relationship) than the Regional Director was seeking in the complaint, and that the Regional Director approved such a settlement.

Allied's claim is unconvincing and not just because such a settlement "would bear no relation to the allegations of the complaint" it settled. (A.110.) Thus, Allied's claim is undermined by the additional fact that, as shown, the language in the recognition/settlement agreement actually tracks the language in the complaint. As the Board noted (A.119 & n.10), the parties certainly would have used very different language from the language set forth in the complaint if they had intended to establish an 8(f) relationship, because the complaint "unquestionably sought establishment of a 9(a) relationship."

Allied's claim that the recognition/settlement agreement merely established an 8(f) agreement is further undermined by the fact that, as the Board noted (A.111), the recognition/settlement language "imposed obligations on [Allied] beyond those of an 8(f) relationship." Thus, the recognition/settlement agreement does not require Allied to recognize Local 337 "as the limited collective-bargaining representative." Instead, as shown, it contains the open-ended obligation contained in Board orders in 9(a) cases, namely, to recognize, and upon request, bargain with Local 337 and to embody any understanding in a signed agreement.

Contrary to Allied's additional claim (Br.32-35), the fact that the settlement agreement contains a nonadmission clause hardly precluded the Board from concluding that Allied had in fact recognized the Union as the 9(a) representative of its employees based on the recognition language contained in that agreement. Thus, the impact of a nonadmission clause, like any other clause in an agreement, necessarily depends on its wording. The clause in this case merely provided that by executing the settlement agreement, Allied did not admit that it had violated the Act. (A.417-19.) However, the recognition language of the settlement agreement, like the language in the complaint about the Union's majority status, does not constitute an admission of an unfair labor practice. Indeed, it is *not* an unfair

labor practice for an employer to recognize a union as the 9(a) representative of its employees in the absence of unfair labor practices or for a union to have been designated by a majority of employees to be their representative. Because the nonadmission clause did *not* state that the Board could not consider the settlement agreement's *recognition* language, or the complaint's allegations about the Union's majority status, in determining the nature of the relationship between Allied and the Union, the Board did not run afoul of the clause in considering that language in reaching its 9(a) determination.

Accordingly, this case is entirely different from *BPH & Company, Inc. v. NLRB*, 333 F.3d 213, 222 (D.C. Cir. 2003) (“*BPH*”) (Br.33), where this Court held that the Board could not rely on language in a settlement agreement in one case *to establish that the employer had committed unfair labor practices* that tainted a decertification petition in another case because the settlement agreement contained a clause stating that the employer did not admit to having violated the Act. *Id.* at 218-20. Nothing in *BPH* calls into question the well-settled principle that “[a]n entire structure or course of future relationships may ... be bottomed upon the binding effect of a status fixed by the terms of a settlement agreement.” *Poole Foundry & Machine Co. v. NLRB*, 192 F.2d 740, 743 (4th Cir. 1951).

Equally unavailing is Allied's complaint (Br.41-42) that Local 337's April 1990 demand letter making the required offer to demonstrate majority support was not contemporaneous with Allied's July 1991 grant of recognition. As the Board explained (A.119), "it would be illogical" in this case to require Local 337 to demonstrate majority support when Allied granted recognition by entering into the settlement agreement, because Allied's grant of recognition settled a complaint that sought a *Gissel* bargaining order. As shown, the very premise of a *Gissel* bargaining order is that, because of the employer's unfair labor practices, it is likely that the union will *not* be able to show that it has *maintained* its majority at the time the Board's remedies are implemented. For, if the union were able to maintain its support, then employees could freely exercise their rights to determine whether they desire representation in an election, and a remedial bargaining order would be unnecessary. *See Gissel*, 395 U.S. at 610, 612-14.

2a. The Board's decision in *Allied-III* precludes Allied from arguing that the parties merely had an 8(f) relationship

The Board also reasonably concluded (A.111-12,118) that its 2001 decision in *Allied-III*, 332 NLRB 1600, collaterally estopped Allied from arguing that it had a Section 8(f) relationship with Local 337, because *Allied-III* "was necessarily premised on the existence of a 9(a) relationship."

Under the doctrine of collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction or by an agency acting in a judicial capacity, that determination is conclusive in subsequent litigation involving parties to the first litigation. *Marlene Industries Corp. v. NLRB*, 712 F.2d 1011, 1015 (6th Cir. 1983); *National Post Office Mail Handlers v. APWU*, 907 F.2d 190, 192 (D.C. Cir. 1990) (“*Mail Handlers*”); 18 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Fed. Prac. & Proc. Juris. 2d* §§4402 pp.8-9 (“*Fed. Prac. & Proc. Juris.2d*”); 18B *Fed. Prac. & Proc. Juris.2d* §4475 pp.468-80; 32 Charles Alan Wright & Charles H. Koch, Jr., *Fed. Prac. & Proc. Judicial Review* §8255 pp.447-48, 451. Accordingly, collateral estoppel “bars a party from relitigating an issue of fact or law that was actually litigated and necessarily decided by a final disposition on the merits in a previous litigation between the same parties.” *Mail Handlers*, 907 F.2d at 192.

Contrary to Allied’s claim (Br.17-18,42-57), all of the requirements for applying collateral estoppel are satisfied. The Board was acting in a judicial capacity when it decided *Allied-III*. The parties in the instant litigation are the same as in *Allied-III*. Moreover, the issue sought to be precluded--the nature of Allied’s collective-bargaining relationship with Local 337--is also the same as in the prior proceeding.

That issue was also actually litigated in *Allied-III* because, as the Board noted (A.119,120), the *Allied-III* complaint alleged that Local 337 was the 9(a) representative of Allied's unit employees, Allied's answer denied that Local 337 was the 9(a) representative of its employees, and the parties never withdrew that issue. *See* 18 *Fed. Prac. & Proc. Juris.2d* §4419 p.500 (actual litigation requirement satisfied as to "any issue framed by the pleadings and not withdrawn, even though it has not been raised at trial in any way"); *Spawr Optical Research, Inc. v. Baldrige*, 649 F.Supp. 1366, 1372-73 (D.D.C. 1986); *In Re Keaty*, 397 F.3d 264, 272 (5th Cir. 2005).

Finally, the nature of Allied's relationship with Local 337 was determined by the Board in *Allied-III* and was essential to the judgment in *Allied III*, because, as the Board noted (A.119-20,111), Allied could not have been found to have violated Section 8(a)(5) by bargaining in bad faith, bypassing the union, making unilateral changes, and refusing to furnish information in *Allied-III* unless it had a 9(a) relationship with Local 337. Accordingly, there is no merit to Allied's claim (Br.48-50) that *Allied-III* did not actually determine that Local 337 was the 9(a) representative simply because the term "9(a)" does not appear in the decision. *See Securities Industries Ass'n v. Board of Governors of the Federal Reserve System*, 900 F.2d 360, 364-65 (D.C. Cir. 1990)(even when an opinion is silent on a

particular issue, issue preclusion is applicable if resolution of issue was necessary to the judgment); *Hoult v. Hoult*, 157 F.3d 29, 32 (1st Cir. 1998)(“an issue may be ‘actually’ decided for collateral estoppel purposes even if it [was] not *explicitly* decided, for it may have constituted, logically or practically, a necessary component of the decision reached”)(citation omitted).

2b. There is no merit to Allied’s claims that the Board improperly invoked collateral estoppel

Allied launches (Br.42-57) a barrage of misguided attacks on the Board’s conclusion that its decision in *Allied-III* precludes Allied from arguing that it merely had an 8(f) relationship with Local 337. For example, Allied argues (Br.42,55) that the Board was not entitled to apply collateral estoppel because the General Counsel and Union did not raise the issue of collateral estoppel. However, because tribunals themselves share interests in repose and avoiding burdensome relitigation and are concerned as well with avoiding inconsistent decisions, it is settled that tribunals “retain the power to consider such doctrines sua sponte.” *Consolidated Edison Co. of NY, Inc. v. Bodman*, 445 F.3d 438, 451 (D.C.Cir. 2006). *Accord* 18 *Fed. Prac. & Proc. Juris.2d* §4405 pp.85-86 (noting that “it has become increasingly common to raise the question of preclusion on the court’s own motion”).

And because *res judicata* doctrines may be invoked by tribunals *sua sponte*, the *parties'* positions as to whether *res judicata* requirements have been satisfied obviously cannot be binding on the *tribunal*. Accordingly, in arguing (Br.44,46-48) that Local 337's 9(a) status was not actually litigated in *Allied III*, Allied places (Br.47-48) entirely too much weight on the General Counsel's statement in an answering brief to Allied's motion for reconsideration--to the effect that Allied "*may well be correct*" in arguing that the issue was never actually litigated in *Allied III*--and on Local 337's apparent concession that parties had not litigated the issue. Indeed, Allied merely argued to the Board in *Allied-III* that "the parties did not litigate whether the Union was the *certified* bargaining representative of AMS' employees." (A.214,221(emphasis added).) As the Board noted (A.120), whether Allied recognized Local 337 as the 9(a) representative of its employees is a different issue from whether Local 337 was the certified representative of Allied's employees.

Thus, as shown above, the Board reasonably found (A.120) that, notwithstanding the statements referenced by Allied, the issue of whether Local 337 was the 9(a) representative *was* actually litigated, because the issue of Local 337's representational status was framed by the pleadings and not withdrawn. *See 18 Fed. Prac. & Proc. Juris.2d* §4419 p.500 (actual

litigation requirement satisfied as to “any issue framed by the pleadings and not withdrawn, even though it has not been raised at trial in any way”); *Spawr Optical Research, Inc. v. Baldrige*, 649 F.Supp. 1366, 1372-73 (D.D.C. 1986). Allied concedes (Br.43) that “the General Counsel [in *Allied-III*] alleged that the [u]nion was a Section 9(a) representative based on the 1991 settlement agreement,” and that Allied “denied” that the union was the 9(a) representative. And the parties certainly never withdrew the issue of the union’s status.¹⁵

Allied also mistakenly contends (Br.50-54) that it was not necessary for the Board to find in *Allied-III* that Allied had a 9(a) relationship with

¹⁵ Thus, Local 337’s brief to the Board in *Allied-III*--the same brief that contains the statement relied on by Allied to show that the issue was not litigated--argued that Local 337 *was* the 9(a) representative as the result of the recognition agreement that settled the *Allied-I* complaint that sought a *Gissel* remedial bargaining order. Indeed, the Union argued that the settlement agreement had to establish a 9(a) relationship, because 8(f) only concerns collective-bargaining agreements and Allied has never had a collective-bargaining agreement with the Union. (*See* A.265,277-79.) The General Counsel pointed out that the judge had properly taken administrative notice of the settlement agreement, which was part of the record in *Allied II*, and he attached the settlement agreement to his brief to the Board. (*See* A.1109,1138-40.) And Allied argued to the Board in that case that the Settlement Agreement “fails to provide the basis for finding a 9(a) relationship.” (*See* A.214,223&n.3.)

Local 337, and therefore collateral estoppel is inappropriate here. As shown, the Board found in *Allied-III* that Allied violated Section 8(a)(5) of the Act by, among other things, failing to bargain in good faith, making unilateral changes, bypassing Local 337 and dealing directly with employees, and refusing to furnish information. According to Allied (Br.51), “Board law establishes that all four of [those Section 8(a)(5)] violations can be supported when an employer takes these actions . . . in violation of a Section 8(f) agreement.” (underlining in original). In other words, Allied argues that it was not necessary for the Board to find a 9(a) relationship in *Allied-III*, because the Board would have found that Allied violated Section 8(a)(5) of the Act by engaging in those actions even if Allied merely had a Section 8(f) relationship with Local 337.

Allied’s argument can be swiftly rejected because, as the Board explained (A.111), “an 8(f) relationship imposes no enforceable duties in the absence of a collective-bargaining agreement,” and Allied never had a collective-bargaining agreement with Local 337. Thus, absent Allied’s having a 9(a) relationship with Local 337, the Board could not have found that Allied violated Section 8(a)(5) in *Allied-III* by failing to bargain in good faith, making unilateral changes, bypassing the union and dealing directly with employees, and refusing to furnish information. Accordingly, “the

Board necessarily determined [in *Allied-III*] that the bargaining relationship between [Allied] and Local 337 was governed by Section 9(a).”

(A.120,111.)

The cases relied on by Allied (Br.51-52) are not to the contrary. Thus, each of the six cases cited by Allied is readily distinguishable because the employer in each of those cases either engaged in the impermissible 8(a)(5) conduct *during the term of a collective-bargaining agreement* to which the employer was legally bound or refused to execute a collective-bargaining agreement to which it had agreed. *See HCL, Inc.*, 343 NLRB 981, 982-83 (2004)(Board found that employer violated Act by engaging in direct dealing during the term of its 8(f) collective-bargaining agreement with union); *Coulter’s Carpet Service, Inc.*, 338 NLRB 732, 733 (2002)(unilateral changes during the term of an 8(f) collective-bargaining agreement violate the Act); *Gary’s Electrical Service Co.*, 326 NLRB 1136, 1136 (1998)(failure to provide relevant information to Section 8(f) bargaining representative during term of 8(f) collective-bargaining agreement violates Section 8(a)(5)); *Glens Falls Contractors Ass’n*, 341 NLRB 448, 448 n.2 (2004)(employers were not free to repudiate their relationship with carpenters union and recognize another union during the term of their collective-bargaining agreement with the carpenters union); *Cedar Valley*

Corp., 302 NLRB 823, 823 (1991)(employer violated the Act by failing to adhere to a collective-bargaining agreement to which it was bound), *enforced*, 977 F.2d 1211 (8th Cir. 1992); *Clarence Spight Equipment Leasing Co.*, 312 NLRB 147, 148 (1993)(employer violated Section 8(a)(5) by failing to execute a collective-bargaining agreement to which it had agreed to be bound).¹⁶

Allied claims (Br.52-53), however, that the Board mistakenly concluded here that only collective-bargaining agreements qualify as “8(f) agreements” that impose Section 8(a)(5) enforceable obligations. According to Allied, other kinds of agreements between employers and unions, such as the settlement agreement here, also constitute “8(f) agreements.” In support of its claim, Allied notes (Br.53) that while the word “agreement” appears in the text of Section 8(f), the term “collective-bargaining agreement” does not.

However, Allied cites no authority for its novel proposition that Section 8(f) was enacted to permit employers and unions to enter into

¹⁶ Even when an employer has agreed to a provision in an 8(f) collective-bargaining agreement that provides that it will negotiate a renewal agreement, courts have emphasized that the obligation to negotiate the renewal arises from the collective-bargaining agreement, not from the National Labor Relations Act. *See, e.g., Sheet Metal Workers’ Int’l Ass’n, Local Union No. 2 v. McElroy’s, Inc.*, 500 F.3d 1093, 1097 (10th Cir. 2007) (although an employer is under no statutory obligation to negotiate a renewal agreement, the terms of the prehire collective-bargaining agreement it agreed to created a contractual obligation to do so).

agreements other than collective-bargaining agreements. To the contrary, Section 8(f)'s legislative history shows that the term "agreement" in Section 8(f) was just a shorthand reference to collective-bargaining agreement.¹⁷

Allied's 1991 settlement agreement certainly does not constitute a collective-bargaining agreement, because it does not provide terms and conditions of employment for its employees. (A.120n.12.) It is thus not surprising that Allied's current position is diametrically opposed to the position Allied took before the Board. Thus, Allied argued to the Board in

¹⁷ For example, in analyzing the need for prehire collective-bargaining agreements in the construction industry, two of the proponents of what would become 8(f) indicated (emphasis added): "*Collective-bargaining agreements* must be negotiated in the construction industry before the employees are hired" because "contractors need to know what [their] wage rates and conditions of employment will be before submitting their [job] bids"; many projects "involve work of such duration that the work would be completed long before a *collective-bargaining agreement* could be signed"; it is manifestly inefficient to negotiate a separate contract for every project; and the "legal validity of [construction-industry employers'] *collective-bargaining agreements* will remain questionable until Congress acts." 105 Cong. Rec. 14204-05(daily ed. Aug.11, 1959) (analysis by Representatives Thompson and Udall), reprinted in II NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act, 1959 pp. 1577-78 (1959). Critics of the proposal likewise recognized that 8(f) concerned collective-bargaining agreements. For example, Senator Goldwater complained that the prehire amendment "permits employers and unions in [the building construction] industry to sign *collective bargaining agreements* even though the union does not represent a majority of the employees in the unit." 105 Cong Rec. 9117 (daily ed. June 8, 1959) (statement of Senator Goldwater), reprinted in III Legislative History of the Labor-Management Reporting and Disclosure Act, 1959 at 1289 (1959).

the instant case that it could *not* have an obligation to bargain at the time of Local 337's 1998 merger *absent a collective-bargaining agreement* with that union.¹⁸

Allied also skates on thin ice in claiming (Br.46,55-56) that *Allied-III* cannot preclude it from arguing that it merely had a Section 8(f) relationship because its belated appeal of that decision is pending and because *Allied-III* would be unenforceable under this Court's *Nova Plumbing* decision. However, the general rule is that "a judgment is entitled to preclusive effect even though an appeal is pending." 18 *Fed. Prac. & Proc. Juris.2d* §4404 p.58. *Accord Mail Handlers*, 907 F.2d at 192. Moreover, as shown above, this Court's decision in *Nova Plumbing* does not preclude the Court from finding that Allied had a 9(a) relationship with Local 337.

Finally, Allied complains (Br.54) that the Board has used collateral estoppel to deny Allied's employees their Section 7 right to choose whether they wished to be represented by a union. Allied's attempt to serve as the vicarious champion of its employees' organizational freedom is particularly

¹⁸ Thus, Allied argued to the Board that, even if the absence of a union membership vote on Local 337's merger did not privilege its withdrawal of recognition, an 8(a)(5) finding would still be inappropriate because "AMS was plainly an 8(f) contractor and had no continuing obligation to recognize the Union *outside the bounds of a collective-bargaining agreement.*" See (A.359,364(emphasis added)).

awkward given its repeated violations of its employees' Section 7 rights and its 1991 agreement to recognize Local 337 without an election.

In any event, it simply cannot fairly be said that the Board's decision "extinguish[es]" (Br.54) the ability of Allied's employees to choose whether they wish union representation. At bottom, the Board's finding that the Union is the 9(a) representative merely means that the Union enjoys a rebuttable presumption of majority status. Allied has never attempted to show that at the time it withdrew recognition the Union did not in fact enjoy majority support, and it does not even claim before this Court that it had a good-faith doubt of the Union's majority status. As the Supreme Court has repeatedly emphasized in a variety of contexts, the presumption of majority status furthers the public policy of industrial peace "by 'promot[ing] stability in collective-bargaining relationships, *without impairing* the free choice of employees.'" *See, for example, Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 38 (1987)(citation omitted)(emphasis added). Thus, once Allied remedies its unfair labor practices, the employees may, if they so choose, petition for a decertification election.

CONCLUSION

For the foregoing reasons, we respectfully submit that the Court should enter a judgment denying the petition for review, and enforcing the Board's Orders in full.

s/ Robert J. Englehart
ROBERT J. ENGLEHART
Supervisory Attorney

s/ Steven B. Goldstein
STEVEN B. GOLDSTEIN
Attorney

National Labor Relations Board
1099 14th Street N.W.
Washington, D.C. 20570
202-273-2978
202-273-3711

June 2011
alliedJune2011finalbrief



RECORD ADDENDUM

1 Counsel's Exhibit No. 25(d).

2 MR. HOWELL: All right. General Counsel's Exhibit No.
3 25(d) is the fourth order consolidated cases in lead case number
4 GR-7-CA-380022, which this is the complaint that issued in
5 December of 1996, upon which Richard Beddow issued his decision,
6 25(c).

7 This does not contain the allegations in case number
8 7-CA-39872, which were later filed and consolidated with. And
9 those allegations were dismissed by the Administrative Law
10 Judge. And it refers to them in this decision. Which I think
11 it concerned payment of accrued vacation pay instructors.

12 MR. BUDAY: As well as the alleged ---

13 MR. HOWELL: Well, it says what it says.

14 JUDGE EVANS: All right.

15 MR. BUDAY: I'm sorry.

16 JUDGE EVANS: All right. With the restatement of the
17 identification, is there any objection?

18 MR. BUDAY: No objection for taking the Exhibit for
19 convenience purposes.

20 JUDGE EVANS: Thank you. Received.

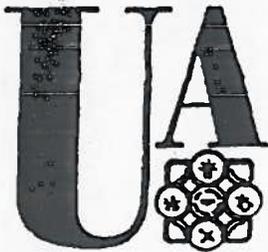
21 (General Counsel's Exhibit No. 25(d) received into evidence.)

22 MR. HOWELL: I would offer General Counsel's Exhibit No.
23 25(e). It is the unfair labor practice charge in GR-7-CA-40066,
24 dated 7-23-97.

25 (General Counsel's Exhibit No. 25(e) marked for identification.)

Argie Reporting Service
1000 West 70th Terrace
Kansas City, Missouri 64113
(816) 363-3657

Att. 1



United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada

LOCAL NO. 335/337 STREET ADDRESS 5906 East Morgan Road
CITY, STATE, ZIP Battle Creek, MI 49017
SUBJECT MATTER Strike Notice DATE 12/23/96

John Huizinga
Allied Mechanical Services
2211 Miller Road
Kalamazoo, MI 49001

Dear John Huizinga: Notice Unfair Labor Practices Strike.

Because and for Allied Mechanical Services continuing unfair labor practices, BE ADVISED THAT AS OF DECEMBER 23, 1996, THE FOLLOWING EMPLOYEE'S ARE ON STRIKE:

Jon Kinney and Tobin Rees

Strike Committee Organizer,

David Knapp

David Knapp
Organizer
U.A. Local Unions 335 & 337

Case No. Official Exhibit No.
GR-7-CA-40307 GC-26A
GR-7-CA-41390
Disposition: Identified
Rejected Received

IN THE MATTER OF:
ALLIED MECHANICAL SERVICES, INC.
Date: 12/30/96 Witness: KNAPP Reporter: DK
No. Pages: 1

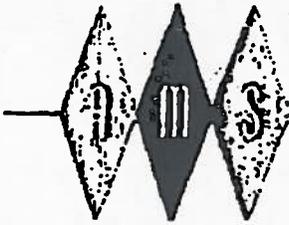
MARVIN J. BOEDE
General President

MARVIN J. BOEDE
General Secretary

DONALD P. McNAMARA
Asst. General President

Att. 2

GC EXHIBIT 26(a) p. —



ALLIED MECHANICAL SERVICES, INC.

PLUMBING - HEATING - AIR CONDITIONING - SHEET METAL - PROCESS PIPING

December 23, 1996

UJA Locals 335 and 337
5906 East Morgan Road
Battle Creek, Michigan 49017

RE: Strike Notice

Gentlemen:

Please be advised that we have received your notice of an alleged unfair labor practice strike. We are unaware of the basis for your strike. In order for AMS to understand your issue(s) and to consider a solution to the issue(s), please provide the following:

1. What specific act(s) do you claim are the basis for your strike; and
2. What specific step(s) do you seek AMS to take in order to cause the cessation of this work stoppage.

Unless we receive an immediate reply to these questions, we will consider this action to be unprotected activity as defined by the National Labor Relations Act. We will consider it to be another unprotected mini-strike. In that case, these individuals must return to work immediately or they will be considered to have quit.

Sincerely,

John Huizinga
John Huizinga
President

Case No. GC-7-CA-40707 Official Exhibit No. GC-26B

Disposition: Identified
Rejected: Received

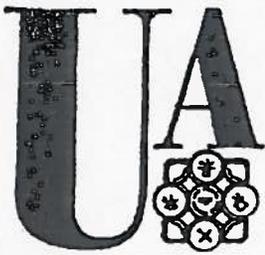
IN THE MATTER OF:

Allied Mechanical Services, Inc.

Date: 12/23/96 Witness: Knapp Reporter: Ch

No. Pages: _____

Add 3 GC EXHIBIT 26(b) p.



United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada

LOCAL NO. 335/337

STREET ADDRESS 5906 East Morgan Road

CITY, STATE, ZIP Battle Creek, MI 49017

SUBJECT MATTER Strike Notice

DATE 12/24/96

John Huizinga
Allied Mechanical Services
2211 Miller Road
Kalamazoo, MI 49001

Dear John Huizinga:

Once again the reason for the unfair labor practice strike is Allied Mechanical Services continuance to refuse to bargain in good faith and the other unfair labor practices set forth in the most recent National Labor Relations Board complaint are the reason for the unfair labor practice strike.

Upon cessation of your continuance to refuse to bargain in good faith and to satisfy all remedies in the outstanding unfair labor practices the workers would be prepared to end their unfair labor practice strike.

Very Truly Yours,

David Knapp
David Knapp
Organizer
U.A. Local Unions 335 & 337

Case No. GC-7-CA-40907, GC-26C

Discretion: Rejected Received
IN THE MATTER OF

Allied Mechanical Services, Inc

Date: 12/24/96 DK

No. Pages: 1

MARION A. LEE
General Secretary-Treasurer

DONALD
1996

Add. 4

UNITED ASSOCIATION
of Journeymen and Apprentices of the
Plumbing and Pipe Fitting Industry of
the United States and Canada

Martin J. Maddalon
General President

Michael A. Collins
General Secretary-Treasurer

C. Randal Gardner
Assistant General President

Founded 1889

Letters should
be confined to
one subject

UA Local Union: 335

Subject: **Unconditional offer to return to work**

March 2, 1998

John Huizinga
Allied Mechanical Services
2211 Miller Road
Kalamazoo, MI 49001

Dear John Huizinga:

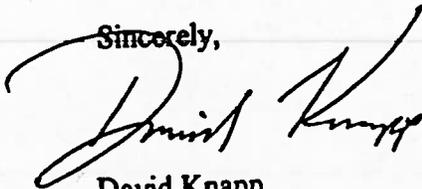
The following Employees have ended their Unfair Labor Practice Strike and are making
a unconditional offer to return to work:

Jim Bronkhorst, Ken Falk, Ted Fuller, Todd Hayes, Harold Hill, Joel Kinney, Jon
Kinney, Jeff Kiss, Mark Lemmer, Grant Maichele, Ron Parlin, Marty Preston,
Tobin Rees, Max Roggow, Brian Rowden, Steve Titus, Jeff Warren and Kirk Wood.

They will be waiting to hear from you on the time and location that you would like them
to show up to work.

If I can be of any other help or assistance feel free to contact me at (616) 968-0355 or
(616) 968-0993.

Sincerely,



David Knapp
U.A. Organizer

Case No. GN-7-CA-40907 Official Exhibit No. GC-30A
-41390

Disposition: Identified
Rejected Received

IN THE MATTER OF:

ALLIED MECHANICAL SERVICES, INC.

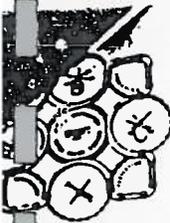
Date: 3/2/98 Witness: KNAPP Reporter: OK

No. Pages:

GC EXHIBIT 30(A) P.

Add 5

U.A. LOCAL UNION 335, 5906 EAST MORGAN ROAD, BATTLE CREEK, MI 49017
(616) 968-0993 OFFICE (616) 968-0025 FAX



UNITED ASSOCIATION
of Journeymen and Apprentices of the
Plumbing and Pipe Fitting Industry of
the United States and Canada

Martin J. Maddaloni
General President
Michael A. Collins
General Secretary-Treasurer
C. Randal Gardner
Assistant General President

Founded 1889

UA Local Union: 335

Subject: **Unconditional offer to return to work**

March 4, 1998

John Huizinga
Allied Mechanical Services
2211 Miller Road
Kalamazoo, MI 49001

Dear John Huizinga:

On March 2, 1998 the following Employees ended their Unfair Labor Practice Strike and made a unconditional offer to return to work:

Jim Bronkhorst, Ken Falk, Ted Fuller, Todd Hayes, Harold Hill, Joel Kinney, Jon Kinney, Jeff Kiss, Mark Lemmer, Grant Maichele, Ron Parlin, Marty Preston, Tobin Rees, Max Roggow, Brian Rowden, Steve Titus, Jeff Warren and Kirk Wood.

Since that time, we have yet to have received any information on times and locations of where to show up for work. If we don't hear from you by the close of work on Friday, March 6, 1998 we will consider that you terminated these fine gentlemen from your employment.

If I can be of any other help or assistance feel free to contact me at (616) 968-0355 or (616) 968-0993.

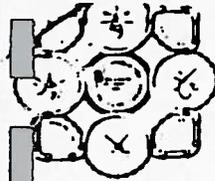
Sincerely,

David Knapp
U.A. Organizer

Add 6

Case No. GR-7-CA-40907 Official Exhibit No. GC-30B
 Disposition: Identified ✓
 Rejected: Received ✓
 IN THE MATTER OF:
ALLIED MECHANICAL SERVICES
 Date: 3/30/98 Witness: KNAPP Reporter: CH
 GC EXHIBIT 30(b) P.

U.A. LOCAL UNION 335, 5906 EAST MORGAN ROAD, BATTLE CREEK, MI 49017
 (616) 968-0993 OFFICE (616) 968-0025 FAX



UNITED ASSOCIATION
of Journeymen and Apprentices of the
Plumbing and Pipe Fitting Industry of
the United States and Canada

Founded 1889

Letters should
be confined to
one subject

UA Local Union: 335

Subject: **Unconditional offer to return to work**

March 25, 1998

John Huizinga
Allied Mechanical Services
2211 Miller Road
Kalamazoo, MI 49001

Dear John Huizinga:

On March 2, 1998 the following Employees ended their Unfair Labor Practice Strike and made a unconditional offer to return to work:

Jim Bronkhorst, Ken Falk, Ted Fuller, Todd Hayes, Harold Hill, Joel Kinney, Jon Kinney, Jeff Kiss, Mark Lemmer, Grant Maichele, Ron Parlin, Marty Preston, Tobin Rees, Max Roggow, Brian Rowden, Steve Titus, Jeff Warren and Kirk Wood.

As stated on March 6, 1998, If the union didn't hear from you by the close of work on that Friday that the union considered that you have terminated these fine gentlemen from your employment.

The union's position is that these fine gentlemen were fired because they were believed to be union supporters. If the union doesn't hear from you by the close of work Friday, the reasoning for the firing of these employee's was because they were union supporters.

If I can be of any other help or assistance feel free to contact me at (616) 968-0355 or (616) 968-0993.

Very truly yours,

David Knapp
U.A. Organizer

ADD. 7

GC EXHIBIT 30 (c) P.

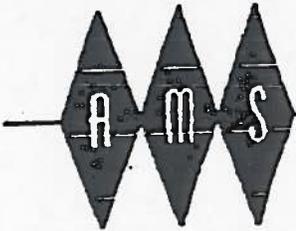
U.A. LOCAL UNION 335, 5906 EAST MORGAN ROAD, BATTLE CREEK, MI 49017
(616) 968-0993 OFFICE (616) 968-0025 FAX

Martin J. Macdonald
General President

Michael A. Collins
General Secretary-Treasurer

C. Randal Gardner
Assistant General President

Case No. GR-7-CA-40907 Official Exhibit No. GC-30C
-41390
Disposition: Identified
Rejected
IN THE MATTER OF:
ALLIED MECHANICAL SERVICES, INC. Reporter: CK
Date: 9/30/99 Witness: KNAPP
No. Pages: 1



ALLIED MECHANICAL SERVICES, INC.

PLUMBING - HEATING - AIR CONDITIONING - SHEET METAL - PROCESS PIPING

April 3, 1998

Kirk W. Stevenson
1350 Seminole Rd.
Muskegon, MI 49441

Dear Kirk,

In order for us to consider your resume, please look over the attached letter, and fill in the additional information that is needed for review. Also, make sure that the back page is signed and sent back, if it applies.

You are welcome to fax these sheets back to me with corrections, at (616) 344-0196, or send them to the office at 2211 Miller Rd., Kalamazoo, MI 49001.

Sincerely,

Janice Howard

ALLIED MECHANICAL SERVICES
Janice Howard
Receptionist

Case No. GA-7-CA-4297 GC-33
-41990

Official Exhibit No.

Disposition: _____ Identified _____
Received _____

IN THE MATTER OF:

ALLIED MECHANICAL SERVICES, INC.

Date: 4/30/98 Witness: KNAPP Reporter: CK

No. Pages:

3

Att. 8



WHAT TO DO IF YOU SEEK EMPLOYMENT AT ALLIED MECHANICAL SERVICES

1. Submit a Resume with
 - a. Full Name
 - b. Social Security Number
 - c. Drivers License Number and State of issue
 - d. Date of Birth
 - e. Current Address
 - f. Current Phone Number
 - g. Education
 - h. Job History
 - i. Job Experience
 - j. Special Skills
 - k. References with phone numbers
List the names of any Allied Mechanical management employees that you might know
2. AMS will consider resumes current for 30 days. After that period, unless there is contact made by the prospective employee in person, resumes will be considered inactive.
3. When AMS is preparing to hire, we will go over all current resumes. Individuals will be selected and may be interviewed. This selection will be based on but not limited to:
 - a. Experience if required
 - b. Special Skills
 - c. Company's Current Needs
 - d. References
4. Final selection will be made after interviews, if required, are completed and references and recommendations are checked.
5. The employment policies and practices of Allied Mechanical Services are intended to recruit and hire employees without illegal discrimination and to treat them fairly with respect to compensation and opportunities for advancement.
6. Allied Mechanical Services, Inc. recruits and hires out of the Kalamazoo office. If you are interested in employment at a branch location, your resume must be sent to the main office in Kalamazoo. Branch locations do not have the authority to hire new employees or answer questions pertaining to the availability of positions within the company.
7. A Certification and Release form must be signed and attached to your resume. Failure to do this will terminate your opportunity to be considered for employment at Allied Mechanical Services, Inc.

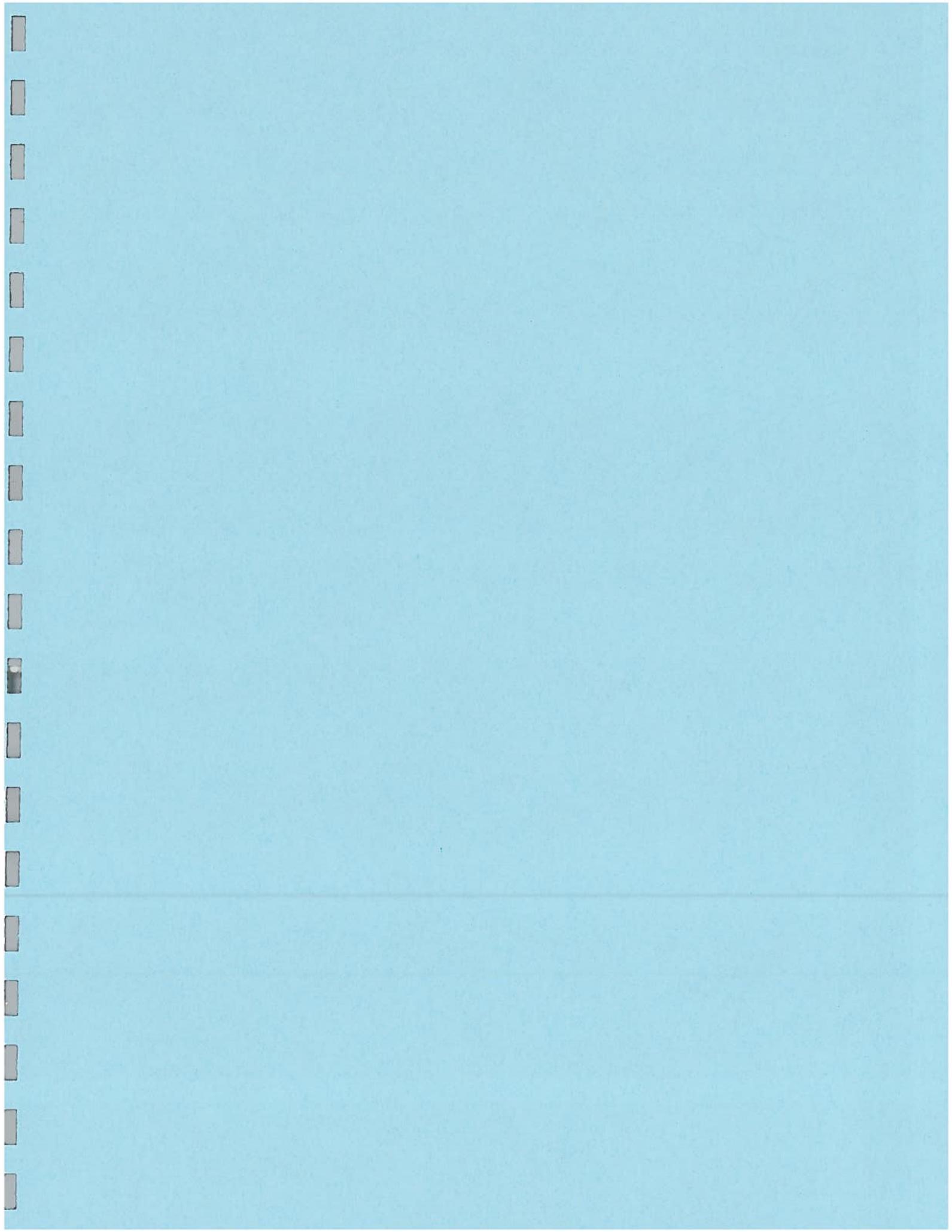
Add 9

CERTIFICATION AND RELEASE

In the event that this resume' results in consideration for employment I understand that false or misleading statements during the interview or on the resume' are grounds for terminating the employment process or, if discovered after employment, terminating employment. I also authorize the company and / or its agents, including consumer reporting bureaus, to verify any of the information given. I authorize all former employers, persons, schools, companies and law enforcement authorities to release any information concerning my background and hereby release any said persons, schools, companies, and law enforcement authorities from any liability for any damage whatsoever for issuing this information. I also understand that a pre-employment drug screen will be required. I understand that any job offer is contingent on this drug screen. If employment has begun but is within the 90-day probationary period this initial drug screen could result in termination if the results are not satisfactory.

Signed _____ Date _____

ADD-10



STATUTORY ADDENDUM

Section 3(b) of the Act (29 U.S.C. §153(b)) provides:

Ch. 7 LABOR—MANAGEMENT RELATIONS

29 § 153

§ 153. National Labor Relations Board

(b) Delegation of powers to members and regional directors; review and stay of actions of regional directors; quorum; seal

The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. The Board is also authorized to delegate to its regional directors its powers under section 159 of this title to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 159 of this title and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

Section 7 of the Act (29 U.S.C. §157) provides:

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

(July 5, 1935, c. 372, § 7, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat. 140.)

Sections 8(a)(1),(3) and (5) of the Act (29 U.S.C. §158(a)(1),(3), and (5)) provide:

§ 158. Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 8(f) of the Act (29 U.S.C. §158(f)) provides:

(f) Agreement covering employees in the building and construction industry

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to subsection (a)(3) of this section: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

Section 9(a) of the Act (29 U.S.C. §159(a)) provides:

§ 159. Representatives and elections

(a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*,

That the bargaining representative has been given opportunity to be present at such adjustment.

Section 10(a) of the Act (29 U.S.C. §160(a)) provides:

§ 160. Prevention of unfair labor practices

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

Section 10(e) of the Act (29 U.S.C. §160(e)) provides:

(e) Petition to court for enforcement of order; proceedings; review of judgment

The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

Section 10(f) of the Act (29 U.S.C. §160(f)) provides:

(f) Review of final order of Board on petition to court

Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ALLIED MECHANICAL SERVICES, INC)
)
Petitioner/Cross-Respondent) Nos. 10-1328, 10-1385
)

v.) Board Case Nos.
) 7-CA-40907

NATIONAL LABOR RELATIONS BOARD)
)
Respondent/Cross-Petitioner)
)
and)
)

UNITED ASSOCIATION OF JOURNEYMEN)
AND APPRENTICES OF THE PLUMBING AND)
PIPEFITTING INDUSTRY OF THE UNITED)
STATES AND CANADA, AFL-CIO, LOCAL)
UNION 357)
Intervenor)

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that, excluding the initial caption, its final brief contains 13,870 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC
this 21st day of June 2011
Allied(10-1328)Certificate of Compliance

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UNION 357)	
)	
Intervenor)	

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC
this 21st day of June, 2011

allied(10-1328) Certificate of Service