

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

HARGROVE ELECTRIC CO., INC.

Respondent

Case 16-CA-027812

ALMAN CONSTRUCTION SERVICES, LP

Respondent

Case 16-CA-027813

BOGGS ELECTRIC CO., INC.

Respondent

Case 16-CA-027814

and

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 20**

Charging Party

**BRIEF ON BEHALF OF
RESPONDENT HARGROVE ELECTRIC CO., INC.,
RESPONDENT ALMAN CONSTRUCTION SERVICES, LP AND
RESPONDENT BOGGS ELECTRIC CO., INC.
IN SUPPORT OF CROSS-EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE**

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INTRODUCTION

Respondent Alman Construction Services, LP, Respondent Boggs Electric Co., Inc., and Respondent Hargrove Electric Co., Inc. (“Respondents”) were Section 8(f) employers who had signed “me-too” agreements to follow the terms of a multi-employer union-employer association contract. In February 2008, they gave timely notice of their revocation of the employer association’s bargaining authority. They also gave the union notice of the terms they would put into effect when the contract terminated in 2010.

Respondents lawfully exercised their rights as 8(f) employers to announce the institution of new terms to take effect after the 8(f) agreement terminated. Those rights were not extinguished when a union became their employees' certified bargaining representative. Irrespective of their rights as 8(f) employers, they had the right to implement those previously-decided changes because the changes were decided upon and announced before a union was their employees' Section 9(a) representative. Therefore, when Respondents implemented changes after the contract terminated on December 11, 2010, those changes did not violate Section 8(a)(5).

Accordingly, the Findings and Conclusions of Law of the Administrative Law Judge to the effect that the changes made by Respondents on December 11, 2010 violated Section 8(a)(5) must be reversed and the Remedial Order recommended by the ALJ must be rejected. (ALJD 6-10, 13-18).¹

STATEMENT OF THE CASE

International Brotherhood of Electrical Workers, Local Union 20 (the Union) filed the Charge against Respondent Hargrove Electric Co., Inc. (Respondent Hargrove) in Case No. 16-CA-027812 on December 22, 2010.² (GC Ex. 1(a)). The Charge against Respondent Alman Construction Services, LP (Respondent Alman) in Case No. 16-CA-027813 and the Charge against Respondent Boggs Electric Co., Inc. (Respondent Boggs) in Case 16-CA-027814 were also filed by the Union on that date. (GC Ex. 1(b), (c)).

On June 30, 2011, an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing issued in these cases. (GC Ex. 1(g)). A hearing took place before Administrative Law

¹ References to the transcript of the hearing will be made as (Tr. ___); references to General Counsel's exhibits as (GC Ex. ___); to Respondents' exhibits as (ER Ex. ___); and to the Decision of the Administrative Law Judge as (ALJD, ___).

² All dates refer to 2010 unless otherwise specified.

Judge Margaret G. Brakebusch (the ALJ) in Fort Worth, Texas, on October 11, 2011. On January 13, 2012, the ALJ issued a Decision finding Respondent Hargrove, Respondent Alman and Respondent Boggs violated Sections 8(a)(1) and (5) by making certain changes without bargaining to impasse with the Union. (ALJD, 13-14).

STATEMENT OF FACTS

Background

Respondents are construction industry employers. They have enjoyed longstanding Section 8(f) bargaining relationships with the Union. (Tr. 45).

Those 8(f) relationships were in effect when, in January 2008, Respondents individually signed Letters of Assent-B with the Union. (GC Exs. 15-17). Each Respondent agreed to comply with the provisions of the December 1, 2007 – November 30, 2010 Inside Agreement between the Union and the Dallas/Fort Worth Division North Texas Chapter, NECA (Agreement or Inside Agreement). (GC Ex. 18). The Letters of Assent remained in effect until terminated. They provided that if each Respondent did not intend to comply with all of the provisions of any subsequent agreements between North Texas Chapter, NECA and the Union, the Respondent had to notify the Union in writing at least 100 days before the end of the Agreement. (GC Exs. 15-17).

February 6, 2008 Notifications to Union

On February 6, 2008, Respondents individually sent letters to the Union regarding the Inside Agreement which was to expire on November 30, 2010, and with proper notice would have no further force and effect after December 11, 2010. (GC Exs. 19-21).

Each Respondent advised the Union they would abide by the Section 8(f) agreement for its term, but did not intend to be bound by any subsequent approved agreements or addenda

between the Union and North Texas Chapter, NECA. Rather, each Respondent stated they would institute new terms and conditions of employment for its electrical employees effective December 11, 2010.

Each Respondent stated the new terms and conditions of employment would cover a 401(k) Plan; health insurance; the Joint Apprenticeship Training Committee (JATC); rules of conduct; holidays; holiday pay rates; overtime; minimum rates of pay; Annuity, JATC and Health and Welfare (H&W) contribution rates; and Construction Wireman and Electrician progression rates. (GC Exs. 19-21).

Respondents further stated their decisions on all other matters would be made at their sole discretion, and they would “not honor any terms from the expired Section 8(f) contract.” (GC Exs. 19-21) (emphasis in original).

Almost immediately thereafter, the Union claimed the February 6, 2008 letters violated the “basic principles” of the Inside Agreement and filed grievances against each Respondent. (ER Exs. 1-2). The Union demanded each Respondent cease “bad faith bargaining and recognize that the employer has an obligation to negotiate with the union for a successor agreement.” The grievances were denied by Respondents and not pursued further by the Union. (Tr. 14). There is no evidence the Union requested in 2008 to bargain with any of Respondents over the announced changes.

Union Certifications

On October 6, 2008, the Union was certified as the Section 9(a) representative of Respondent Boggs’ electrical employees. (GC Ex. 23). On April 3, 2009, the Union was certified as the Section 9(a) representative of Respondent Hargrove’s electrical employees. (GC Ex. 22). On October 30, 2009, the Union was certified as the Section 9(a) representative of

Respondent Alman's electrical employees. (GC Ex. 24). Subsequent to its certifications, the Union did not request to bargain over the changes announced by Respondents in February 2008, to take effect in December 2010.

2010 Developments

On August 9, Respondent Alman and Respondent Boggs sent notices to the Union. They stated:

As you are aware [Respondent] served notice during February 2008 revoking its Letter of Assent B and implementing new terms and conditions of employment to be effective at the end of the present Local No. 20 contract to which [Respondent] is bound through that Revoked Letter of Assent.

This letter also serves as notice under Section 1.02(a) to terminate the present contract between Local No. 20 and [Respondent].

(GC Exs. 25, 39). An identical letter was sent by Respondent Hargrove on August 13, 2010. (GC Ex. 26).

On August 16, the Union sent Respondents individual letters seeking to open negotiations for a new contract with each employer. The Union also gave notice, pursuant to the terms of Inside Agreement, of termination of that agreement effective November 30. (GC Exs. 27-29). Receipt of those letters was individually acknowledged by each Respondent on August 27. (GC Exs. 30-32). Respondents also told the Union the terms and conditions established in their February 2008 letters would also constitute their initial contract proposal as required under Section 1.02 of the Agreement.

Thereafter, in November, each Respondent commenced negotiations with the Union for a collective bargaining agreement. On November 11, Respondent Boggs presented its initial proposal to the Union. (GC Ex. 9). Respondent Alman submitted its initial contract proposal on

November 11. (GC Ex. 14). On November 16, Respondent Hargrove made its initial proposal. (GC Ex. 5).

In each of their proposals, Respondents proposed a grievance procedure and dues checkoff. Respondents' negotiator, Richard Lowe, told the Union each Respondent would agree to dues checkoff if needed economic concessions were made by the Union because Respondents had each proposed contracts that would be ideal for them to be able to compete. (Tr. 96).

On November 30, each Respondent sent the Union a 10-day notice of termination of the Inside Agreement. They told the Union the agreement "will have no further force and effect after December 10, 2010." (GC Exs. 33, 35, 37).

On or about December 11, Respondent Alman terminated the Inside Agreement and changed employees' terms and conditions of employment. More specifically, Respondent Alman:

- implemented a reduced wage rate for new employees;
- ceased making payments into the National Electrical Benefit Fund;
- reduced the amount paid to the Annuity Fund;
- ceased dues deduction for employees; and
- ceased making vacation deductions.

(Tr. 36). At the time Respondent Alman made those changes, it was not at impasse with the Union in contract negotiations. (Tr. 36).³

Also on or about December 11, Respondent Boggs terminated the Inside Agreement and changed employees' terms and conditions of employment. More specifically, Respondent Boggs:

- implemented a new wage scale for new employees;
- ceased making vacation deductions;
- ceased dues deduction; and
- ceased recognizing the grievance procedure.

³ On December 15, the Union stated its opposition to Respondent Alman's changes but did not request to bargain over the implemented changes. (GC Ex. 38).

(Tr. 36-37). At the time Respondent Boggs made those changes, it was not at impasse with the Union in contract negotiations. (Tr. 36-37).⁴

Further, on or about December 11, Respondent Hargrove terminated the Inside Agreement and changed employees' terms and conditions of employment. More specifically, Respondent Hargrove:

- implemented a reduced wage rate for newly hired employees;
- ceased dues deduction; and
- ceased recognizing the grievance procedure.

(Tr. 35-36). At the time Respondent Hargrove made those changes, it was not at impasse with the Union in contract negotiations. (Tr. 35-36).⁵

THE ALJ'S DECISION

The ALJ found Respondents violated Sections 8(a)(1) and (5) by making certain changes on or about December 11 without bargaining to impasse with the Union. Other changes, specifically the discontinuation of dues checkoff on that date, were found to not be violative of the Act.

The ALJ found the parties' relationship had converted from a Section 8(f) relationship to a 9(a) relationship prior to the commission of the changes and that Section 9(a) governed Respondents' rights and obligations. The ALJ further found Respondents' 2008 announced changes did not demonstrate a required specificity of intent so as to establish a "firm decision" to make changes upon termination of the parties' contracts. In this regard, the ALJ found letters from Respondents' counsel dated August 27, 2010 confirmed the terms and conditions

⁴ On December 17, the Union stated its opposition to Respondent Boggs' changes but did not request to bargain over the implemented changes. (GC Ex. 36).

⁵ On December 15, 2010, the Union stated its opposition to Respondent Hargrove's changes but did not request to bargain over the implemented changes. (GC Ex. 34).

established by their February 6, 2008 letters were each Respondent's initial proposal for bargaining. According to the ALJ, the language of those August 2010 letters reflected that the February 2008 letters were not "firm decisions" but were simply proposed changes each Respondent was incorporating in the bargaining process.

The ALJ held the parties' bargaining relationships had matured into 9(a) relationships triggering Respondents' 9(a) bargaining obligations. Under Section 9(a), changes could not be unilaterally implemented without first bargaining to impasse and, as Respondents' ensuing changes were implemented in the absence of an impasse, those changes violated Section 8(a)(5). (ALJD, 9-10).

ARGUMENT

I. RESPONDENTS DID NOT VIOLATE SECTION 8(a)(5) BY IMPLEMENTING CHANGES ON DECEMBER 11, 2010 (EXCEPTIONS 1-7, 9-26).

When Respondents were 8(f) employers, they lawfully announced the new terms and conditions of employment they would implement after their 8(f) agreements expired. The Union's subsequent attainment of 9(a) status did not deprive Respondents of their rights to institute previously-announced changes after the expiration of the 8(f) agreements. Indeed, Board law recognizes that an employer may unilaterally implement changes if those changes were decided upon before a union became its employees' bargaining representative.

The ALJ attempted to avoid application of that longstanding principle by mistakenly concluding Respondents' February 2008 announcements of prospective new terms and conditions of employment were only proposals for bargaining and not statements of definite intent. The ALJ did not rely upon the terms of the February 2008 letter, nor upon any legal

principles in making that conclusion. Instead, she found Respondents' late-August letters somehow changed the meaning of the February 2008 letters.

That finding is incorrect. Respondents lawfully announced in February 2008 they would make changes in employees' terms and conditions of employment after the 8(f) agreements expired. After the Union became their employees' 9(a) representative, Respondents twice reaffirmed their plans to make post-contract expiration changes. Respondents also independently commenced negotiations with the Union. The changes implemented by Respondents on December 11 were consistent with the definite plans announced in February 2008. They were not, in any manner, tied to Respondents' negotiations with the Union. Therefore, Respondents did not make unilateral changes and the ALJ's Findings and Conclusions of Law must be reversed.

A. Respondents Did Not Violate Section 8(a)(5) By Implementing Changes It Had Announced When It Was An 8(f) Employer in February 2008.

Respondents were Section 8(f) employers in February 2008 when they sent letters to the Union announcing the changes they would implement when their contracts expired. Section 8(f) employers have the right to make unilateral changes after their contracts expire. The Union's subsequent attainment of 9(a) status did not nullify Respondents' exercise of rights announced in February 2008.

Respondents honored their Section 8(f) agreements with the Union through the term of those agreements. As they had each previously advised the Union on February 6, 2008, they repudiated their 8(f) agreements when those agreements terminated and implemented new terms. Such actions were permitted under *John Deklewa & Sons*, 282 NLRB 1375, 1386-1387, *enfd.* 843 F.2d 770 (3d Cir. 1988), *cert. denied* 488 U.S. 889. Therefore, Respondents' action did not violate Section 8(a)(5).

Section 8(f) provides that an employer engaged primarily in the building and construction industry may enter into an agreement with a union covering its employees without the union's demonstration it represents a majority of the employees.

Unlike a bargaining relationship within the meaning of Section 9(a), an 8(f) relationship may be terminated by either the union or the employer at the expiration of a collective bargaining agreement. *Id. See also Diponio Construction Co., Inc.*, 357 NLRB No. 99, ALJD at pp. 2-3 (2011). Implicit in those rights is the right of an 8(f) employer to lawfully make unilateral changes upon the expiration of its agreement with the union without the necessity of bargaining to impasse with the union.

Before the Union attained 9(a) status, its relationships with Respondents were governed by Section 8(f). Only once the Union attained majority representative status, did Respondents' relationships with the Union become governed by Section 9(a). Accordingly, it was not until that point that each Respondent could no longer exercise their *Deklewa* right to walk away from the bargaining relationship at the expiration of the Agreement. Therefore, they each offered to bargain with the Union over the terms of a new 9(a) agreement.

However, although the Union's certifications changed some prospective aspects of their bargaining relationships with Respondents, those certifications did not nullify Respondents' February 2008 letters or the right to implement in December the actions announced in those letters.

The ALJ mistakenly concluded in reliance on *VFL Technology Corp.*, 329 NLRB 458 (1999), that the Union's certifications negated Respondents' rights to make the changes announced in February 2008 when they had announced when they were 8(f) employers. (ALJD, 8-9). The ALJ is wrong. In *VFL Technology*, the issue was whether newly-established 9(a)

status barred rival union petitions filed after 9(a) status was attained. The Board held the preexisting 8(f) prehire agreement barred that petition.

VFL Technology is clearly inapposite. The issue in that case was whether the pre-hire agreement became a contract bar after the union party to that agreement became the 9(a) representative. It did not concern the continued vitality of changes announced by the employer before the union became the 9(a) representative to take effect after the pre-hire agreement expired. Here, however, Respondents' changes had their genesis before 9(a) status had been attained. Therefore, *VFL Technology* does not apply in the circumstances of these cases.

The issue in these cases is whether 9(a) status may retroactively wipe out events and rights accruing before that status had been attained. The ALJ did not cite any Board precedent to that effect because the Board has not ruled to that effect.

Board law allows an employer with no union relationship to carry out plans announced before 9(a) status was attained. See *Starcraft Aerospace, Inc.*, 346 NLRB 1228 (2006). The ALJ's reasoning would deny that right to an employer who has only an 8(f) relationship before 9(a) status is attained. That reasoning is wrong. There is simply no reason the Act should give an employer with an 8(f) relationship fewer rights than an employer with no preexisting union relationship. Therefore, the Board must find Respondents retained their rights as 8(f) employers to implement changes they had announced before the Union became their employees' 9(a) representative, and that Respondents' actions did not violate Section 8(a)(5).

B. Respondents Did Not Violate Section 8(a)(5) By Implementing Changes It Had Announced Before The Union Was A Section 9(a) Representative.

Under Board law, an employer has the right to unilaterally implement changes it has decided upon before a union became its employees' 9(a) representative. Respondents announced in February 2008 it would make certain changes in terms and conditions of employment after its

8(f) agreements expired. Those changes were announced before the Union became their employees' 9(a) representative. The record establishes the changes announced in February 2008 were sufficiently definite and were not mere bargaining proposals. Respondents' subsequent correspondence in August reaffirmed that intent and did not indicate the February 2008 announcements were only "proposed changes." Therefore, the changes implemented by Respondents in December did not violate Section 8(a)(5).

An employer does not violate Section 8(a)(5) when it implements changes announced or decided upon before it had a Section 9(a) relationship. *See Starcraft Aerospace, Inc.*, 346 NLRB 1228, 1230 (2006) ("If, however, an employer makes a decision to implement a change before being obligated to bargain with the union, the employer does not violate Section 8(a)(5) by its later implementation of that change;" therefore, employer lawfully laid off employees where decision to layoff employees "as soon as possible" was made prior to election); *SGS Control Services*, 334 NLRB 858, 861 (2001) (well before union was on the scene employer had determined to change its method of paying overtime); *Consolidated Printers, Inc.*, 305 NLRB 1061 fn. 2 (1992) (decision to layoff employees was made prior to time employer was obligated to bargain with union); *Embossing Printers, Inc.*, 268 NLRB 710 (1984) (decision to cancel Christmas bonus made before Board-conducted election).

The ALJ, in her Decision, and the Union, in its exceptions, recognize an 8(f) employer may lawfully make changes after the expiration of an 8(f) agreement, whether or not those changes are announced before the agreement expires. Similarly, they recognize that under *Starcraft*, an employer may implement changes decided upon before a union is certified under Section 9(a). Further, contrary to the argument of the Union, there is no requirement under *Starcraft, supra*, that the employer must have, at the time it made the decision to make

subsequent changes, the “absolute untrammelled right to make a unilateral change,” at the time it announced the prospective change. The holding in *Starcraft, supra*, and similar cases, is that the employer had the right to make the particular change at the time it implemented the change. The Union has attempted to insert an irrelevant factor that had in fact no consideration in the Board’s decisional process in those cases and should have no bearing in these cases.

The ALJ recognized that when Respondents made their intentions known in February 2008, they were 8(f) employers. Therefore, had they remained 8(f) employers, they had the absolute, untrammelled right to withdraw recognition or make unilateral changes once their 8(f) agreements expired.⁶ The ALJ also recognized that employers under a Section 9(a) bargaining obligation may unilaterally implement changes decided upon before the Union became the 9(a) representative.

Nonetheless, the ALJ held cases such as *Starcraft* were distinguishable on the basis that Respondents’ February 2008 announcement did not have the same “sufficiency of intent” of the announced changes in *Starcraft* and related cases. She justified her holding by concluding Respondents’ August 27, 2010 letters showed the changes announced in February 2008 only constituted Respondents’ initial proposals for Section 9(a) bargaining.

The ALJ’s conclusion is contrary to the evidence. Respondents each sent three letters to the Union. In February 2008, Respondents each sent a letter to the Union. They each announced the changes they would make after the Agreement expired in 2010. Their letters did not state those changes would constitute an initial contract proposal.

⁶ There is no dispute that Respondents were not obligated in December to make all of the changes they had announced in February 2008. There is no requirement under the Act that an employer who has stated an intention to implement several disparate changes must implement all of them. For example, in a post-impasse implementation, an employer need not implement all of its pre-impasse proposals. *Plainville Ready Mix Concrete Co.*, 309 NLRB 578, 582, n. 3 (1992); *Bi-Rite Foods, Inc.*, 147 NLRB 59 (1964).

Thereafter, between August 9 and 13, each Respondent sent an identical letter to the Union. The letters stated Respondents were reminding the Union they had served notice during February 2008 revoking their Letters of Assent and implementing new terms and conditions of employment to be effective at the end of the Agreement. (G.C. Exs. 25, 26, 39). The letters did not state the new terms and conditions of employment would constitute each Respondent's initial contract proposals.⁷

Finally, on August 27, Respondent sent further letters to the Union. Those letters were required under Section 1.02 of the Agreement to apprise the Union of the proposals Respondent intended to make in the upcoming negotiations, reserving, of course, the right to change those proposals. The August 27 letters did, as found by the ALJ, indicate the changes announced in February 2008 would constitute Respondents' initial bargaining proposals. But, the letters did not state or imply Respondents would not implement the previously announced conditions upon contract expiration. Respondents did not retract their February 2008 letters or their earlier August letters, or change the prospective status quo.

The ALJ misinterpreted the August 27 letters and found the Company had changed its mind about the February 2008 decision to implement new terms and conditions of employment when the Agreement terminated. The ALJ's misinterpretation of Respondents' August 27, 2010 letters finds no support in the terms of the letters. Respondents did not state their February 2008 announced changes were now only "contract proposals." Neither is there any extrinsic evidence to support her misinterpretation. Furthermore, the ALJ cited no cases in support of her blatant misreading of the letters. Her misinterpretation defies the realities of the collective bargaining process and common sense. The only possible interpretation of Respondents' August 27 letters is that, in addition to reaffirming their February 2008 announcement of the new terms and

⁷ Respondents served notice of contract termination as required under Section 1.02 of the Agreement.

conditions to take effect after the contract terminated, those same terms and conditions would also constitute their initial contract proposal. That last statement regarding Respondents' bargaining proposals was made to fulfill its obligations under Section 1.02 of the Agreement.

For those reasons, the ALJ's finding that Respondents' August 27, 2010 letter showed Respondents did not have, in February 2008, the clear intention to make changes on December 11, 2010 must be rejected. Respondents announced in February 2008 the clear intention to make those changes. Therefore, the *Starcraft*, *SGS Control*, and *Consolidated Printers* cases are controlling and the Board must find Respondents were privileged to make the unilateral changes of December 11, 2010.⁸ Accordingly, the ALJ's Conclusions of Law and Recommended Order must be rejected and the Board must find Respondents did not violate Section 8(a)(5).⁹

II. THE ALJ FAILED TO FIND THE DUES DEDUCTION AUTHORIZATIONS WERE INVALID (EXCEPTION 8).

For years the Union used several means by which employees authorized Working Dues being deducted by their employer from their pay and forwarded to the Union. The various versions of the form were included on the referral slip provided by the Union's hiring hall.

⁸ Even if Respondents had an obligation to bargain over the changes to take place in December, the Union waived its right to bargain. The Union knew in February 2008 Respondents intended to implement changes after the Inside Agreement terminated in December. Once the Union was certified as Respondents' employees' 9(a) representative, they never requested to bargain with Respondent over the intended changes. Thus, the Union waived any right to bargain it may have had and Respondents were privileged to implement changes in December. See *Alcoa, Inc.*, 352 NLRB 1222, 1223-1224 (2008) (waiver found); *Budd Co.*, 348 NLRB at 223 (2006) (union failed to request bargaining over intended changes).

⁹ Respondents' rights to act unilaterally in these circumstances did not and would not allow them to "walk away" from the bargaining obligations imposed upon them by Section 9(a). The ALJ conceded that as 8(f) employers Respondent could walk away from the Union or change the terms established under the 8(f) agreements once those agreements expired. Once the Union attained 9(a) status, Respondents could exercise their rights to implement unilateral changes only if those changes had been decided upon before the Union became a 9(a) representative. They could not, and did not, walk away from the Union but the 9(a) relationship did not nullify Respondents' right to implement changes previously announced and thus set a new status quo upon expiration of the Agreement. Any concerns about the alleged dire consequences from allowing Respondents to exercise their rights are misplaced given the unique circumstances of these cases.

Every time an employee was referred to an employer from the Union hiring hall, they received an authorization form. (Tr. 79-80, 85). The three forms used for journeymen were:

DUES AND VACATION DEDUCTION AUTHORIZATION

I, ___[Employee]___ hereby authorize my Employer, who is signatory to a Collective Bargaining Agreement with IBEW, Local Union 20, to deduct from my pay each week the amount of Working Dues (specified in the Local Union By-Laws) the amount of Vacation (specified in the Agreement) and the employer's cost of pre-hire drug test if I fail. The Working Dues will be forwarded to Local 20 monthly. The Vacation will be forwarded to the respective Credit Union monthly. I reserve the right to discontinue such deduction by notifying the Employer and the Union in writing 60 days prior to June 30th of any year.

(ER Ex. 5; Tr. 88-89).

DUES AND VACATION DEDUCTION AUTHORIZATION

I, ___[Employee]___ hereby authorize my Employer, who is signatory to a Collective Bargaining Agreement with IBEW, Local Union 20, to deduct from my pay each week the amount of Working Dues (specified in the Local Union By-Laws) and the amount of vacation (specified in the Agreement). The Working Dues will be forwarded to Local 20 monthly. The Vacation will be forwarded to Local Union 20 monthly. The vacation will be forwarded to the respective Credit Union monthly.

(ER Ex. 7; Tr. 90).

DUES AND VACATION DEDUCTION AUTHORIZATION/CODE OF EXCELLENCE

I, ___[Employee]___ hereby authorize my Employer, who is signatory to a Collective Bargaining Agreement with IBEW, Local Union 20, to deduct from my pay each week the amount of Working Dues (specified in the Local Union By-Laws) the amount of Vacation (specified in the Agreement) and the employer's cost of pre-hire drug test if I fail. The Working Dues will be forwarded to Local 20 monthly. The Vacation will be forwarded to the respective Credit Union monthly. I reserve the right to discontinue such deduction by notifying the Employer and the Union in writing 60 days prior to June 30th of any year. By signing this referral, I also acknowledge the Seventh District Code of Excellence and my obligation to comply therewith.

(ER Ex. 6; Tr. 89).¹⁰

¹⁰ These forms were used for all employees of Respondents. (Tr. 87-89).

An additional form was used for apprentices:

DEDUCTION AUTHORIZATION

I hereby authorize my Employer, who is signatory to a Collective Bargaining Agreement with IBEW Local 20, to deduct from my pay each week the amount of Working Dues (specified in the Local Union By-Laws) the amount of Vacation (specified in the Agreement) and the employer's pre-hire if I fail. The Working Dues will be forwarded to Local 20 monthly. The Vacation will be forwarded to the respective Credit Union monthly. By signing this referral, I also acknowledge the Seventh District Code of Excellence and my obligation to comply therewith.

(ER Ex. 4; Tr. 87).¹¹

In 2011, the Union changed the form for journeymen. It omitted reference to vacation deductions even though the form is still titled "DUES AND VACATION DEDUCTION AUTHORIZATION/CODE OF EXCELLENCE." (ER Ex. 8; Tr. 93, 95). It almost omitted reference to the pre-hire drug test.

Contract Provisions

Section 6.13 of the Inside Agreement provided:

Section 6.13. Union Dues Deduction

The Employer agrees to deduct and forward to the financial Secretary of the Local Union, upon receipt of a voluntary written authorization, the additional working dues from the pay of each IBEW member. The amount to be deducted shall be the amount specified in the approved Local Union Bylaws. Such amount shall be certified to the Employer by the Local Union upon request by the Employer.

Vacations were established under Section 6.15 of the Inside Agreement:

Section 6.15. Vacation

(A) Each Employee working under the terms of this Agreement shall sign a card authorizing the Employer to withhold as a vacation allowance, an amount equal to five percent (5%) of gross pay, which amount is included in the wage rates listed in the Labor Agreement. The employee shall have the option to opt out of the vacation deduction or to increase the amount withheld, upon completion of the proper authorization forms. The amended vacation withholding percentage shall remain in effect for a period of no less than 12 months.

¹¹ This form was used for employees of Respondents. (Tr. 87).

(B) The vacation allowance shall be withheld. An authorization card for each Employee working under the terms of this agreement shall be on file at the office of IBEW Local 20. The vacation allowance shall be withheld from the employee's weekly pay and shall be sent on a transmittal to the Administrative Maintenance Fund to be remitted to the vacation fund account in a timely manner. All vacation funds will be forwarded to the Local 20 IBEW Federal Credit Union for dispersal.

The ALJ failed to find that the pre-2011 authorizations Respondents ceased honoring were invalid.

To be lawful, dues authorizations must be voluntary. *Local 74, SEIU (Parkside Lodge of Ct., Inc.)*, 322 NLRB 289, 293; *Electrical Workers Local 601 (Westinghouse Electric Corp.)*, 180 NLRB 1062 (1970). None of the forms utilized for dues deduction authorization by the Union as of December 2010 were voluntary.

Section 6.15 of the Inside Agreement requires all employees to sign a card authorizing their employer to withhold five percent of their gross pay as a vacation allowance. Only after the employee signs the form may they opt out of the vacation program. (GC Ex. 18).

All five of the dues deduction authorization forms in effect as of December 2010 combined mandatory vacation deduction authorization with dues deduction authorization. (ER Exs. 3-7).¹² Vacation dues deduction authorization was mandatory for all employees. The only way it could be accomplished was by the employee also agreeing to dues deduction authorization. Thus, employees were required to agree to dues deduction authorization as well as vacation deduction authorization. Therefore, their dues deduction authorizations were not voluntary. Involuntary dues deduction authorizations are not valid. *See Communications Workers of America, Local 110 (New York Telephone Company)*, 281 NLRB 413 (1986).

¹² ER Ex. 5 actually combined three authorizations: dues, vacation, and drug test cost reimbursement. ER Ex. 6 combined those three and the employee's acknowledgement of his obligation to comply with the Seventh District Code of Excellence. ER Ex. 4 combined vacation deduction, dues deduction and adherence to the Code of Excellence.

Accordingly, General Counsel cannot establish that Respondents discontinued honoring valid dues deduction authorizations.¹³ Therefore, the allegations regarding Respondents' deduction of such authorizations must be dismissed.

¹³ The Union changed its dues deduction authorization in 2011 and the 2011 form no longer includes reference to the mandatory vacation deduction. No explanation was offered on the record for the 2011 change. The 2011 dues deduction authorization card was admissible to impeach the Union's testimony that its pre-2011 cards were valid. *See, e.g., Adams v. City of Chicago*, 469 F.3d 609 (7th Cir. 2006) (while Rule 407 concerns safety measures it does not apply to disparate impact claims where a subsequently enacted method bears on the availability of an alternative method on an earlier date); *Swinton v. Potomac Corp.*, 270 F.3d 794 (9th Cir. 2001) (in employment discrimination context, post-occurrence remediation is part and parcel of the legal framework). Here, the 2011 card shows that prior to 2011, the Union could have utilized a dues deduction authorization not tying voluntary dues deduction to mandatory vacation deduction but failed to do so.

CONCLUSION

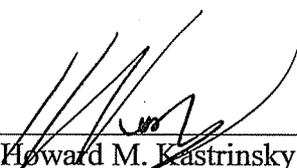
Respondents were 8(f) employers, when in February 2008, they announced changes to take effect after their 8(f) agreements with the Union expired. Those announced changes remained in effect after the Union was certified as the 9(a) representative of Respondents' employees. Respondents never retracted the announced changes nor gave any indication those changes were only "proposals." Therefore, Respondents lawfully implemented those previously-announced changes on December 11. The ALJ's findings and conclusions to the contrary must be overruled and the Consolidated Complaint dismissed in its entirety.

Dated this 24th day of February, 2012.

Respectfully submitted,

KING & BALLOW

By: _____


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CERTIFICATE OF SERVICE

This is to certify that the foregoing Brief On Behalf Of Respondent Hargrove Electric Co., Inc., Respondent Alman Construction Services LP And Respondent Boggs Electric Co., Inc. In Support Of Cross-Exceptions To The Decision Of The Administrative Law Judge was e-filed with the NLRB and sent via e-mail to the following on this 24th day of February 2012:

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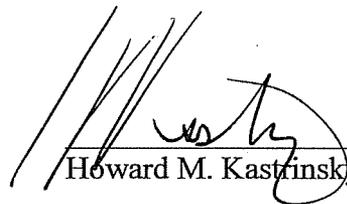
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