The Raymond F. Kravis Center for the Performing Arts *and* International Alliance of Theatrical Stage Employees and Moving Picture Technicians and Allied Crafts of the United States, its Territories and Canada, IATSE, AFL–CIO, Local 623. Case 12–CA–21361

September 28, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND KIRSANOW

This case presents the question of whether, in light of the Supreme Court's decision in *NLRB v. Financial Institution Employees of America Local 1182* (*Seattle-First),* 475 U.S. 192 (1986), the Board should modify its standard for determining under what circumstances a union merger or affiliation may relieve an employer of its obligation to recognize and bargain with the incumbent union. In view of the Court's decision, we have determined that an employer is not relieved of its bargaining obligation merely because the merger or affiliation is accomplished without due process safeguards.

I. BACKGROUND

The Respondent, The Kravis Center for the Performing Arts, is a theatrical performance complex located in West Palm Beach, Florida. In September 1992, the Respondent entered into an initial collective-bargaining agreement with the International Alliance of Theatrical Stage Employees and Moving Picture Technicians and Allied Crafts of the United States, its Territories and Canada (IATSE), Local 623 (Local 623). The agreement provided for an exclusive hiring hall arrangement under which the Respondent utilized employees referred by Local 623 to perform backstage work for all productions at the Respondent's facility.

In March 1998, the parties entered into a second agreement, which lasted through June 30, 2000. This agreement provided that the Respondent would use the hiring hall exclusively for its own productions in the facility's concert hall, but that the Respondent could use other sources of labor in addition to the hiring hall for stagehand work at other theaters in the complex, or for productions by outside companies.

On April 27, 2000, the Respondent notified Local 623 that it was terminating the collective-bargaining agreement on its expiration date. The Respondent failed to notify the Federal Mediation and Conciliation Service (FMCS) of its intention as required by Section 8(d)(3) of the Act.

The parties began negotiating for a successor agreement in late May. Approximately 3 months later, on September 11, the Respondent declared impasse and unilaterally implemented the terms of its final bargaining proposal, which included use of the hiring hall on a nonexclusive basis, the right to subcontract stagehand work at the Respondent's discretion, and the application of the collective-bargaining agreement only to those workers referred from the hiring hall. The Respondent withdrew recognition from the Union on September 24, 2000. Except in one instance, when an orchestra specifically requested IATSE stagehands, the Respondent did not request any referrals from the Union's hiring hall after that date.

On February 1, 2002, several days before the hearing in this case began, Local 623 merged with five other south Florida IATSE locals to form Local 500. The merger was conducted in accordance with the International Union's constitution;[1] however, members of Local 623 were not given an opportunity to vote on the merger. The General Counsel contends that as a result of the merger, Local 500 is the successor of Local 623 and has inherited the right to represent the Respondent's employees.

II. THE JUDGE'S DECISION[2]

The judge found that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing terms and conditions of employment without first having given notice to the FMCS as required under Section 8(d)(3) of the Act. The judge further found that the Respondent violated Section 8(a)(5) and (1) by declaring impasse over a change in the scope of the unit, and by withdrawing recognition from Local 623. He also found that the Respondent violated Section 8(a)(3) and (1) by discharging unit employees who were classified as department heads,

[1] The constitution provides that a merger of locals may be authorized by the International's president and executive board after a hearing or investigation to determine whether a local is in a position to effectively discharge its responsibilities, or whether the merger is in the best interest of the members.

[2] On November 13, 2002, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent, the General Counsel, and the Charging Party filed exceptions, supporting briefs, and answering briefs. The Charging Party and the Respondent filed reply briefs.

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

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions except as discussed below, and to adopt the recommended Order as modified and set forth in full below.

The General Counsel and the Respondent have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

and by refusing to use the Union's hiring hall after declaring impasse.

Applying current Board law, the judge rejected the General Counsel's contention that Local 500 was the successor to Local 623. Accordingly, the judge found that the Respondent had no obligation to recognize and bargain with Local 500, and that any bargaining obligation the Respondent had with Local 623 was terminated as of the date of the merger. He therefore ordered that any remedy due the alleged discriminatees as a result of the Respondent's unilateral changes should be cut off as of the merger date.

III. DISCUSSION

A. The Unfair Labor Practices

We affirm the judge's findings of the violations, except as discussed below.[3]

First, we agree with the judge that the Respondent violated Section 8(a)(5) and (1) by implementing changes to terms and conditions of employment, including the refusal to use the hiring hall, without having given prior notice to FMCS pursuant to Section 8(d)(3).[4] See *Days Hotel of Southfield,* 306 NLRB 949, 956 (1992) (and cases cited therein).[5]

Second, we affirm the judge's finding that the Respondent violated Section 8(a)(5) and (1) by declaring impasse in September 2000. As explained more fully in the judge's decision, the Respondent insisted to impasse that, inter alia, the collective-bargaining agreement would apply only to those workers referred from the Union's hiring hall. The judge found, and we agree, that this constituted an insistence by the Respondent on changing the scope of the bargaining unit, which included all workers performing stagehand work. The scope of the bargaining unit is a permissive subject of bargaining over which a party may not insist to impasse. See, e.g., *Grosvenor Resort*, 336 NLRB 613, 616–617 (2001) (citing cases). Thus, we find that the Respondent's declaration of impasse was unlawful.[6]

Third, we affirm the judge's finding that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from Local 623. The applicable standard here for determining whether the withdrawal of recognition was lawful is that set forth in *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359, 361 (1998).[7] Pursuant to that standard, an employer may not lawfully withdraw recognition from a union unless the employer demonstrates that it had a good-faith reasonable doubt or uncertainty as to the union's majority support at the time of withdrawal.

The Respondent does not contend that it withdrew recognition from Local 623 because it had a good-faith doubt or uncertainty that the Union no longer had majority support. Rather, the Respondent argues that it was privileged to withdraw recognition when the 1998 collective-bargaining agreement expired because the parties' bargaining relationship was not initially based on a claim or showing that the Union represented a majority of the unit employees. We agree with the judge that this argument is time barred,[8] and that the relationship between the parties is governed by Section 9(a).[9] Accordingly, the Respondent was not privileged to withdraw recognition from Local 623 without demonstrating a good-faith reasonable doubt or uncertainty as to the Union's support among employees.[10] Because the Respondent failed to

[3] We agree with the judge, for reasons stated in his decision, that it is unnecessary to reach the issue of whether the Respondent violated Sec. 8(a)(5) and (1) by engaging in surface bargaining.

[4] Sec. 8(d) provides, in relevant part, that no party to a collective-bargaining agreement may terminate or modify that agreement unless the party "notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial Agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time . . . ." 29 U.S.C. § 158(d).

[5] We do not rely on the judge's apparent finding that the Respondent's failure to provide the notice constituted a separate violation of Sec. 8(a)(5).

[6] In finding this violation, we find it unnecessary to pass on the judge's finding that the Respondent unlawfully insisted on changing the scope of the bargaining unit by demanding that the "core group" of permanent employees who replaced the department heads be excluded from the unit.

[7] The judge mistakenly applied the standard set forth in *Levitz Furniture Co.,* 333 NLRB 717 (2001), which modified the *Allentown Mack* standard by holding that an employer may withdraw recognition unilaterally only by demonstrating that the union has actually lost majority support. In *Levitz,* the Board determined that it would apply the modified standard prospectively, and that the *Allentown Mack* standard would be applied to all cases pending before the Board prior to the time that *Levitz* was issued. See *Levitz,* 333 NLRB at 729. Because the charges in this case were filed before *Levitz* issued, the *Levitz* standard is not applicable.

[8] See, e.g., *North Bros. Ford,* 220 NLRB 1021 (1975) (Sec. 10(b) applies to a refusal-to-bargain defense that a bargaining relationship was unlawfully established), citing *Machinists Local Lodge 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411 (1960).

[9] In finding that a 9(a) relationship existed, we rely on evidence that the Respondent and Local 623 were parties to collective-bargaining agreements since 1992. We find it unnecessary to rely on the judge's determination that the bargaining relationship between the parties "matured into a 9(a) collective bargaining relationship." See *Strand Theatre of Shreveport Corp.*, 346 NLRB 523, 523 fn. 1 (2006), enfd. 493 F.3d 515 (5th Cir. 2007).

[10] For reasons stated by the judge, we reject the Respondent's argument that it could lawfully withdraw recognition after Local 623 filed an election petition on Sept. 18, 2000. The Respondent contends that *General Box Co*., 82 NLRB 678 (1949), on which the judge relied, is inapplicable because the union sought an election in a broader bargaining unit than the existing unit, and its filing of a petition for that unit raised a question concerning representation permitting it to withdraw

meet this burden, the withdrawal of recognition was unlawful. See *Strand Theatre of Shreveport Corp.*, 346 NLRB 523 (2006), enfd. 493 F.3d 515 (5th Cir. 2007).

Finally, we find it unnecessary to pass on the judge's findings that the Respondent violated Section 8(a)(3) and (1) by discharging employees who were classified as department heads, and by refusing to utilize the hiring hall. Because both actions constituted unilateral changes in violation of Section 8(a)(5), as discussed above, the additional findings would not materially affect the remedy. See, e.g., *675 West End Owners Corp.*, 345 NLRB 324, 324 fn. 3 (2005).

B. The Union Merger

1. The due process issue

The judge concluded that Local 500 was not the successor to Local 623 because the members of Local 623 had not been given the opportunity to vote on the merger, and the merger had therefore not been conducted with the appropriate "due process" safeguards as required under Board law.[11] The Union argues that the Board's due process requirement is no longer viable in light of the Supreme Court's *Seattle-First* decision, and that the merger raised no question concerning representation that would require Local 500 to seek an election before it could represent the Respondent's employees. The Respondent contends that *Seattle-First* is inapplicable, as all that *Seattle-First* decided was that the due process standard requiring a vote could not be extended to nonmembers. As explained below, we find merit in the Union's argument.

As set forth in the judge's decision, the Board has traditionally applied a two-prong test, examining both continuity of representation and "due process," when a union's representational status has been challenged following a union merger or affiliation.[12] The Union's exceptions and brief present the issue of whether the latter prong—the requirement that union members must have an opportunity to vote, with adequate due process safeguards, on union affiliations—remains valid in light of the Court's decision in *Seattle-First.* Although *Seattle-First* was decided 21 years ago, the Board has not previously resolved this issue.[13] We do so now.

a. The Supreme Court's decision in Seattle-First

In *Seattle-First,* the Supreme Court held that the Board had exceeded its statutory authority by denying a union's postaffiliation petition to amend its certification, based on the union's failure to comply with a Board rule requiring that all bargaining unit members, including nonunion members, be allowed to vote on the affiliation. The Court rejected the Board's argument that the rule was a reasonable means of protecting the right of unit employees to select a bargaining representative under Section 7 of the Act. Rather, the Court found that, under the system for employee representation prescribed by the Act, "the Board cannot discontinue [a certified union's] recognition without determining that the affiliation raises a question of representation and, if so, conducting an election to decide whether the certified union still is the choice of a majority of the unit."[14]

The Court further found that the Act "authoriz[es] the Board to conduct a representation election *only* where affiliation raises a question of representation. Conversely, where affiliation does not raise a question of representation, the statute gives the Board no authority to act."[15] Thus, the Court concluded that the Board's rule "upsets the accommodation drawn by the statute by effectively decertifying the reorganized union even where affiliation does not raise a question of representation."[16] Finding that the Board's rule also violated congressional policy against outside interference in union decisionmaking, the Court stated:

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recognition. We find no merit in that contention. Even though the petition was for a broader unit, its filing, as the judge found, did not "seek to dispel any doubt or question as to whether the employees who [were] already represented [in the existing unit] continue[d] to want union representation," let alone create such a doubt or question.

[11] See, e.g., *CPS Chemical Co.*, 324 NLRB 1018 (1997), enfd. 160 F.3d 150 (3d Cir. 1998); *Mike Basil Chevrolet, Inc.*, 331 NLRB 1044 (2000).

[12] See *Seattle-First*, 475 U.S. at 199 (describing the Board's practice).

[13] In union affiliation cases decided since *Seattle-First,* the Board has consistently avoided this issue, usually by finding either that the continuity of representation prong was not met (and, therefore, the affiliation was invalid) or, more often, that both the continuity of representation and due process prongs were met (and, therefore, the affiliation was upheld). In either event, the Board did not need to address what consequences would have resulted if the due process prong were not satisfied. In some of these cases, the Board expressly found it unnecessary to pass on the continuing vitality of the due process requirement. See, e.g., *Sullivan Bros. Printers, Inc.,* 317 NLRB 561, 562 fn. 2 (1995), enfd. 99 F.3d 1217 (1st Cir. 1996); *Paragon Paint & Varnish Corp*., 317 NLRB 747, 748 (1995); *May Department Stores Co.,* 289 NLRB 661, 665 fn. 16 (1988), enfd. 897 F.2d 221 (7th Cir. 1990), cert. denied 498 U.S. 895 (1990); *Hammond Publishers, Inc.,* 286 NLRB 49, 50 fn. 8 (1987). In others, the Board simply recited the traditional two-prong test without noting a question regarding the validity of the due process prong. See, e.g., *Ed Morse Auto Park*, 336 NLRB 1090, 1100–1101 (2001); *Rodgers & McDonald Graphics*, 336 NLRB 836, 844 (2001); *RCN Corp*., 333 NLRB 295, 303–305 (2001); *Mike Basil Chevrolet, Inc,* supra; *CPS Chemical Co.,* supra; *Minn-Dak Farmers Cooperative*, 311 NLRB 942, 944–947 (1993).

[14] 475 U.S. at 202.

[15] Id. at 203 (emphasis in original).

[16] Id.

> [T]he Act establishes a specific election procedure to decide whether the employees desire a change in a certified union's representative status. While the Board is charged with responsibility to administer this procedure, the Act gives the Board no authority to require unions to follow other procedures in adopting organizational changes.[17]

The Court cited the Board's acknowledgment that the union's failure to allow nonunion employees to vote in the affiliation election was insufficient to present a question of representation.[18] Because no question of representation was raised, the Court found that by refusing to order the employer to bargain with the union, "the Board effectively circumvented the decertification procedures provided for by statute."[19]

b. Seattle-First's impact on the Board's traditional "due process" test

The rule held invalid in *Seattle-First* is not precisely the rule at issue in the present case.[20] Nevertheless, we find that the Court's reasoning in *Seattle-First* is persuasive here. *Seattle-First*'s rationale was not based on a distinction between union members and nonmember unit employees voting on affiliations.[21] Rather, the Court's essential holding was that the Board cannot discontinue an employer's obligation to recognize a union based on the union's affiliating with another union unless the Board determines that the affiliation raises a question concerning representation. Thus, it is clear that under the Act, as explicated in *Seattle-First*, an employer's duty to recognize an incumbent union following affiliation cannot be discontinued on the basis that union members were not allowed to vote on the affiliation, unless the Board determines that depriving union members of an opportunity to vote raises a question concerning representation.

c. Does the absence of a vote of union members on a merger or affiliation raise a question concerning representation?

The Court in *Seattle-First* addressed the circumstances in which a union affiliation may raise a question concerning representation:

> [A] new affiliation may substantially change a certified union's relationship with the employees it represents. These changed circumstances may in turn raise a "question of representation," if it is unclear whether a majority of employees continue to support the reorganized union. . . . In many cases, [however,] a majority of employees will continue to support the union despite any changes precipitated by affiliation.[22]

A majority of employees often will continue to support the union because, as the Court noted:

> The Board has recognized that "affiliation does not directly involve the employment relation. The status of wages, working conditions, benefits, and grievance procedures is unaffected by the affiliation vote; the collective-bargaining agreement between the union and the employer remains effective until the stated expiration date."[23]

More generally, a question concerning representation in relation to an incumbent union is presented when the employer has a good-faith reasonable uncertainty whether a majority of unit employees continues to support the union.[24] Evidence to show such uncertainty can include antiunion petitions signed by unit employees, statements by employees concerning personal opposition to the union, employees' statements regarding other unit employees' antiunion sentiments, and employees' statements expressing dissatisfaction with the union's performance as the bargaining representative.[25]

We find that the lack of a membership vote concerning union affiliation is insufficient to raise a question concerning representation, that is, to make it "unclear whether a majority of employees continue to support the reorganized union."[26] A membership vote reveals employees' sentiments on an issue. By the same token, when there is no vote, the employees' sentiments remain unstated. Thus, unlike antiunion petitions or other expressions of employee dissatisfaction with the union, the absence of a vote indicates nothing about employee sentiment regarding support for the incumbent union.

Further, even if held, a vote limited to union members would not necessarily reflect the sentiment of a majority of the bargaining unit employees because the bargaining unit employees may not all be union members. Indeed, in some cases, only a small portion of the bargaining unit

[17] Id. at 204.
[18] Id. at 203.
[19] Id. at 204.
[20] The Court in *Seattle-First* found it unnecessary to assess the propriety of the Board's due process requirement with respect to union members. Id. at 199 fn. 6.
[21] Unlike *Seattle-First*, this case involves a union merger, not an affiliation. However, the Court's reasoning in *Seattle-First* applies with equal force in the merger setting.
[22] Id. at 202–203.
[23] Id. at 203 fn. 10 (quoting *Amoco Production Co.,* 239 NLRB 1195 (1979)).
[24] Good-faith reasonable uncertainty is the standard for an employer to obtain an RM election. *Levitz Furniture Co.*, 333 NLRB at 727.
[25] Id. at 728.
[26] *Seattle-First*, 475 U.S. at 202.

belongs to the union. When only a portion of unit employees are union members, there is less reason to think that their vote regarding affiliation would be indicative of the sentiments of the bargaining unit employees as a whole.[27] Thus, the fact that not all unit employees—and, sometimes, very few—are union members further reinforces our conclusion that the absence of a vote solely of union members on affiliation can raise no question concerning representation.[28]

Moreover, the other prong of the Board's standard regarding union affiliations—that the employer's duty to recognize the union does not continue when the organizational changes are so dramatic that the postaffiliation union lacks substantial continuity with the preaffiliation union—remains intact.[29] Thus, if it is determined that the postaffiliation union lacks substantial continuity with the preaffiliation union, a question concerning representation is thereby raised and the employer's obligation to recognize the union ceases. In such an instance, the due process prong of the Board's standard—requiring that union members vote on the affiliation—becomes irrelevant because a question concerning representation is raised regardless of such a vote.

In cases in which there is substantial continuity between the preaffiliation and postaffiliation union, the postaffiliation union is largely unchanged from the preaffiliation entity—i.e., nothing has happened to the union that would lead one reasonably to think that the employees no longer support it. Thus, when there is substantial continuity, the absence of a vote of the union members on the affiliation would not seem to render unit employee support for the union unclear, as the union has remained largely the same. Accordingly, no question concerning representation would be raised.

In sum, the absence of a vote of union members on a union affiliation does not raise a question concerning representation. Further, the requirement that union members vote on a union affiliation serves no useful purpose in light of the Board's separate requirement that the preaffiliation union and the postaffiliation union have substantial continuity.

Accordingly, we have decided to abandon the Board's due process requirement for union affiliations in light of the Supreme Court's decision in *Seattle-First*. We therefore overrule our prior law and hold that, when there is a union merger or affiliation, an employer's obligation to recognize and bargain with an incumbent union continues unless the changes resulting from the merger or affiliation are so significant as to alter the identity of the bargaining representative.

2. Substantial continuity

For the reasons discussed above, we reject the judge's finding that Local 500 was not the successor of Local 623 because the merger was conducted without a vote of the members. Because the judge found that the Board's due process requirement had not been met, he found it unnecessary to reach the question of whether lack of substantial continuity between the premerger and postmerger unions, Local 623 and Local 500, was shown.[30] We find that it was not.[31]

In determining whether there is a lack of continuity of representation after a merger or affiliation, the Board considers whether the merger or affiliation resulted in a change that is "sufficiently dramatic" to alter the union's identity. *May Department Stores*, 289 NLRB 661, 665 (1988), enfd. 897 F.2d 221 (7th Cir. 1990). This may occur where "the changes are so great that a new organization comes into being—one that should be required to establish its status as a bargaining representative through the same means that any labor organization is required to use in the first instance." *Western Commercial Transport, Inc.,* 288 NLRB 241, 217 (1988). In assessing con-

[27] The Board has, in fact, addressed union affiliations in which none of the unit employees were union members. In such cases, the Board has held that failure to afford the unit employees an opportunity to vote on the affiliation did not justify the employer's withdrawal of recognition from the postaffiliation union. See *Deposit Telephone Co*., 349 NLRB 214 (2007); *Avante at Boca Raton, Inc.,* 334 NLRB 381 (2001), review denied 54 Fed. Appx. 502 (D.C. Cir. 2003); *Potters' Medical Center*, 289 NLRB 201, 202 (1988).

[28] The Board, of course, cannot require a vote of all bargaining unit employees, including those who are not union members, on an affiliation because to do so would be directly contrary to the precise holding of the Supreme Court in *Seattle-First*. See, e.g., *F. W. Woolworth Co*., 285 NLRB 854 (1987).

[29] *Seattle-First*, 475 U.S. at 209 fn. 13.

[30] The burden to make such a showing is on the party seeking to avoid its bargaining obligation. *CPS Chemical Co*., 324 NLRB at 1020; *Sullivan Bros. Printers, Inc.*, 317 NLRB at 562; *Minn-Dak Farmers Cooperative*, 311 NLRB at 945.

[31] We deny the Respondent's request to reopen the record for the purpose of introducing evidence relevant to continuity of representation, as we find that the Respondent was given adequate opportunity to present such evidence during the hearing. The Respondent contends that it was permitted to solicit testimony concerning this issue only on a limited basis; however, it has identified no specific evidence that was excluded by the judge. Accordingly, we deny the request.

We also find no merit in the Respondent's contention that it was prejudiced by the judge's partial revocation of its July 18, 2002 subpoena. The subpoena requested numerous documents from all of the locals involved in the merger, including financial documents, agendas and minutes of membership meetings, and documents related to hiring hall systems. The judge revoked the petition to the extent that it required the production of those documents from the five locals that were not involved in these proceedings. We agree with the judge that such information is not potentially relevant here, as none of the five locals had represented the Respondent's employees.

tinuity, the Board considers the totality of the circumstances. *Mike Basil Chevrolet,* 331 NLRB 1044 (2000).

Applying those principles here, we find that the evidence does not show that there was a lack of continuity of representation between Local 623 and Local 500, as discussed below.

Upon the merger, members of Local 623 became members of Local 500 without having to pay any initiation or transfer fees. Referral fees remained the same as they had before the merger, and there was no change in members' status concerning their place on the work list, their date of hire, or their date of membership. Although postmerger dues were adjusted to reflect the average dues of several of the former locals, this adjustment resulted in only a $10 increase for members of former Local 623.[32]

The hiring hall/referral system is administered in the same manner as it had been before the merger.[33] Members who had served on Local 623's hiring hall/referral committee serve on Local 500's referral committee, which is made up of two representatives from each of the former locals' respective hiring hall committees.

Former Local 623 business agent John Dermody continues to serve in that role, which includes negotiating contracts, handling grievances, and servicing unit members. Dermody also continues to be the contact person for employers, and he is a member of Local 500's hiring hall procedures committee. Dermody maintains his home office as he had before the merger, but also operates out of Local 500's office in Fort Lauderdale. Former members of Local 623 are able to contact Dermody by using the same telephone number as they had used before the merger.

At the time of the hearing, International Representative Louis Falzarano was in charge of Local 500's day-to-day operations. Both before and after the merger, Falzarano assisted Local 623 with organizing and contract negotiations. Falzarano testified that a constitution and bylaws for Local 500 had been drafted and were awaiting approval by International President Thomas Short. Once approved, the constitution and bylaws would be subject to approval by a vote of the membership, and an election of officers would be held.[34] Pursuant to the constitution and bylaws, each of the crafts would have a representative vote on an executive board and a delegate to the Union's national convention.

Finally, employers continue to make benefit contributions to the Union's vacation and pension funds as they had before the merger. These independent trust funds are jointly administered by the same premerger Local 623 representatives and employers.

We conclude from this evidence that merger did not result in such a dramatic change to the Union as to raise a question concerning representation. Consequently, we reverse the judge and find that Local 500 is the successor to Local 623, and that the Respondent was therefore required to recognize and bargain with Local 500 as the representative of its employees. We further reverse the judge's findings that the Respondent's obligation to remedy its violations of Section 8(a)(5) terminated as of the date of the merger, and we shall modify the judge's order accordingly.

AMENDED REMEDY

Having found that Local 500 is the successor to Local 623, we shall order the Respondent to recognize and bargain with Local 500 as the representative of its employees in the unit set forth in the Order. We adhere to the view, for the reasons fully set forth in *Caterair International*, 322 NLRB 64 (1996), that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees." The United States Court of Appeals for the District of Columbia, however, has required the Board to justify its imposition of the order on the facts of each case. In *NLRB v. Vincent Industrial Plastics,* 209 F.3d 727 (D.C. Cir. 2000), the court required the Board to balance: (1) the employees' Section 7 rights; (2) whether other purposes of the Act override the rights of employees to choose their bargaining representatives; and (3) whether alternative remedies are adequate to remedy the violation of the Act. Having done so, we find that an affirmative bargaining order is warranted in the instant case.[35]

[32] The Board has held an increase of this type is not evidence of discontinuity. See, e.g., *CPS Chemical Co.*, 324 NLRB at 1022 (higher dues after merger merely reflects a greater level of service provided to members).

[33] International Representative Louis Falzarano testified that Local 500 had come up with a way to make the system more efficient, but did not provide much detail. However, Falzarano testified that members would continue to work in their local areas, and former reciprocity practices would continue.

[34] Former officers of Local 623 became stewards after the merger.

[35] Chairman Battista does not agree with the view expressed in *Caterair International*, supra, that an affirmative bargaining order is "the traditional, appropriate remedy for an 8(a)(5) violation." He agrees with the United States Court of Appeals for the District of Columbia Circuit that a case-by-case analysis is required to determine if the remedy is appropriate. *Saginaw Control & Engineering, Inc.*, 339 NLRB 541, 546 fn. 6 (2003); see also *Flying Foods,* 345 NLRB 1278, 1287 fn. 23 (2005). He recognizes, however, that the view expressed in *Caterair International* represents extant Board law. Regardless of which view is applied here, Chairman Battista agrees that an affirmative bargaining order is warranted.

An affirmative bargaining order here vindicates the Section 7 rights of the unit employees who were denied the rights of collective bargaining by the Respondent's unlawful withdrawal of recognition. An affirmative bargaining order, with its attendant bar to challenging the Union's continued majority status for a reasonable time, does not unduly prejudice the Section 7 rights of those employees who may oppose continued union representation because the duration of the order is no longer than is reasonably necessary to remedy the effects of the violations.

The affirmative bargaining order also serves the policies of the Act by fostering meaningful collective bargaining and industrial peace. That is, it removes the Respondent's incentive to delay bargaining in the hope of further discouraging support for the Union. It also ensures that the Union will not be pressured, by the possibility of a decertification petition, to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and-desist order.

A cease-and-desist order without a temporary decertification bar would be inadequate to remedy the Respondent's violations because it would permit a decertification petition to be filed before the Respondent had afforded the employees a reasonable time to regroup and bargain through their representative in an effort to reach a collective-bargaining agreement. Such a result would be particularly unfair in circumstances such as those presented here, where the Respondent's unfair labor practices are of a continuing nature and are likely to have a continuing effect.

Having unlawfully declared impasse over a change in the scope of the bargaining unit, the Respondent made numerous unilateral changes, including the elimination of certain unit positions and the refusal to utilize the Union's hiring hall. These violations are likely to have a long lasting and negative impact on union support, effects that will not be remedied without the Union being offered time to prove itself to employees—an event that is less likely absent a decertification bar. We find that these circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees opposed to continued union representation.

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

We shall also order the Respondent to rescind any unilateral changes made after September 11, 2000, including the elimination of the department head positions and the refusal to use the hiring hall, and to make employees whole for any loss of wages or benefits that they may have suffered as a result of those changes. See, e.g., *Strand Theatre of Shreveport Corp.*, supra. Whatever backpay is found to be due the former department heads and the stagehands who likely would have been hired from the Union's hiring hall in the absence of the Respondent's unfair labor practices shall be calculated in accordance with *F. W. Woolworth Co.,* 90 NLRB 289 (1950). Backpay resulting from other unilateral changes in terms and conditions of employment shall be calculated as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). Interest on backpay shall be computed in accordance with *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

We shall leave to compliance the task of determining the identity of those individuals who likely would have been referred to the Respondent had it continued to utilize the hiring hall in accordance with the 1998–2000 agreement.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below, and orders that the Respondent, The Raymond Kravis Center for the Performing Arts, West Palm Beach, Florida, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain in good faith with the Union, International Alliance of Theatrical Stage Employees and Moving Picture Technicians and Allied Crafts of the United States, its Territories, and Canada, IATSE, AFL–CIO, Local 500, as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

> All employees performing work described in Article I, Section B of the collective-bargaining agreement between the Respondent and the Union, effective from March 4, 1998, to June 30, 2000.

(b) Unilaterally ceasing the application of the terms and conditions set out in the 1998–2000 collective-

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Member Kirsanow observes that the Board's practice of routinely ordering bargaining to remedy an unlawful refusal to bargain is of exceptionally long duration and was unanimously reaffirmed in *Caterair International* after full briefing and oral argument, and no party challenges that settled practice here. On this basis, Member Kirsanow adheres to the *Caterair* doctrine. As to the merits of that doctrine, Member Kirsanow will reserve judgment until the issue is presented in a case in which it is fully briefed by the parties, and preferably also by amici. See *Parkwood Developmental Center*, 347 NLRB 974, 976 fn. 11 (2006).

bargaining agreement to unit employees, including the elimination of the department heads and the refusal to use the Union's hiring hall, without complying with the requirements of Section 8(d)(3) and without having first lawfully bargained to impasse with respect to the terms and conditions of employment that were implemented.

(c) Insisting on changing the scope of the bargaining unit as a condition of reaching a collective-bargaining agreement.

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

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

(a) Within 14 days from the date of this Order, restore the terms and conditions of employment that were in effect and applicable to employees in the bargaining unit before the Respondent unilaterally changed the terms and conditions of employment on September 11, 2000, including the exclusive use of the Union's hiring hall and restoration of the department head positions.

(b) Make whole all unit employees for losses suffered as a result of the unlawful changes in the manner set forth in the amended remedy section of this decision.

(c) Within 14 days from the date of this Order, offer reinstatement to the department head positions to the following employees: John LeBlance, Bob Davis, Daniel McMenamin, Russ Baron, Rick Hearth, and Maureen Pena.

(d) Recognize and, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of unit employees with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its West Palm Beach, Florida facility copies of the attached notice marked "Appendix."[36] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 11, 2000.

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

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

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to recognize and bargain in good faith with the Union, International Alliance of Theatrical Stage Employees and Moving Picture Technicians and Allied Crafts of the United States, its Territories, and Canada, IATSE, AFL–CIO, Local 500, as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

> All employees performing work described in Article I, Section B of our collective-bargaining agreement with the Union, effective from March 4, 1998, to June 30, 2000.

WE WILL NOT unilaterally cease the application of the terms and conditions set out in the 1998–2000 collective-

bargaining agreement to unit employees, including the elimination of the department heads and the refusal to use the Union's hiring hall, without complying with the requirements of Section 8(d)(3) of the Act, and without having first lawfully bargained to impasse with respect to the terms and conditions of employment that were implemented.

WE WILL NOT insist on changing the scope of the bargaining unit as a condition of reaching a collective-bargaining agreement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, restore the terms and conditions of employment that were in effect and applicable to employees in the bargaining unit before we unilaterally changed the terms and conditions of employment on September 11, 2000, including the exclusive use of the Union's hiring hall and restoration of the department head positions.

WE WILL make whole all unit employees for losses suffered as a result of our unlawful changes in the manner set forth in the amended remedy section of the Board's decision.

WE WILL, within 14 days from the date of the Board's Order, offer reinstatement to the department head positions to the following employees: John LeBlance, Bob Davis, Daniel McMenamin, Russ Baron, Rick Hearth, and Maureen Pena.

WE WILL recognize and, on request, bargain in good faith with the Union as the exclusive collective-bargaining representative of unit employees with respect to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

THE KRAVIS CENTER FOR THE PERFORMING ARTS

Karen Thornton, Esq., Jennifer Burgess-Solomon, Esq., and *Hector Nava, Esq.,* for the General Counsel.
Robert J. Janowitz, Esq., Jeffrey Pheterson, Esq., and *Kimberly Seten, Esq.,* for the Respondent.
Mathew J. Mierzwa Jr., Esq., for the Union.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried before me in Miami, Florida, on various dates commencing on February 4, 2002, and continuing until August 7, 2002.

The charge was filed on March 7, 2001, and the complaint was issued on August 31, 2001.

In substance, the complaint alleges as follows:

1. That the Kravis Center has, since September 1992, recognized and bargained with the Union in a unit consisting of

> All department heads and theatrical stage employees, (including riggers, electricians, carpenters, lighting technicians, sound technicians, fitters, loaders, unloaders, and other technicians performing work in connection with sets, props, costumes, wardrobes, audio visuals, motion pictures, radio broadcasts, commercials and rehearsals) involved in presentations at Dreyfoos Hall.

2. That the Respondent and the Union were engaged in negotiations for a new contract from May 22 through September 9, 2000, when the Respondent withdrew recognition.

3. That during the above described negotiations, the Respondent:

(a) Insisted that it was not required to bargain about the assignment of bargaining unit to persons outside the unit.

(b) Insisted on the elimination of the exclusive hiring hall provision while taking the position that employees not referred by the hiring hall would not be part of the bargaining unit.

(c) Insisted on changing the scope of the unit.

(d) Declared an impasse when no valid impasse had occurred.

(e) Engaged in surface bargaining with no intention of reaching an agreement.

4. That on or about September 11, 2000, the Respondent implemented its final proposal and made unilateral changes including the elimination of performance pay, premium pay, guaranteed minimum pay, turnaround pay, meal penalty allowance, overtime pay for hours worked over 8 during 1 day, fringe benefit contributions and the use of the Union's referral system, and changes in timekeeping, breaktimes, and holiday pay.

5. That on or about September 11, 2000, the Respondent eliminated certain unit classifications, including department heads, truck loaders, and truck unloaders.

6. That since on or about September 24, 2000, the Respondent transferred and/or assigned bargaining unit work from stage employees and department heads to other employees and/or independent contractors.

7. That since on or about September 24, 2000, the Respondent has failed and refused to use theatrical stage employees and department heads referred by the Union.

8. That since on or about September 24, 2000, the Respondent withdrew recognition from the Union.

9. That since September 24, 2000, the Respondent has changed terms and conditions of employment, has made changes in the assignment of workers and has refused to hire people referred by the Union because of their union membership and activities.

The complaint alleges that the changes made above, were both violations of Section 8(a)(3) and (5), as being not merely unilaterally implemented, but also discriminatorily motivated.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

There is no dispute and I find that the Respondent, the Raymond F. Kravis Center for the Performing Arts, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Nor is there a dispute that up until January 30, 2002, International Alliance of Theatrical State Employees and Moving Picture Technicians and Allied Crafts of the United States, its Territories and Canada, IATSE, AFL–CIO, Local 623 was a labor organization within the meaning of Section 2(5) of the Act. (That organization will be referred to as Local 623).

At the hearing, all parties were notified that Local 623 and various other local unions of IATSE were merged by the International Union into a new local union, designated as Local 500. This event was consummated effective on February 1, 2002. The General Counsel takes the position, and amended the complaint accordingly, that Local 500 is the successor to Local 623 and that it therefore inherited the legal right to represent the employees of the Respondent.

The Respondent denied that Local 500 is a labor organization within the meaning of the Act. It also denied that Local 500 has any rights to represent its employees. The Respondent's argument is that the procedure by which Local 623 and the other five locals were merged into Local 500, did not provide for notice to their memberships or for an opportunity to vote on the issue.

In order to maintain the continuity of this story line, I will deal with the merger issue later in the decision. Suffice it to say at this point, that if it is concluded that Local 500 is not the "successor" to Local 623, then upon the latter's cessation of business, there would be no prospective bargaining order even if it is concluded that the Respondent violated Section 8(a)(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Kravis Center is a concert hall and theatrical complex located in Palm Beach, Florida. The concert hall, which has a seating capacity of about 2100, was completed in 1992. At that time, it entered into a 5-year contract with Local 623. That Agreement was made without either an election or pursuant to any demonstration by Local 623 that it represented a majority of the employees who were going to be covered by the contract. It was, in essence, a prehire agreement, which because the Kravis Center was not an employer engaged in the construction industry, was not one permitted by Section 8(f) of the Act.[1]

Nevertheless, the agreement was never challenged by the filing of any unfair labor practice charge within 6 months of its execution and under Board law that agreement no longer can be challenged under either Section 8(a) or (b) of the Act as being unlawful because it was not supported by majority employee support at the time it was made. *Route 22 Auto Sales,* 337 NLRB 84 (2001). As such, the agreement, which may have originally been built on a pile of sand, has matured into a 9(a) collective-bargaining relationship pursuant to which the Employer may not withdraw recognition, in the absence of a Board election, without a showing that the Union no longer represents a majority of the employees who are covered by the agreement. *Levitz Furniture Co of the Pacific*, 333 NLRB 717 (2001).

At the time that the initial agreement was executed in September 1992, there existed plans to construct additional venues for the Kravis Center. The original agreement took account of these but it covered only the main concert hall, which is called Dreyfoos Hall. At that time, the agreement covered all backstage work performed at Dreyfoos Hall, whether a production was presented by the Kravis Center or by other producers who rented the hall for their shows.

The original contract, which ran from September 1, 1992, to August 31, 1997, provided for an exclusive hiring hall to provide various categories of backstage employees to Dreyfoos Hall. But although the Respondent seems to argue that the agreement, and its successor agreement, covered only those people who Local 623 referred for employment that is not how I read the contract. The initial contract covers certain job classification and work descriptions within a defined geographic space, and in this sense is typical of most labor contracts. It also provides for an exclusive hiring hall arrangement by which those jobs will be filled as the need arises. But the fact that a contract contains such a mechanism for manning jobs, hardly means that it covers only those people who are referred to those jobs and there is nothing in either the original contract or its successors which suggest otherwise.

The agreement covers the categories of carpenters (making and/or assembling sets), electricians (dealing with sound and light), loaders (who unload and unload trucks), flymen/riggers (dealing with the operation of sets and scenery during a performance), props (dealing with relatively small objects used by performers during a show), and wardrobe (self-explanatory). All of these people, as opposed to front of house people, such as ushers, box office people, ticket takers, are covered by the agreement.

The original and successor agreement cover essentially two types of people. The agreement provides for utilization of six department heads, one for each of the above noted categories.

[1] In its brief, the Respondent, for the first time contended that the agreements between it and Local 623 were governed by Sec. 8(f) of the Act and therefore it could legally withdraw recognition after the contract expired without regard to whether it had an objective basis for doubting Local 623's continuing majority status. I reject this argument as it is clear that the Kravis Center, which is a cultural arts performance forum, is not an enterprise engaged in the construction industry. While it is true that stagehands do carpentry, electrical work and laborer's work, what they do involves the transient creation of sets, lighting, sound, etc., and is not related to the construction of permanent fixtures. See *Teamsters Local 83*, 243 NLRB 328 (1979). In *Operating Engineers Pension Trust v. Beck Engineering & Surveying Co*., 746 F.2d 557 (9th Cir. 1984), the court in discussing what constituted an agreement sanctioned under 8(f) stated that, "By its terms, Section 8(f) imposes three perquisites on a prehire agreement in order to bring the agreement within its coverage; (1) it must cover employees who are engaged in the building and construction industry; (2) the agreement must be with a labor organization of which building and construction employees are members; and (3) the agreement must be with an employer engaged primarily in the building and construction industry."

The department heads, although they originally got their jobs through Local 623's hiring hall, have in fact evolved into regular part-time employees who worked on a steady basis at the Kravis Center. These are particular individuals who, according to Business Agent Dermody, were approved and appointed by the Employer and if one leaves Kravis for one reason or another, a different person will be chosen by the Employer to take his or her place. During the time that they were department heads, they worked every production produced.

All other stagehands, during the period before 2001, had been sent from Local 623's hiring hall and none hade any expectation of regular employment at this particular venue. They may work 1 day, a year, or many days a year depending on the luck of the draw. In fact, they are sent to many other theatres and concert halls within the Palm Beach and southern Florida area. Thus, when a production is put on at Kravis, it will use at least four of the department heads (for a small and unelaborate production), to more than 100 stagehands for a large production such as a traveling broadway show. A typical show which is presented by the Kravis Center might utilize somewhere between 15 and 25 stagehands including the department heads.

The season for Kravis Center performances begins in late September or early October and ends around the end of May. Therefore, the bulk of stagehand work is done within that 8-month window and any work done in the summer (June through August) would be minimal and done only by the five or six department heads. This would be normal maintenance or repair of stage equipment or some work for a summer camp run by the Center.

Local 623, as noted above, operated a hiring hall but not all of the people it refers for employment were union members. Indeed because Florida is a right-to-work State, less than half of the people on its referral lists were union members.

With respect to the hiring hall, Local 623 had a group of about 300 people who are placed on an A list, a B list, and a C list. The A list consists of persons who have worked at least 2000 hours within the craft and jurisdiction of Local 623 during a preceding 2-year period. These people, of whom there are about 100, are referred to jobs first. The B list consists of persons who have worked at least 1000 hours within the craft and jurisdiction of Local 623 during the same period. This group, which consists of about 30 people, is referred after the A list is exhausted. The C list consists of everyone else who applies and who has shown qualifications for one or more of the job classifications covered. The C list people are referred after the A and B lists are exhausted.

It should be noted that there also exist a number of nonunion companies who contract with theaters and concert halls in Florida and who employ stagehands. One, PTT, for example, has provided stagehands to Kravis since around October 2000. It, like Local 623, draws from a pool of people who it can call upon and its pool consists of people, (of about 300), who in many instances are also on one or more of Local 623's referral lists.

During the term of the first 5-year contract between Kravis and Local 623, the Cohen Pavilion was finished in or about 1994. This is essentially a space where eating takes place, either as a restaurant or a catering hall. In 1995, and before the contract expired, the Rinker theatre was completed. After that, the Gosman Amphitheater was finished in 1997. The Rinker is what is called a black box that can seat a maximum of 300 people. The Gossman is an outdoor amphitheater.

On March 4, 1998, the parties, with the assistance of Federal mediation, entered into a successor agreement that was retroactive to August 1997. That agreement ran to June 30, 2000, and modified the earlier agreement in two major respects; albeit the definitions of the type of work covered and the job classifications covered remained the same. First, Local 623 and Kravis agreed that the agreement would cover only those productions that were to be produced by Kravis itself (Kravis presents). And in this respect, five of the major presenters that used Dryfoos Hall on a regular basis, such as the Miami City Ballet, also entered into simultaneous agreement whereby they separately adopted the terms of the Kravis/Union contract for the times that they were scheduled to use the hall. Otherwise, the agreement was not to cover other production companies that rented the space. The second change, which may have seemed not so important at the time, was that Local 623 agreed with Kravis' demand that as to Rinker and the Gossman, the Company could utilize outside people to do stagehand work at its discretion for all or part of a production. The effect of this was that the parties entered into an agreement whereby Local 623 waived its exclusive hiring hall arrangement with Kravis vis-à-vis these two smaller and less used venues.

In 1998, the Kravis decided to use a mixed crew for a production at Rinker; some referrals from Local 623 and some not. Local 623 filed a grievance over this and the matter went to arbitration. On May 14, 1999, the arbitrator issued a ruling to the effect that the Kravis was entitled to utilize people at the Rinker other than those referred from Local 623 because this was explicitly agreed to in the contract. It is somewhat interesting to note that no one raised the question as to whether the non-referred employees who worked at the Rinker should nevertheless be covered by and paid in accordance with the terms of the labor agreement. The arbitrator did not address that question.

There is also some evidence that in early and mid-1998, Kravis used, at Dryfoos, the services of a company called Freelance Productions which furnished sound equipment for several shows. On two or more occasions, Freelance charged Kravis for two technicians who did something (indeterminate) with respect to the leased equipment. It was acknowledged by Pheterson, that Kravis was not intending to breach the agreement with Local 623 by using outside stagehands at the main venue.

In December 1999, employees referred by Local 623 to a show at the Rinker refused to work alongside nonreferred people. In subsequent correspondence between Kravis and the Local 623, the latter notified the Employer that it would not refer any people to Rinker so long as Kravis used outside people to do stagehand work. This position was in conflict with the earlier arbitration award and might be construed as a unilateral attempt by the Union to modify the 1998–2000 agreement.

In December 1999 and January 2000, Local 623 engaged in hand billing at the Kravis Center. There was a settled unfair labor practice case that involved the Union's contention that the

Company's prohibition as to the location of the union activity was unlawful. That settlement contained a nonadmission clause and cannot be the basis for any finding of antiunion animus.

B. The Negotiations

On April 27, 2000, the Company gave formal notice to the Union that it was terminating the contract at its expiration date and offered to bargain for a new agreement. *No 8(d) notice was given by the Company at this time*. (Emphasis added.)

Sometime in 1999, five of the department heads filed a lawsuit alleging FLSA violations and asking for overtime payments. These were Dan McMenamin, Robert Davis, Rick Howarth, Irma Hale, and John LeBlanc. This claim was based on the idea that their time working for Kravis on Kravis presents productions should be accumulated with time spent working at Kravis from outside productions so that any hours over 40 per week should be paid at overtime rates. The Kravis took the position that it was only obligated to pay these people for hours worked in excess of 40 when they were employed by Kravis and not by outside renters who also used their services. (This is clearly a correct position.) But during that matter, it also became apparent that the timekeeping procedures were not good and needed to be tightened up. That lawsuit was settled by Consent Order dated April 7, 2000. This issue of timekeeping became an issue during 2000 negotiations as the Company wanted to install timeclocks.

On May 12, 2000, Local 623, by John Dermody, sent a letter terminating the contract and offered to meet for the purpose of negotiating a new contract. The letter has an attachment which is a filled out Federal mediation form which apparently was sent to the Company. But according to Dermody, he neglected to send this to the FMCS because he didn't know that he had to. Whether he did or not is probably not relevant, but in any event, I credit Dermody's assertion.

Negotiations started on May 22, 2000, and continued until September 9, 2000. There were meetings on May 22 and 31, June 7, July 3 and 10, August 7, 14, and 24, and September 5 and 9. An impasse was declared by the Company at the last meeting and it sent a letter to that effect on September 11, 2000.

At the start of negotiations, Local 623's position was that it would accept the existing language of the 1998–2000 contract with a cost-of-living increase. The Company's position, as it became clear after a few meetings, was quite different.

On June 7, 2000, the Company presented a full written contract proposal that it called the "Contracted Labor Agreement." The cover letter which was handed across the table, states, inter alia:

> The hiring hall system should continue and calls will be made by the Kravis Center based on staffing needs. The pay under this new agreement will be increased to $19.00 per hour for Stage Technicians, a raise of 16.7% for most employees referred. This pay raise is substantial.
>
> As to the other major changes in this proposal, the Kravis Center desires to hire as direct employees certain additional staff members in a technical/production/building capacity, which will affect the nature of referrals required from the hiring hall. Under the attached proposal you will note that there is no mandatory Union jurisdiction to any venue at the Kravis Center. Also, the departmentalization of workers has been eliminated, with the concomitant restricting of the crew call system to reflect the necessity to make calls only for Stage Technicians under this agreement. As there are no departments, the former position of department head is no longer necessary. It should be noted that even the former department heads will receive a pay raise of over 5% from their prior pay rates (which was more than the rate for Stage Technicians) when responding to calls under this proposed agreement.
>
> As discussed at our prior negotiation sessions, you will find revised building security and timekeeping language. Some of your suggested revisions to the security provision have been incorporated, such as allowing workers to go into the non-public areas backstage one half hour prior to commencement of work.
>
> There are a number of suggested revisions regarding wages and benefits. The significant increase in scale wages is noted above. The Kravis Center proposes to streamline the payroll methodology by elimination of several categories of premium pay, such as turnaround (which proved itself to be particularly nettlesome under the terminated agreement) and certain overtime provisions. It is our desire to simplify and streamline this process to assure fair compensation, full compliance with Federal law and a successful season without the computational difficulties experienced last year.
>
> The proposed grievance procedure is also straightforward in nature and should result in any disputes being resolved in a fair and expeditious manner.

With respect to the timekeeping proposals, Local 623, according to Dermody had no real dispute with this. As to security badges, he also testified that this was OK so long as it was not applied only to stagehands in a discriminatory manner.

As far as this case is concerned, the basic issues are: (1) the Company was demanding to eliminate the six department head jobs and bring the work done by those people in-house to be performed by direct full-time employees of Kravis; (2) that although Kravis would continue to use the union hiring hall for referrals to all theatres, it could use the hiring hall at its sole discretion; (3) that the terms of the contract would apply only to those employees referred by Local 623 and not to anyone else; and (4) that Kravis would have the right to subcontract stagehand work at its sole discretion.

On June 21, 2000, Local 623 responded and rejected the Company's proposals.

Thereafter, on July 10, 2000, the Company made some slight modifications to its proposal but did not alter the core ideas. On July 13, 2000, Local 623 responded as follows:

> We are in agreement of your first paragraph, but have problems with some of your other statements. The Union believes that the Kravis Center has directly hired certain employees represented by IATSE Local 623. We feel this being the case we are entitled to any and all information concerning terms and conditions centered on this new pro-

posal. At our last meeting we asked for the current Kravis Center benefit package that other Kravis employees enjoy. We again request this information. . . .

The offer of $19.00 is a substantial and well-deserved pay increase. . . . The Union is grateful for this offer, and as stated, is not casually sweeping it aside. The proposed offer you have brought to the table does not preserve any of the hiring hall system. In fact it is designed to use the union employees as a privately owned temp agency. . . .

On August 24, 2000, the Company sent the Union a draft job description for production engineer. The letter goes on to state; "I believe it is important that I reiterate the position of the Kravis Center that this position is not a part of the current negotiations, but this draft job description is provided to you in an effort to work with Local 623 in reaching a new hiring hall collective-bargaining agreement." In the draft job description which requires a high school diploma and a minimum of 3 years' experience in all phases of professional theater including carpentry, sound, lighting, rigging, and properties, it goes on to describe the prospective job duties as follows:

POSITION AND CONCEPT

Responsible to provide assistance in unloading, setting up, running, maintenance, breakdown, loading and safety for all Kravis Center events and equipment, and for keeping the Center's building and equipment in top condition.

DUTIES AND RESPONSIBILITES

1. To safely operate and maintain all Kravis Center's Theatrical Equipment in Dreyfoos Hall, the Rinker Playhouse and the Gosman Amphitheater.
2. Assist in all areas of technical operations as required by the Technical Director.
3. Assist in the set up and maintenance of all rental Equipment for Kravis Center Productions.
4. Will be expected to work a flexible schedule with long hours including nights and weekends.
5. Responsible as needed for theater style table and chair setups, and banquet and meeting room tasks.
6. Assist in all other duties as assigned by the Technical Director or Senior Director of Building and Production Services.
7. Must be team oriented individual, work well with others and enjoy cross-training and flexible work assignments.
8. Will assist in maintenance of HAC, electrical, plumbing and irrigation systems, building hardware and finishes.
9. Will assist in operation of the building's computerized energy management system.
10. Work in a safe manner and maintain safe conditions throughout the complex.
11. Maintain organized and efficient workspace in building shops and maintenance areas.
12. Other duties as assigned.

On Saturday, September 9, 2000, Local 623 submitted a full draft contract counterproposal. This proposal retained the job duties and job description for the unit previously recognized and retained the concept of an exclusive hiring hall arrangement for all of the venues at Kravis Center. It also retained the category of the six department heads that would be appointed by the Company, subject to consultation with Local 623. With respect to department heads, Local 623's proposal gave the Company more discretion in their choice but proposed that after an initial 3-month period of probation, each department head would be considered to be a full-time employee of the Company. (The department heads would be the head carpenter, the head electrician, the head property person, the head sound person, the head flyman, and the head wardrobe person.) Local 623's contract proposal retained the various premium rates contained in the old contracts. Also, its proposal returned to some of the contract language in the 1992 agreement regarding overtime and premium pay and other items that were modified to some extent in the 1998 contract. Local 623's contract proposal contained no language regarding timecard procedures or security arrangements even though, back in May 2000, those issues had previously been agreed to in principle.

Also on September 9, the Company made its own revised contract proposal. Although somewhat revised, it retained most of the core issues that it had raised earlier. They included the elimination of the department head positions; the discretionary use of the hiring hall; the concept that agreement would apply only to persons referred by the Union; unfettered discretion to subcontract for labor; and the right to used mixed crews.

By letter dated September 11, 2000, the Employer declared an impasse and stated that it was implementing its last offer. In pertinent part, this letter read:

> It is with some considerable dismay that I write this letter confirming the status of our discussions regarding a successor hiring hall agreement. . . . After approximately ten negotiation sessions, the Union is taking positions, which are clearly regressionary in nature. It is conceded by the Union . . that based on the Union's proposal we are moving farther apart, not closer together. Thus, the Raymond F. Kravis Center . . . has declared an impasse in these negotiations.
>
> I suggested that, as we seem to be unable to agree or make any progress, we immediately contact the Federal Mediation and Conciliation Service. You indicated that you would consider this request. That agency was called in by the Kravis Center in the last negotiations and did assist the parties in reaching a negotiated hiring hall agreement. I suggest we try to use those services again to address this impasse.
>
> From the inception of these negotiations, Local 623 has attempted to have the Kravis Center sign what is calling a "uniform" contract. It was reported that a number of organizations have already signed a contract containing essentially similar terms and conditions of employment. As has been discussed at great length over these past sessions, the Kravis Center has different programmatic and technical needs based on the nature of its presentations and based upon its role as owner and operator of the performing arts facility. It is both logical and lawful for the Kravis

> Center to take a position, which is somewhat different from the arts organizations, which produce, choreograph and present their own productions.
>
> . . . .
>
> Inasmuch as we are at an impasse in negotiations, the terms and conditions for hiring hall referrals in the future will be imposed as set forth in the proposal provided to Local 623 at our session last Saturday. . . . The Technical Director will provide a crew sheet to the Business Representative for the upcoming Sesame Street show in the customary manner. If the Local 623 is going to refuse to refer workers for this or other shows, as Local 623 has done in the past regarding the Rinker Playhouse, please have the professional courtesy to advise us of this decision immediately. This request for notification does not in any way waive any rights that the Kravis Center has with respect to such a refusal to honor a request for referral of workers . . . .

On September 14, 2000, the Union by its attorney, responded to Pheterson's September 11, as follows:

> First, at the conclusion of negotiations on September 9, 2000, you suggested and I agreed to involve the Federal Mediation and Conciliation service in an effort to assist in resolving these negotiations. In fact, you specifically agreed to contact me on Monday afternoon, September 11, in order to discuss and mutually arrange for a mediator. . . to assist us. Instead . . . you sent me your September 11 letter. . . . Aside from your failure to keep your word, your declaration of impasse and imposition of your last proposal violates federal law insofar as the Kravis Center failed to provide notice to the Federal Mediation and Conciliation Service in accordance with federal law.
>
> Second, your conduct in negotiations . . . demonstrates a failure to confer in good faith as is required by law. Since presenting Local 623 with your initial proposal, you absolutely refused to alter your proposal in any significant way. In session after session, you insisted that the Kravis would not deviate from its position and on Saturday, September 9, you repeated your intention not to deviate from your initial proposal except for, what you referred to as, insignificant changes presented on Saturday, September 9. This "take it or leave it" conduct during negotiations constitutes an unfair labor practice. . . .
>
> Third, specifically, on Saturday, September 9, you refused to even discuss Local 623's proposal other than for you to summarize it and declare impasse. When we attempted to explain its various positions, you refused.
>
> Fourth . . . your insistence on the non-exclusive hiring hall and refusal to apply your proposal to bargaining unit members not referred by Local 623 was and is illegal. . . .
>
> Finally, your characterization of your proposal as "a fair contract for workers" is preposterous. Throughout negotiations, you all but admitted that the non-exclusive hiring hall would provide no job security for any bargaining unit employee working for the Kravis Center. . . .
>
> Local 623 urges The Kravis Center to provide proper notice to the Federal Mediation and Conciliation Service, cease bargaining in bad faith, and return to the bargaining table.

C. Events Subsequent to the "Impasse" Declaration. The Filing of a Representation Petition. Implementation of the Last Offer and Refusal to use Local 623's Hiring Hall

On September 18, 2000, Local 623 filed a petition for an election in Case 12–RC–8549. The Employer contends that even if it is held that it could not challenge the original recognition because of Section 10(b), the fact that the Union filed a petition for an election, by itself, raised a question concerning representation. Therefore, according to the Employer, it was free to withdraw recognition at that time. I don't agree.

The representation petition filed by Local 623 was filed pursuant to a case called *General Box Co*., 82 NLRB 678 (1949). That case permits an already voluntarily recognized union to seek a Board certification. Pursuant to the *General Box* rule, this kind of petition would be filed by a union seeking certain protections afforded under Section 8(b)(4) as well as the benefits of the "one year rule." Moreover, the Board reasoned that the benefits of certification could provide greater protection to a recognized union against raids of competing unions. Thus, although the procedures for holding an election are identical to a situation where an unrecognized union files a petition for an election, the rationale for the filing of a *General Box* type of petition is quite different. For our purposes, the main difference is that such a petition does not seek to dispel any doubt or question as to whether the employees who are already represented, continue to want union representation. On the contrary, the appropriate election procedures to deal with a situation where there is a doubt of a union's continuing majority status is either the filing of an RM petition by an employer or an RD petition by one or more employees.

In any event, a hearing was held in the representation case on February 8, 2001. At the hearing, the Union argued for a voter eligibility formula that would be based on the number of times and hours that people had worked over a 2-year period of time. The Company took the position that this would not be appropriate inasmuch as it had hired direct full-time employees to do the stage work; that it was using subcontractors to do the remaining work; *and that it had no intention at all of hiring any people from the Union's hiring hall in the future*.

It is noted that the last assertion was contrary to the statements made by Pheterson at the last negotiation session on September 9, where he said that under the Company's last offer, it would utilize one group of regular full-time and/or part-time employees to do stage work; would utilize contractors do some of the remaining work and would utilize the hiring hall of Local 623 to do what was left over. Although not quantified at the negotiations, Pheterson clearly said that under the Company's proposal, which allegedly was put into effect on September 11, after the "impasse," that the Company would continue to hire from Local 623's hiring hall, at least for some people. Yet at the representation hearing, Pheterson stated that the Company, contrary to its stated position at the bargaining table, would no longer hire *any* people from the hiring hall.

To me, this looks like what Pheterson was trying to do was to make his legal assertion in the Representation case come true

by establishing a policy of refusing to hire anyone from Local 623's hiring hall. In my opinion, this is discrimination on its face and indicates that the Company established a hiring policy that would insure that even if an election were to be held, Local 623 would be very unlikely to win because the Company would have eliminated from the voting pool, many of the people who likely would vote in favor of union representation. This would be analogous to a situation where, during the processing of a representation case, an employer hires his relatives and friends for the purpose of packing the unit so that it can't lose an election.

After September 24, 2000, the Company no longer requested any people from Local 623's hiring hall except for one occasion when an orchestra directly requested that IATSE stagehands be used. And the two instances in September 2000, when Local 623 stagehands were used, were situations where the arrangements for their use had been made before the Company declared the impasse.

On September 28, 2000, the Employer filed a charge in Case 12–CB–4806. This alleged that Local 623 violated 8(b)(1)(A), (2), and (3).

In support of the CB charge, Pheterson gave an affidavit in which he made it abundantly clear that the position of the Kravis Center during and after the negotiations was that Local 623 could only represent employees referred from its hiring hall; that any labor agreement it made with Local 623 could only cover such persons; and that the Kravis Center would not bargain about any employees it might directly hire who would be assigned to do stagehand work. In pertinent part, he stated:

> In 1990, IATSE 623 sent the Kravis Center letters soliciting business from it. It refers to other "clients" that have utilized IATSE 623 as a source for workers. It did not refer to a collective bargaining agreement, and in fact, it is Kravis Center's contention that this was always a vendor relationship and that we had no duty to bargain with the Union since they were never recognized as the collective bargaining representative of an uncoerced majority of the stagehands that worked on productions at the Kravis Center. . . .
>
> . . . .
>
> On July 10, 2000, I provided a letter to the Union. . . . Our position was that the agreement being negotiated with the Union for the future was only for those workers referred by the union hall, as in the past, and was not being negotiated for any workers that the Kravis Center might directly hire to do work that union referred workers may have previously done or other work. The Kravis Center's position is that the Union never was and is not the bargaining representative for full-time and/or regular, part-time directly hired employees doing stage labor work on our payroll at that time or currently. . . .
>
> In summary, we discussed the scope and the employer was viewing the agreement being negotiated as a contract labor agreement. McKenzie asked if we were trying to staff the productions in Dreyfoos Hall with our own employees rather than their referrals. I said yes. McKenzie said that they would never let that happen.[2]

Sometime in September 2000, the Company made arrangements to utilize the services of a company called PTT to furnish stagehands. That company started sending people to the Kravis Center after September 24. I note that many of the people that PTT sent are also on Local 623's C list and some are union members.

In late September or early October 2000, the Kravis Center began hiring its core group. These were people who Kravis intended to be its direct employees and who would be cross-trained. Thus, they would be assigned to do general building and grounds maintenance for part of their time and stage functions for the remainder of their time. Additionally, at or about the same time, the Kravis Center transferred some of its other regular employees from other jobs into the core group. This is occurring at the same time that the Kravis Center ceased requesting any referral from Local 623. The decision to hire its own core group and to cease requesting referrals from Local 623 was made, according to Pheterson, sometime after he declared an impasse and before the representation case hearing was held.

General Counsel's Exhibit 47 is list of the employees who constituted the core group during the 2000/2001 season. (From about September 2000 to June 2001.) As indicated, some had previously been employed directly by the Kravis Center in other occupations.

NAME	TITLE	PAY	HIRE	STATUS

[2] The charge in Case 12–CB–4806 was dismissed on January 24, 2001, and the General Counsel denied an appeal on March 26, 2001. In pertinent part, the dismissal letter states:

> The allegations described above are predicated on the Employer's claim that the Employer recognized the Union in 1992 under circumstances where the Union did not represent a majority of the Employer's employees in the unit, that the Union never achieved majority status, and that hence, the Union violated the above-cited sections of the Act by claiming to be the collective bargaining representative. . . . Assuming, for the sake of argument, a majority of the unit employees had not designated the Union as their collective bargaining representative at the time of recognition, such recognition can only be challenged within the six month period provided for under Section 10(b) of the Act. . . . In these circumstances, it was concluded that the Union's claim to be the collective bargaining representative of the employees covered by the contract that expired on June 30, 2000 does not constitute a violation of the Act as alleged. For the same reason, it was concluded that the Union did not violate the Act, as alleged, by being a party with the Employer to an alleged "pre-hire agreement" without achieving majority status. A challenge to the Employer's initial recognition of the Union would be barred by the time limitations imposed by Section 10(b) of the Act. To the extent you assert that the Union operates its hiring hall in an unlawful fashion, the investigation failed to adduce sufficient evidence to establish such claim. Similarly, the Employer's claim that the Union has made unlawful and improper contractual demands based on the Union's insistence that it has "majority status" does not establish a violation of the Act in light of the circumstances of the Employer's recognition of the Union and their subsequent bargaining relationship. To the extent the Employer claims that the Union violated the Act by picketing the Employer's premises with the object of obtaining recognition, such conduct, without more, does not constitute a violation of the Act. . . .

			DATE	
James Mitchell Sr.	Dir. Bldg. & Prod. Svce.	Mgt	04/20/92	Full time
Tim Lessig	Technical Dir.	Mgt	06/08/92	Full time
Barry Mitchell	Bldg & Prod Svce Sup	50000/yr	08/31/92	Fulltime
John Wurm[3]	Bldg & Prod Svce Sup.	45000/yr	02/16/98	Fulltime
Tad Bagley[4]	Bldg & Prod Technician	21/hr	11/30/00	Full time
Diane Carlton	Bldg & Prod Technician	16.25/hr	03/18/01	Full time[5]
Marie Cormier	Stage Mgr	Mgt	04/27/92	Full time
Ricardo Gonzalez	Bldg & Prod Technician	16/hr	10/08/00	Full time[6]
Derek Jones	Bldg & Prod Technician	16/hr	10/08/00	Full time[7]
Jeffrey Lamb	Bldg & Prod Technician	17/hr	08/24/99	Full time
Richard Morgan[8]	Bldg & Prod Technician	21/hr	02/11/01	Full time
Walter Scott	Bldg & Prod Technician	19/hr	08/22/98	Full time
Scott Wagmeister	Bldg & Prod Technician	19/hr	12/13/00	Full time
Virginia Weintraub	Bldg & Prod Technician	14/hr	10/15/00	Full time[9]
James Rigg	Bldg & Prod Technician	28,580/yr	02/22/99	Full time
Jody Sheilds	Bldg & Prod Technician	33,280/yr	08/28/00	Full time
George Silovich	Bldg & Prod Technician	34,840yr	12/07/98	Full time
Al Tonge	Bldg & Prod Technician	31,570/yr	09/13/94	Full time
Reed Benardo	Bldg & Prod Technician	15/hr	08/27/01	Part time
Amanda Loftus	Bldg & Prod Technician	14/hr	08/05/01	Part time[10]
Debra Blizzard	Bldg & Prod Technician	14/hr	09/25/00	Part time
Elizabeth Cadaret[11]	Bldg & Prod Technician	15/hr	09/24/01	Part time
Heidi Fleming	Bldg & Prod Technician	14/hr	11/13/01	Part time

On May 15, 2001, the Kravis Center entered into a contract with a theatre company for a children's performance. Paragraph 6 of the contract's addendum states: "The Kravis Center will provide staff for all backstage labor . . . these workers are highly qualified professional technicians, fully trained and none of these workers are represented by any labor organization or covered by any collective bargaining agreement." (Presumably the General Counsel offered this piece of evidence to buttress its contention that the Respondent had a discriminatory intent in refusing to utilize Local 623's hiring hall.)

On June 13, 2001, Pheterson finally got around to sending a letter to the Federal Mediation Service. It was stipulated that this was the first notice sent by the Employer in the context of these negotiations. This is almost a year late and 9 months after the Company declared the impasse and implemented its last offer. I also note that no notice was sent to any Florida State agency. (It is not clear in this record if such any agency exists.)

In August 2001, Local 623 representatives and company representatives met again on two occasions in an attempt to resolve this case and to negotiate a contract. Apart from whether that evidence is privileged because the meetings occurred, at least in part, in an attempt to settle the unfair labor practice charge, the evidence nevertheless shows that there was no change in the company position on the unit issues. That is, the Kravis Center continued to insist that Local 623 represented only those people who were referred from the hiring hall (at this time no one); and that the Company could hire its own employees who would be assigned to do stagehand work and about whose conditions of employment, the Company would not bargain.

On October 5, 2001, the Company tendered another proposal. Although agreeing in principle to an exclusive hiring hall arrangement for all venues, the proposal provided that the Company retained the exclusive right to use subcontractors and its own full-time and part-time nonunion employees, without limit, while using the hiring hall only for excess. Since this essentially allows the Company to avoid using the hiring hall at all, it was, in a sense, an illusory offer. Additionally, the Company proposed that any exclusive hiring arrangement be temporary and subject to termination, subject to arbitration, in the event any incidents occurred.

The evidence shows that union attorney Mierzwa, in an effort to resolve all issues was willing to make compromises give up a core group of permanent full-time people who would be excluded from the bargaining unit and would be directly employed by Kravis. But he wanted a cap on the number and also either elimination or a ceiling on part timers or subcontractors. He demanded information to see how the pie could be cut up.

D. The Union Merger

Prior to the opening of the hearing, Local 623 was merged into a newly created Local 500 effective on February 1, 2002.[12] This merger resulted in Local 623 ceasing to exist. The merger also involved five other Florida locals.

The Respondent asserts that this merger did not meet the minimal "due process" requirements set forth in *NLRB v. Food & Commercial Works Local 1182*, 475 U.S. 192 (1986). It therefore argues that even if it violated Section 8(a)(5) in this

[3] R. Exh. 18 shows that before his initial hire in 1998, Wurm listed John LeBlanc from Local 623 as a reference. He thereafter was transferred into the core group in September 2000.

[4] R. Exh. 14 shows that Bagley was a member of Local 631 IATSE.

[5] Dinae Carlton was originally hired in September 1992 and she was assigned to work as a part-time technician from Aug. 18, 2000, to March 17, 2001.

[6] Gonzalez was originally hired in December 1998 and worked part time as a stage technician before the Oct. 8, 2000 hire date.

[7] Jones was originally hired in October 1995 and worked part time as a technician before Oct. 8, 2000.

[8] R. Exh. 16 shows that Morgan had previously been a member of Local 623.

[9] Weintraub was a part time technician starting on January 26, 2000, and then went to full time on Oct. 15, 2000.

[10] Loftus also worked part time in 1999.

[11] R. Exh. 15 shows that Cadaret, prior to her hire, had been a member of some union other than IATSE.

[12] Subsequent to the opening of the hearing, the Union moved to add the name of IATSE, Local 500 as a party to the preceding. Also the General Counsel moved to amend the complaint to allege that Local 500 was the successor to Local 623. I reserved ruling on those motions.

case, it owed no further duty to bargain after the dissolution of Local 623. Therefore, the resolution of this question, although not relevant per se to the underlying alleged unfair labor practices, is very relevant to the issue of what kind of remedy would be available in the event that a violation was found.

It is important to recognize the limited scope of this issue. I am *not* deciding if the merger that took place contravened the International Union's constitution and bylaws. Nor am I making any finding that the newly created Local 500 is not a valid labor organization for purposes of representing employees under the National Labor Relations Act (the Act) or for any other purpose pursuant to any other Federal or State statutes.

All that I am called upon to do in this case is to decide if the merger that took place met a standard pursuant to which it could be said that the employees involved could reasonably be said to have made a choice of representation and therefore that the Respondent would be bound by the results of that merger in the absence of an election or some other procedure to determine if the employees desired to be represented by the newly created local union.

The International Union's constitution at article 19, section 29 deals with the merger of Locals. It states:

> The International President may conduct a hearing or assign an International Representative to conduct an investigation to determine (a) whether any local union is in a position to effectively discharge its duties as a bargaining agreement and perform its responsibilities as an affiliate of the Alliance, or (b) whether a merger of such local union, either alone or with one or more other local unions in similar position, into another local union of the Alliance would be in the best interests of the memberships of such local unions and the Alliance.
>
> If the International President, based on such hearing or investigation concludes that a merger is necessary, he shall be authorized with the approval of the General Executive Board, and notwithstanding any other provisions of this Constitution, to effect such a merger with the necessary protections of the memberships of the local unions so merged.

On October 15, 2001, International Vice President Michael Sullivan requested that six South Florida locals produce their financial books and records for inspection. He assigned General Secretary-Treasurer Michael Proscia and Vice Presidents Michael Sullivan and Jamie Wood in addition to International representatives, Lou Falzarano, Ron Lynch, Debbie Reid, Joanne Sanders, and Jack Beckman to conduct the inspection. This notice was made pursuant to article 7, section 9 of the International's constitution and the locals were told that the inspections would take place on October 30 or 31, 2001.

The recipients of this notice were Local 623 (comprising about 104 mixed stagehands in Palm Beach, Martin, and Saint Lucie Counties); Local 316 (comprising about 67 audiovisual technicians in Dade County); Local 545 (comprising about 156 stagehands in Dade County); Local 827 (comprising about 18 ticket takers and treasurers in Dade County); Local 853 (comprising about 23 wardrobe attendants in Dade County); and Local 646 (comprising about 158 mixed stagehands in Broward County).

On October 30 and 31, the inspections took place at the offices of the six local unions. Among the items examined were the referral procedures of the locals, their collective-bargaining agreements, their benefit plan documents and their membership rosters.

The minutes of Local 623's executive board meeting dated October 30, 2001, shows that correspondence from the International was read regarding the possibility of a merger. The minutes also indicate that an audit would take place at Business Agent Dermody's home. (That is where the local operated from and where its records were kept.)

The examination of Local 623's books took place on October 30. By a report dated October 31, from Michael W. Proscia and Michael Sullivan, they described the local's membership, finances, referral system, and the contents of seven long-term collective-bargaining agreements. The report indicates that Local 623 used a payroll company called Stage Paymasters that received 18.5 percent of the gross pay for any particular event to which employees were referred. The Report recommended that a merger would be beneficial to Local 623's members because it was maintaining outdated membership practices and work rules; that it lacked benefits other than pension benefits; that it lacked organizing success; that it lacked personnel to assist in local administration; and that it lacked continuity of benefits. (I presume that similar reports were made by the International's auditors with respect to the other South Florida locals.)

By letter dated November 1, 2001, from International President Thomas C. Short to Local 623, it was advised that a hearing would take place in Fort Lauderdale on November 19, 2001, to determine whether there should be a merger of Locals 316, 545, 623, 646, 827, and Local 853 (It is noted that of these locals, only Locals 545, 623, and 646 had hiring hall referral systems. The others were small and apparently represented fixed employees.)

In early November, Local 623 sent out a meeting notice to its members indicating that there would be a regularly scheduled meeting on November 8, 2001. The agenda included the International's plans for South Florida.

Local 623 held a membership meeting on November 11, 2001, where, according to Dermody, about 25 to 30 members were present. Although there was a vote taken about the initiation of new members (reflected in minutes) there was *no* vote taken as to the merger issue. Although Dermody testified that he got the sense from the discussion at the meeting that a consensus was in favor of merger, he named four individuals who spoke in favor of a merger and three who spoke against. The others said nothing. The members who were present at the meeting were informed of the correspondence sent by the International including the notice that there would be a hearing held on November 19 in Fort Lauderdale. The minutes of the November 11 meeting state, inter alia;

> Dermody gave a background on the latest information concerning merger. He said there would be some good points for all the locals. . . . Much speculation in regards to the officers

> of the one large local and what it is and how it will be chosen. Some support for this merger by members in terms that our benefit contribution would follow and we would have more bargaining leverage. It is felt that there's not much we can do to stop this merger.

On November 19, 2001, a hearing was held in Fort Lauderdale to determine whether to merge the six locals. The hearing was conducted by International Representative William Gearns and representatives of each local attended and were invited to give testimony. On the same day, Gearns issued a report recommending the merger. Thereafter, President Short adopted the report and the recommendation was approved by the International's executive board. The result was that six local unions were merged into a new Local 500.

In December 2001, the members of Local 623 received a notice of a meeting to discuss the International's merger decision. The minutes of a meeting held on December 13, read as follows:

> Mike Sullivan reported all is status quo, probably will happen in January and should be smooth and non disruptive. There may be another meeting late in January. Little information from the International concerning the merger has been received. All or no cross county hiring. . . . Discussion was held regarding security of jobs when merged.
>
> Discussion about merger—pros and cons. In general, we will have to wait and see.

On January 18, 2002, the International sent a letter advising that effective February 1, 2002, Locals 316, 545, 623, 646, 827, and 853 would officially be merged into one mixed local union to be chartered as of that date and titled, IATSE Local 500. The letter went on to say that effective February 1, 2002, the designated representative in charge of the new local would be the International Union's division director, William E. Gearns Jr., who would be assisted in its administration by International representative, Louis Falzarano. Further, the International notified that the International representatives would be assisted by John Dermody, former business agent of Local 623; Alice Renee, former business agent of Local 646; and Daniel Bonfiglio, former business agent of Local 545. The six local unions were told that all of their books and records were to be turned over to William E. Gearns.

On January 19, 2002, Short met with business representatives of the affected local unions and told them that effective February 1, 2002, the locals would be merged into a new mixed local (Local 500), and that its offices would be located at the former offices of Local 646 in Fort Lauderdale.

According to Dermody, for the first year of its creation, Local 500 would have no elected officers; all being appointed by President Short. Gearns would be in over all charge of the Local and Falzarano would be in charge of its day-to-day operations. With respect to hiring lists, each local's hiring list (assuming that a local used a hiring hall), would be kept separate at least for a time and each operated by the respective former business agent. Also, contract administration for the large locals (Locals 623, 646 and 545), would be done by each respective former business agent.

On July 18, 2002, a letter was sent to the merged membership regarding (1) per capita dues and (2) referral fees. The letter notified the members that the dues were slightly different from what they were before the merger. No vote was taken on new dues. The referral fees (for use of hiring halls), however remained the same.

With respect to hiring hall referrals, Local 500 has kept the same referral lists for each local that had a hiring hall and has utilized them in the same way. There have been some minor changes regarding cooperation and cross referrals to different locations when needed.

For the most part, and perhaps only with the exception of the Kravis Center, employers having contracts with the various predecessor locals have recognized Local 500 as the successor. Charging Party's Exhibit 3 is a list of companies that had contracts with the local unions before the merger and who either have adopted those contracts with Local 500 or have negotiated with Local 500 since the merger. Also, it contains the names of new companies that have been organized by Local 500 since the merger.

It was stipulated that insofar as Local 623, its members were never given the opportunity to vote on the question of the merger. And in this regard, although the General Counsel asserts that Dermody "polled" the membership and got a sense of their desires, the objective evidence does not support a conclusion that its members overtly expressed their approval of the merger. It may be that if some kind of vote had taken place, the members of Local 623 would have chosen to merge with the other five locals into Local 500. But that did not happen, either by way of a formal vote or by any informal equivalent.

III. ANALYSIS

A. The 8(a)(5) Allegations

The Kravis Center originally recognized Local 623 as the representative of stagehands back in 1991 and the first contract ran from September 1, 1992, to August 31, 1997. There is no dispute that this initial recognition took place without an election and without any showing that employees wished to be represented by the Union. It was, therefore, a classic prehire agreement, which if it had occurred in the context of the construction industry would have been permitted by Section 8(f) of the Act.

But the Kravis Center is not primarily engaged in the construction industry and the agreement would have been, had it been challenged at the time, a violation of the Act by both the Employer and the Union. As indicated above, because the agreement was never challenged by the filing of a charge within 6 months of its execution it no longer can be challenged under either Section 8(a) or (b) of the Act. *Route 22 Auto Sales,* 337 NLRB 84 (2001). As such, the agreement has matured into a 9(a) collective-bargaining relationship pursuant to which the Employer may not withdraw recognition, in the absence of a Board election, without a showing that the Union no longer represents a majority of the employees who are covered by the agreement. *Levitz Furniture Co.*, 333 NLRB 717 (2001).

The Respondent contends that the successive collective-bargaining agreements do not embody an appropriate bargain-

ing unit. In this regard, the Respondent's contention is that the bargaining unit has historically encompassed only those stagehands who have been referred by Local 623 through its hiring hall. I suppose that the Respondent's contention is that the agreement might somehow be construed as being equivalent to a member's only contract. I do not agree.

The agreements covers the categories of carpenters, electricians, loaders, fly men/riggers, props employees, and wardrobe employees. Front of house people, such as ushers, box office people, and ticket takers, are not covered by the agreement. While it is true that the successive collective-bargaining agreements contain provisions whereby the Employer obligated itself to utilize Local 623's hiring hall for stagehands, there is nothing in the contracts themselves that purport to describe or limit the bargaining unit only to those people who got their jobs through a hiring hall. Nor is there any hint in either the contracts, or in practice, that the bargaining unit was contemplated to be a member's only arrangement. (Indeed, because Florida is a right-to-work State, many of the people referred from the Union's hiring hall were not members.)

Thus, as of the commencement of negotiations in 2000, the Union had a history of collective bargaining in an appropriate unit (stagehands), in a nonconstruction industry and which, by virtue of the 10(b) statute of limitations, could no longer be challenged under Section 8(a) or (b) of the Act. Further, that unit included six individuals who were denominated as nonsupervisory department heads and who were regular part-time employees of Kravis, whose employment did not depend upon referrals from Local 623's hiring hall. In addition, as of 1991, the last contract contained provisions requiring Kravis to utilize the hiring hall to fill all temporary stagehand jobs at the Dreyfoos concert hall, if not for the two other venues.

On April 27, 2000, the Company gave formal notice to the Union that it was terminating the contract at its expiration date and offered to bargain for a new agreement. As such, the Company was the initiating party as defined in Section 8(d) of the Act. It neglected, however, to give the required 8(d) notices to the Federal and State Mediation Services. Indeed, the Respondent did not manage to give notice to the Federal Mediation Service until well after the negotiations had concluded and after it had implemented a variety of unilateral changes that modified the last effective collective-bargaining agreement.

Section 8(d) of the Act states in pertinent part:

> (d) . . . . Provided, that where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—
>
> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith, notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and
>
> (4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

In *United Artists Communications*, 274 NLRB 75 (1985), the Board made it clear that the burden of filing the 8(d)(3) notice of dispute always stays with the initiating party, in this case, the Kravis Center, and that the failure of the initiating party to file such notice precludes it from undertaking otherwise lawful economic action.

In *Days Hotel of Southfield*, 306 NLRB 949, 956 (1992), the administrative law judge, in a decision adopted by the Board, held that the Respondent was precluded from implementing unilateral changes after it claimed an impasse because, among other reasons, it had failed to send the timely notices that are required by Section 8(d)(3) of the Act.[13] The Judge cited *Weathercraft Co. of Topeka*, 276 NLRB 452, 453 (1985), where the judge stated:

> Section 8(d) is unequivocal. It provides that the duty to bargain includes serving written notice upon the other party to a collective-bargaining agreement of one's desire to terminate or modify it, with notice also to the Federal Mediation and Conciliation Service and the appropriate state agency.
>
> Board authority is also unequivocal. Failure of a party desiring to terminate or modify a collective-bargaining agreement to give appropriate notice under Section 8(d) precludes it from altering terms or condition of the collective-bargaining agreement. . . . This proscription exists notwithstanding that the expiration date of the agreement has past. See *Meatcutters Local 576 (Kansas City Cyip Steak Co*.), 140 NLRB 876 (1963); *United Marine Local 333 (General Marine Transportation Corp*.), 228 NLRB 1107 (1977).

Therefore, because the Employer was the party initiating the termination of the collective-bargaining agreement, I conclude that because it failed to give the notices required by Section 8(d)(3) to at least the Federal Mediation and Conciliation Service, it violated Section 8(a)(5) of the Act. Also, as the Act makes explicitly clear, the Employer's modification of the terms of the last collective-bargaining agreement, in the absence of such notice, constitutes a unilateral change prohibited by Section 8(d) and 8(a)(5) of the Act.

Turning to the substance of the negotiations, it is clear to me that from no later than June 7, 2000, the Employer's intent was to radically change the way it hired stagehands and its relationship to the Union. In my opinion, the Respondent's intention was to reduce to a minimum, the Union's role in providing stagehands to the Kravis Center and to, de facto, render nugatory, Local 623's role as the employees' representative in negotiating the terms and conditions of employment for those people whom the Employer decided to utilize to do stagehand functions.

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[13] See also *Nabors Trailers*, 294 NLRB 1115, 1120 (1989), enfd. 910 F.2d 268 (5th Cir. 1990), and *Bi-County Beverage Distributors*, 291 NLRB 466 (1988).

From the contract proposal presented by the Employer on June 7, 2001, until the Company declared impasse on September 11, 2000, its unchanging position on its key demands were (a) that it intended to eliminate the six department head jobs and bring the work done by those people in-house to be performed by direct full-time employees; (b) that although Kravis would continue to use the hiring hall for referrals, it would use the hiring hall at its sole discretion; (c) that the terms of the contract would apply only to those employees referred by the hiring hall and to no one else and; (d) that Kravis would have the right to subcontract stagehand work at its sole discretion.

There is nothing improper about a company demand to cease using a union hiring hall as this would be a mandatory subject of bargaining. *Sage Development Co*., 301 NLRB 1173 (1991), *Houston Chapter, Associated General Contractors of America,* 143 NLRB 409 (1963), enfd. 349 F.2d 449 (5th Cir. 1965), *H. A. Artists & Associates v. Actors Equity Assn.*, 451 U.S. 704 (1981).

Nor it there anything improper about a company demand that it be permitted to utilize subcontractors for bargaining unit work as the issue of subcontracting is normally considered to be a mandatory subject of bargaining. *Fiberboard Corp. v. NLRB,* 379 U.S. 203 (1964).

But an attempt by one side or the other, to unilaterally change the scope of the existing bargaining unit is a nonmandatory subject of bargaining and neither side is forced to concede or even bargain about such an issue. *Douds v. Longshoremen's Assn.*, 241 F.2d 278 (2d Cir. 1957). For example, in *Health Care & Retirement Corp*., 317 NLRB 1005 (1995), the Board stated:

> It is clear that the scope of the bargaining unit is a permissive subject of bargaining, regardless of whether the unit has previously been certified by the Board or voluntarily agreed on by the parties. Accordingly, once a specific job has been included within the scope of the bargaining unit either by Board action or consent of the parties, the employer cannot remove or modify the position without first securing the consent of the union or the Board.

There can be no dispute that the Employer's position throughout bargaining in this case was that any contract it would sign would have to give it the sole discretion to hire, either on a permanent or job-by-job basis, any stagehand it chose, and that except for those employees who it deigned to hire through Local 623's hiring hall, they would *not* be covered by the terms and conditions of any collective-bargaining agreement. Thus, to the extent that the Company would hire permanent employees to do regular stagehand work, and thereby replace the six department heads, the Company's position was that the wages and terms and conditions of this new category of people (described as the core group), would be determined solely by the Company and would not be encompassed within any bargaining unit defined by the contract. Similarly, to the extent that the Company hired, on a case-by-case basis, any stagehands for particular events who were not referred from the hiring hall, those people also would not be covered by any union contract. That these positions were taken by the Respondent is clear by Pheterson's pretrial affidavit where he stated, inter alia:

> On July 10, 2000, I provided a letter to the Union. . . . Our position was that the agreement being negotiated with the Union for the future was only for those workers referred by the union hall, as in the past, and was not being negotiated for any workers that the Kravis center might directly hire to do work that union referred workers may have previously done or other work. The Kravis Center's position is that the Union never was and is not the bargaining representative for full-time and/or regular, part-time directly hired employees doing stage labor work on our payroll at that time or currently. . . .

In summary, we discussed the scope and the employer was viewing the agreement being negotiated as a contract labor agreement. McKenzie asked if we were trying to staff the productions in Dreyfoos Hall with our own employees rather than their referrals. I said yes. McKenzie said that they would never let that happen.

In my opinion, the Company insisted as a condition of reaching an agreement, that the six department heads be eliminated and that their work be replaced by a core group of employees that would be hired directly by the Company. By itself, no problem. But when the Company also insisted that this core group would be assigned to do stagehand work on a regular basis, it described a group of people who ordinarily would be included in the bargaining unit. (Under *Beria Publishing Co*., 140 NLRB 516 (1963), people who are dual function employees are included in the bargaining unit.)[14] And when the Company insisted that this intended core group be excluded from the bargaining unit and that their conditions of employment be determined solely at the Employer's discretion, this was an example of overreaching. For in this respect, the Company made what amounted to a demand to change the scope of the existing bargaining unit that is a permissive subject of bargaining.

Similarly, while there is nothing improper about seeking to eliminate the use of a union hiring hall, the Company also overreached by insisting that any employee hired as a stagehand in the future, would not be covered by a collective-bargaining agreement unless he or she did not get the jobs through the hiring hall. Inasmuch as the bargaining unit description encompasses all stagehands, the Company's insistence on carving the unit up into two separate groups; one group referred by Local 623 and the other hired directly by the Company, this amounted to a demand that Local 623 accept a fundamental change in the scope of the bargaining unit and to relinquish any rights to bargain about stagehands hired directly by the Employer.

As I have concluded that throughout the course of the negotiations, the Company insisted, as a condition of reaching an

[14] See also *Ansted Center*, 326 NLRB 1208 (1998); *Air Liquide America Corp*., 324 NLRB 661 (1997). To be in the unit, dual function employees must spend a substantial amount of time doing "identical" functions, *Davis Transport*, 169 NLRB 557 (1968), and must perform such work on a regular pattern or consistent schedule, *Mc-Mor-Han Trucking Co*., 166 NLRB 700, 702 (1967). See generally *Outline of Law and Procedure in Representation* cases at pp. 219 and 220.

agreement, that Local 623 accept a change in the scope of the bargaining unit, I find that the Employer violated Section 8(a)(1) and (5) of the Act. I also conclude that because these demands, concerning nonmandatory subjects of bargaining, were the main stumbling blocks in reaching any new agreement, the impasse declared by the Company on September 9, 2000, was invalid. Therefore, any unilateral changes in the terms and conditions that existed at the time of the declared impasse would also amount to a violation of Section 8(a)(1) and (5) of the Act. *Health Care & Retirement Corp*., supra. See also *Antelope Valley Press*, supra, *L & L Wine & Liquor Corp.*, 323 NLRB 848 (1997); *Benjamin Winniger & Sons*, 286 NLRB 1177 (1987); *NLRB v. Herman Sausage Co*., 275 F.2d 229 (5th Cir. 1960).

The Respondent contends that when Local 623 filed the representation petition on September 18, 2000, this, by itself, raised a question concerning representation and therefore, it was justified in withdrawing recognition. I have already discussed this issue and concluded that the filing of a representation petition by an incumbent union under the rule enunciated in *General Box Co*., 82 NLRB 678 (1949), does not give an employer objective grounds for rebutting the presumption that Local 623 continued to represent a majority of the bargaining unit employees.

The General Counsel also alleges that the Respondent engaged in surface bargaining in that it negotiated with no intention of reaching an agreement. In this regard, the evidence shows that the Respondent intended to reach an agreement; albeit one completely on its own terms and one which would relegate Local 623 to a minimal or peripheral role in representing stagehands. In light of my other conclusions that the Respondent illegally failed to bargain in good faith, it is unnecessary to reach a conclusion on this particular issue and any finding would be redundant.

B. The 8(a)(3) Allegation

The General Counsel and the Charging Party contend that after the employer declared an impasse, it violated Section 8(a)(1) and (3) by discharging the six department heads for discriminatory reasons. These were, at the time, John LeBlance (audio), Bob Davis (lineman), Daniel McMenamin (carpenter), Russ Baron (electrician), Rick Howarth (props), and Maureen Pena (wardrobe).

They also contend that the Respondent violated Section 8(a)(1) and (3) by refusing to utilize Local 623's hiring hall for job referrals. In this regard, the refusal to utilize the hiring hall could be both a violation of Section 8(a)(5) of the Act (as a unilateral change), or a violation of Section 8(a)(1) and (3), if intended as a way to avoid hiring union members or otherwise discriminating against prospective employees because of their affiliation with or support for the Union. Or with the intention to avoid the hiring of people who probably would vote for Local 623 if an election were to be held.

I have concluded that the Employer bargained in bad faith by insisting on changing the scope of the bargaining unit and by refusing to bargain about the terms and conditions of people it expressly intended to use as replacements for bargaining unit employees. In fact, it is clear to me that the intention of the Employer herein was to essentially eliminate the Union's role as a bargaining representative and to reduce its role to being simply another labor contractor which the Employer could use, at its whim.

Given this conclusion, it is my opinion that the General Counsel has made out a prima facie case, under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), showing that the Employer's refusal to hire any more Local 623 job referrals, after the Company declared an "impasse" and/or after Local 623 filed the representation petition, was motivated by its desire to free itself from any obligations it might have to having, in whole or even in part, a unionized work force.

It therefore is my conclusion that the Respondent violated Section 8(a)(1) and (3) of the Act when it replaced (and therefore discharged), the six department heads. I also conclude that the Kravis Center violated Section 8(a)(1) and (3) of the Act when it engaged in hiring practices which were designed to reduce the probability of hiring stagehands who were members of or supportive of Local 623.[15]

C. The Union Merger

We now come to the subject of the union merger. As noted above, the outcome of this issue will greatly affect the remedy that would be appropriate.

From time to time a labor organization may make changes in its organization, structure or affiliation. If the change is mainly cosmetic, such as a name change or a change in its bylaws, there can be no problem because the change does not alter the underlying identity of the organization and it can reasonably be presumed that the employees it represents continue to give it their support. In such circumstances an employer having a contract with such union, would automatically be obligated to continue to recognize and bargain with it.

However, there are situations where one union may seek to affiliate with another labor organization *or* where two or more unions merge into a new organization. In either type of circumstance, the Board must deal with the tension between different statutory policies. On one hand, Sections 7 and 9 are designed to give employees the right to select representatives of their own choosing. On the other hand, there is a substantial interest in maintaining industrial/labor stability that would be undermined every time there was a situation involving a successor union or successor employer.[16] A third consideration is that the Board should not lightly interfere with the internal affairs of unions. In *Western Commercial Transport*, 288

[15] However, I do not think that the General Counsel has made out the 8(a)(4) allegation. In my opinion, the Respondent while making a decision to refuse to use Local 623's hiring hall was intended to gerrymander any potential voting unit to insure a high probability that the Union would lose an election, this is not the same as a finding that this decision was motivated by a desire to retaliate against employees because the Union filed a legal proceeding with the Board.

[16] In *NLRB v. Financial Institution Employees (Seattle-First)*, 475 U.S. 192, 202–203, (1986), the Court stated inter alia; "[t]he industrial stability sought by the Act would unnecessarily be disturbed if every union organizational adjustment were to result in displacement of the employer-bargaining representative relationship."

NLRB 214, 217 (1988), the Board rejected a petition to amend the certification of an independent union that attempted to affiliate with a larger labor organization. Citing the Supreme Court's opinion in *NLRB v. Financial Institution Employees Local 1182*, 475 U.S. 192 (1986), the Board stated:

> The Supreme Court's decision in *NLRB v. Financial Institution Employees Local 1182, (Seattle-First)*, 475 U.S. 192 (1986), provides valuable guidance for the instant case. Although the narrow holding in Financial . . . applies solely to the question of whether non-member employees must be afforded the opportunity to vote on their bargaining representative's decision to affiliate with another union, the Court undertook to discuss the focus of the Board's general inquiry in affiliation cases.
>
> The Court reiterated that the long-understood role of the Board regarding union affiliates is to determine whether the "affiliation raises a question of representation and, if so, conducting an election to decide whether the certified union still is the choice of majority of the unit." The Court stated that changed circumstances, such as organizational and structural changes derived from the affiliation, may alter the relationship between the union and the employees it represents; and this, in turn may raise the question of whether the affiliated union enjoys continued majority support. . . .
>
> Thus, once a question concerning representation is raised as a result of dramatic changes in the bargaining representative, an affiliation vote cannot be used as a substitute for a representation proceeding before the Board to bring in a totally new bargaining representative. The Court noted that not every affiliation creates a new organization nor results in the dissolution of an existing organization and that many purely internal organizational and structural changes may operate to alter a union's identity, such as changes in the constitution or bylaws, reorganization of financial obligations, et. However "[i]f these changes are sufficiently dramatic to alter the union's identity, affiliation may raise a question of representation and the Board may then conduct a representation election. Otherwise, the statute gives the Board no authority to interfere in the union's affairs."

In cases involving either the affiliation of one union into another or where two or more unions merge, the Board has traditionally balanced the policies described above by holding that an employer must continue to bargain with a labor organization if the merger or affiliation process was conducted by a vote having adequate due process safeguards and if the organizational changes are not so dramatic that the post-affiliation entity lacks substantial continuity with the preexisting union or unions. *Sullivan Bros. Printers*, 317 NLRB 561, 562, (1995); *Mike Basil Chevrolet,* 331 NLRB 1044 (2000).

With respect to first prong of the test, it is clear that the Board has required some type of voting process even if such a vote need not meet the strict standards that the Board sets for itself in holding a representation election. Thus, the Board at least, has no requirement that an election be conducted by secret ballot, *Paragon Paint & Varnish Corp.*, 317 NLRB 747 (1995). (Although the D.C. Cir., in reviewing that case suggested otherwise, 90 F.3d 591.) Nor is it necessary that an election be conducted in strict compliance with a union's constitution and bylaws so long as adequate procedurals safeguards are met. *Mike Basil Chevrolet, Inc*., supra. Additionally, as noted in *Santa Barbara Humane Society*, 302 NLRB 833, 836 (1991), a vote limited to members, and excluding employees who are part of the bargaining unit, will not vitiate the efficacy of the vote.

The position of the Charging Party is that where there is a situation involving sister locals of an International Union, the law need impose a requirement that a vote take place; that this is purely an internal union matter that should be governed solely by the International's constitution and bylaws. In his brief, counsel states:

> Frankly, the entire voting process makes no sense. A requirement that union members vote in favor of a merger really has little to do with whether employees at the Kravis Center continued to support the Union as their collective bargaining representative. First, in accordance with *Seattle First*, non-union members would not vote at all. Because there are substantial numbers of non-union members who are referred by Local 623 to the Kravis Center, a significant portion of the bargaining unit would never be able to express their desires. Second, a vote among union members of Local 623 would include members of Local 623 who do not work at the Kravis Center and are not part of that bargaining unit. There is no reason whey they should be allowed to vote. Finally, if the ultimate desire is to determine whether a majority of employees at the Kravis Center still support the union, what sense does it make to allow members of five former sister locals to vote and affect whether the Union is still the bargaining representative for unit members of the Kravis Center.

A review of the cases cited by the parties indicates to me that in order to meet the minimum "due process" standard, employees must be given some kind of notice of a proposed merger or affiliation and that a vote of some kind has to be taken. (Even in cases involving sister locals of the same International Union. *Syscon International,* 322 NLRB 539 (1996).)

In *State Bank of India*, 262 NLRB 1108 (1982), the Board found that the minimum standards of due process were not met because (1) the distribution of a proposed merger notice was not completed until shortly before the meeting; (2) the notice failed to announce that a vote on the merger agreement would take place; (3) the individuals present at the meeting did not have access to copies of the merger agreement; (4) no records were kept of the identity of the persons attending the meeting; and (5) there was no secret ballot.

In *Lord Jim's*, 259 NLRB 1162 (1982), the evidence showed that apart from the members of one local, the members of the other local unions involved in a merger were not given an opportunity to vote on the merger. The Board affirmed the administrative law judge who stated:

> In deciding whether a union is a successor to another union in any particular unit, the Board "looks to a number of factors, including whether democratic procedures have been followed in any vote on affiliation or merger, whether the new organi-

> zation has succeeded to the assets and liabilities of the predecessor, whether the employees in the bargaining unit have had an opportunity to register their desires and whether there is a continuity in the leadership and representation of the employees in the bargaining unit." . . . The Board has indicated that whether the employees in the unit have had an opportunity to pass on the change of representative is "the primary concern" in such cases. [Citations omitted.]

The only case pointed out to me that involved a merger without a vote was *City Wide Insulation, Inc*., 307 NLRB 1 (1992). But that case did not involve the merger or affiliation of a local union that was the party to a collective-bargaining agreement. In that case, the District Council to which the local union had a connection, was merged into another District Council of the same International Union. That merger of District Councils was according to the Regional Director, in an opinion adopted by the Board, merely one involving "auxiliary functions to the Local Union" and did not affect the local union itself, which continued to exist in its present form with its extant officers.

In the present case, the evidence shows that there never was any kind of vote among the members of Local 623 whereby they were asked to decide if they were for or against the merger proposed by and ultimately accomplished by the International Union. Since there was no vote at all (or any equivalent procedure to a vote), there is, for better or worse, no need to determine if there was continuity of representation.

Therefore, as of February 1, 2000, the date that the merger became effective, Local 623 ceased to exist and the Employer was, at that point, no longer required to recognize or bargain with that union or Local 500.

I want to reiterate my earlier point that I am not concluding that the newly created Local 500 is not a labor organization within the meaning of Section 2(5) of the Act. On the contrary, the evidence here convinces me that it is an organization in which employees participate and which exists for the purpose in whole or in part, to represent employees for purposes of collective bargaining. The fact that its current officers were temporarily appointed by the International for a period of 1 year (which is almost up), does not detract from its status as a labor organization and it clearly could, if it so chose, to utilize Section 9 of the Act to seek to represent employees of the Kravis Center or any other employer.[17]

CONCLUSIONS OF LAW

1. By failing to give the proper notices pursuant to Section 8(d) of the Act and by unilaterally changing the terms and condition set forth in the contract that expired on June 30, 2000, in the absence of such notice, the Respondent violated Section 8(a)(1) and (5) of the Act.

2. By insisting as a condition of reaching an agreement, that Local 623 consent to a change in the scope of the bargaining unit, the Respondent violated Section 8(a)(1) and (5) of the Act.

3. By insisting that it intended to create a new classification of employees which would be assigned to do bargaining unit work, and by insisting that this group would not be within the bargaining unit or covered by any collective-bargaining agreement, the Respondent violated Section 8(a)(1) and (5) of the Act.

4. By declaring an impasse on September 9, 2000, and by unilaterally changing the existing terms and conditions of employment set out in the contract that expired on June 30, 2000, the Respondent violated Section 8(a)(1) and (5) of the Act.

5. By withdrawing recognition from Local 623, the Respondent violated Section 8(a)(1) and (5) of the Act.

6. By discharging the department heads, the Respondent violated Section 8(a)(1) and (3) of the Act.

7. By refusing to use Local 623's hiring hall for the referral of stagehands after September 2000, the Respondent violated Section 8(a)(1) (3) and (5) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged John LeBlance, Bob Davis, Daniel McMenamin, Russ Baron, Rick Hearth, and Maureen Pena, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from the effective dates of such actions to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The remaining portions of the remedy are complicated by the finding that Local 623 ceased to exist as a labor organization as of February 1, 2002. (This would be more than a year after the violations in this case occurred.) For example, although I found that the Respondent illegally failed to bargain in good faith with Local 623, I cannot recommend that the Respondent be compelled to bargain with an organization which no longer exists or that it rescind the unilateral changes made. And as I have found that the merger of Local 623 into Local 500 was done in accordance with the constitution and bylaws of the International Union, the fact that the employees of Local 623 did not vote on that question is, by itself, sufficient to raise a question concerning representation thereby allowing the Respondent to refuse to bargain with the successor union.

Further, the typical remedy for 8(a)(5) violations involving unilateral changes, even after a contract has expired, is to order the Respondent to rescind those changes until it bargains in good faith and to make employees whole for any loss of wages or other benefits that they may have suffered because of the changes. *Made 4 Film, Inc*., 337 NLRB 1152 (2002); *Gloversville Embossing*, 314 NLRB 1258, 1265 (1994). But by February 1, 2002, there no longer was any organization with which the Respondent would have had a legal obligation to bargain. To that extent, it seems to me that whatever obligation the Respondent may have had to make employees whole for the 8(a)(5) unilateral changes, would expire as of February 1, 2000. Therefore, in defining the Respondent's backpay obligation

[17] *Alto Plastics Mfg. Corp*., 136 NLRB 850, 851–852 (1962); *East Dayton Tool Co*., 194 NLRB 266 (1972).

resulting from the unlawful unilateral changes, it is my conclusion that this has to be cut off as of February 1, 2002.

Even assuming that a make-whole remedy is granted for the unilateral change findings, there is a question as to whom that remedy applies. After September 2000, the Respondent no longer hired any people from Local 623's hiring hall, but instead utilized its own employees, or contractors who hired their own employees, to do stagehand work. To the extent that employees directly employed by Respondent and who worked at Dreyfoos Hall would be part of the established bargaining unit, they should be paid the difference between what they got and what they should have received under the terms of the contract that expired in June 2000.[18]

The evidence establishes that since the end of September 2000, the Respondent has refused to hire employees through Local 623's hiring hall for job referrals to Dreyfoos Hall. I have concluded that this constituted an unlawful unilateral change of the expired collective-bargaining agreement, in violation of Section 8(a)(5) of the Act. I have further concluded that this change was, at least in substantial part, motivated by the Respondent's intention to avoid any future obligation to bargain with Local 623, by refusing to hire individuals who either were members of that union or who would likely vote for that union in the event that an election were to be held. As such, it was my conclusion that the refusal to utilize Local 623's hiring hall not only violated Section 8(a)(5), but that it was discriminatorily motivated in violation of Section 8(a)(1) and (3) of the Act.

It is impossible to know at this point, the identity of individuals who likely would have been referred to the Respondent if it had continued to utilize Local 623's referral system. Nor can it now be determined how long such people would have worked or what they would have been paid. Therefore, this question must be left open for compliance. (And I don't envy their task.)

In the absence of an 8(a)(3) finding, I would have recommended that the obligation to continue to utilize Local 623's hiring hall would have ceased on February 1, 2000, when Local 623 ceased to exist and when there no longer was an organization with which the Respondent had an obligation to bargain.

However, as I have concluded that the Respondent has discriminatorily refused to hire individuals because of their union affiliation, it seems to me that affirmative relief under Section 8(a)(3) should not depend upon the Respondent's lack of bargaining relationship to Local 500. The fact that the Respondent has no present obligation to bargain with that labor organization does not mean that Local 500 can't be used as a source of qualified labor if that would serve to remedy the unlawful refusal of the Respondent to hire union affiliated employees. And to this extent only, I shall grant Local 500's motion to intervene in this proceeding; not as a successor to Local 623, having a right to bargain with the Respondent, but rather as the post merger labor organization, whose hiring system can be used as a means to remedy the Respondent's illegal refusal to hire union affiliated employees.[19]

Therefore, in order to provide affirmative relief for the Respondent's discriminatory refusal to hire, I shall recommend that if requested to do so by Local 500, that the Respondent be required to utilize Local 500's hiring hall for the hiring of stagehands to be employed by Kravis for its productions at Dreyfoos Hall for a period of 1 year from the date that it complies with this Order.[20]

Although I have concluded that the Respondent should affirmatively be ordered to utilize Local 500's hiring hall as a remedy for the 8(a)(3) portion of this case, I should note that because there does not exist any collective-bargaining agreement or any present obligation to bargain, any employees referred by Local 500 would be paid in accordance with the wage rates and terms that the Respondent pays other similarly situated employees performing the same or substantially the same work. Put another way, such employees would not be entitled to receive wage rates or benefits in accordance with any existing labor contract.

In all instances where the Order requires that employees be made whole, interest should be granted and calculated in accordance with *New Horizons for the Retarded*, supra.

[Recommended Order omitted from publication.]

[18] I note that the prior contracts between the Respondent and Local 623 contained a provision that 18-1/2 percent of the gross payroll was to be deducted and remitted to a payroll company. Such payments clearly were not wages or benefits for the benefit of bargaining unit employees paid for bargaining unit services. As such, any backpay award, should preclude such payments.

[19] In this context, the term "union affiliated employees" does not mean persons who are union members. It simply means individuals who are qualified and choose to use the union hiring hall for job referrals.

[20] In *Mainline Contracting Corp*., 334 NLRB 922, (2001), the Board ordered the employer therein to consider for hire, a group of people for future job openings and to notify the Union and the Regional Director of future openings in positions for which the discriminatees applied or to substantially equivalent positions, for a period of 6 months from the date of the Order. In the present case, however, I am extending the period for 1 year because, the period that the Respondent actually hires is limited from the end of September to May of each year. Therefore, the commencement of a 6 month period could easily occur at a time when Kravis is not hiring any stagehands. Further, the Respondent has, to date, discriminated against union affiliated stagehands for two full seasons and a 1-year preference would, in my opinion, tend to restore the status quo ante.