

Minn-Dak Farmers Cooperative and American Federation of Grain Millers and its Local Union No. 405. Case 18-CA-12051

May 28, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On a charge filed January 10 and amended April 30, 1992, by the American Federation of Grain Millers and its Local Union No. 405, the General Counsel of the National Labor Relations Board issued a complaint February 24, 1992 (amended April 7 and May 13), against Minn-Dak Farmers Cooperative, the Respondent, alleging that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to recognize and bargain with American Federation of Grain Millers Local Union No. 405 (Local 405) as the exclusive bargaining representative of the Respondent's employees in an appropriate bargaining unit. The complaint further alleged that the Respondent violated Section 8(a)(5) and (1) by bypassing Local 405 and dealing directly with the unit employees by presenting them with a proposal for a new grievance procedure which excluded Local 405 from participation and by implementing this grievance procedure. The Respondent filed a timely answer admitting in part and denying in part the allegations in the complaint.

On June 23, 1992, the General Counsel, the Respondent, and the Charging Parties filed with the Board a stipulation and motion to transfer the case to the Board. The parties stated that the stipulation and attached exhibits contained all relevant facts and evidence necessary for a decision in the case and that they waived a hearing before and decision by an administrative law judge. On September 8, 1992, the Board approved the stipulation and transferred the proceeding to the Board for issuance of a decision and order. The General Counsel, the Respondent, and the Charging Parties filed briefs.¹

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

On the entire record and the briefs, the Board makes the following

¹ The General Counsel also filed a motion to strike portions of the Respondent's brief or to file a reply brief. On October 21, 1992, the Board issued an order granting the motion to strike in part and granting the motion to file a limited reply brief. Thereafter, the General Counsel and the Respondent filed reply briefs.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a North Dakota corporation, has been engaged in the manufacture and nonretail sale and distribution of beet sugar and related byproducts at its office and place of business in Wahpeton, North Dakota. During 1991, in conducting its business operations, the Respondent sold and shipped from its Wahpeton facility goods valued in excess of \$50,000 directly to points outside the State of North Dakota and purchased and received at its Wahpeton facility goods valued in excess of \$50,000 directly from points outside the State of North Dakota.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

The Respondent operates primarily a seasonal business which peaks immediately after the sugar beet harvest. Until the harvest is completely processed, the Respondent's plant operates 24 hours a day, 7 days a week. During the 1990-1991 peak season, the Respondent employed about 280 production and maintenance employees. During the off-season in 1991, the Respondent employed about 140 employees. Most of the Respondent's peak season work force consists of individuals who worked for the Respondent during prior peak seasons.

Before 1977, the Minn-Dak Farmers Cooperative Employees' Association (the Association), an independent union, was recognized as the exclusive representative of the Respondent's Wahpeton, North Dakota production and maintenance employees. Since then, the Association and the Respondent have been parties to a number of collective-bargaining agreements, including one with a term from June 1, 1988, to May 31, 1991. In July 1991, the Association had about 78 dues-paying members.

The Respondent and the Association began negotiating for a new collective-bargaining agreement in about April 1991.² In late July, the Association's executive committee decided to seek bargaining assistance from the American Federation of Grain Millers (AFGM). On July 25, at a meeting open to all employees of the Respondent, the Association voted to commence formal efforts to affiliate with the AFGM. On July 29, the Association mailed to employees a notice that a meeting

² All dates are in 1991, unless otherwise indicated.

would be held on August 6 to consider affiliation with the AFGM. The notice was sent to all production and maintenance employees whose names appeared on a list provided by the Respondent and represented by it as a list of all current employees' names and addresses.

On August 6, the Association conducted a meeting attended by about 100 employees and by representatives of the AFGM. The meeting lasted over 3 hours and all present were permitted to and did engage in questions and discussion concerning consequences of affiliation. On about August 7, the Association sent notice to all employees on the list provided by the Respondent that a meeting to vote on the question of affiliation would be held August 22.

On August 20, the Association's and the Respondent's bargaining committees agreed to a contract proposal for presentation to the employees for ratification. The employees rejected the proposal. On August 22, the bargaining committees met again. The Respondent withdrew all its bargaining offers.

About 6 p.m. on August 22, the Association, pursuant to the August 7 notice, held a meeting open to all the Respondent's employees. For one half hour, the meeting consisted of further question-and-answer discussion, with AFGM representatives present. After the discussion period closed, the AFGM representatives were expelled from the meeting. The employees approved affiliation with the AFGM by a secret-ballot vote of 103 to 78. The Association kept a list of the employees who voted. Approximately 77 were dues-paying members, although ballots of members and nonmembers were not segregated.

The affiliated union was designated Local 405, American Federation of Grain Millers. Local 405 is an unincorporated association whose members are all employees of the Respondent and whose purpose is at least in part to deal with the Respondent concerning wages, hours, and conditions of employment for its members. Local 405's charter has not been formally issued by the AFGM, its issuance contingent only on recognition of Local 405 by the Respondent.

Immediately after the affiliation vote, Association President Edward Papa became Local 405's president, and Association Shift Representatives Rick Ehlert, Craig Erickson, Mike Sonju, and Chuck Evevold became Local 405's vice president, chief steward, recording secretary, and sergeant at arms, respectively. Calvin Hoeft, who was not an officer of the Association, became Local 405's secretary/treasurer.

On August 23, the Association informed Larry Steward, the Respondent's president and chief executive officer, of the affiliation vote. On August 29, Steward sent a letter to employees stating that the Respondent had decided not to recognize the Association's "attempt at affiliation" with the AFGM and that

the Respondent was willing to continue its bargaining relationship with the Association but was "not willing to bargain with the Grain Millers Union." The Respondent's reason for this position, Steward stated, was that the affiliation vote did not meet the requirement of the Association's bylaws that affiliation be decided by a majority of the membership.³ While the vote for affiliation was 103 to 78, those in favor constituted less than a majority of the Association's total membership, which, Steward stated, was composed of the Respondent's 282 production employees.

Supervisors of the Respondent and representatives of the employees, generally including Edward Papa, have occasionally met since the affiliation vote to discuss wages and working conditions. The Respondent consistently took the position that it was meeting with the Association. The employees took the position that they were now represented by Local 405. The parties essentially agreed to disagree on the precise identity of the representative and leave the issue for resolution by the Board or the courts.

On November 22, a lawsuit was filed by "Minn-Dak Farmers Cooperative Employees Association a/k/a American Federation of Grain Millers, Local 405" in United States District Court for the District of North Dakota seeking a declaratory judgment that the Respondent must honor the affiliation vote. On March 10, 1992, the Respondent filed a motion to dismiss for lack of jurisdiction, contending that the Board had exclusive jurisdiction over the matters raised in the lawsuit. In its July 28, 1992 decision, the court refrained from deciding the jurisdictional issue but dismissed the lawsuit on the merits. The court agreed with the Respondent's interpretation of the Association's bylaws as requiring that affiliation must be approved by a majority of the entire membership. Because it found that the Association had 282 members and that 103 of them had voted in favor of affiliation, the court held that the Respondent was not required to recognize the affiliation vote.

On about April 3, 1992, Respondent Director of Human Relations Jerry Pierson and Vice President of Operations Rich Richter presented to Edward Papa a memorandum, dated March 25, 1992, concerning a proposal for a grievance procedure. The memorandum stated that the grievance procedure contained in article 9 of the collective-bargaining agreement that had expired May 31, 1991, was no longer binding. The memorandum proposed, nevertheless, that grievances would be processed in accordance with article 9 if

³Bylaw chapter 1, sec. 5, the relevant bylaw, stated as follows:

Membership in Affiliate Organizations: The Executive Board of the Association may propose affiliation with other organizations, and if the proposal is approved by a majority vote of Association members, Association members must also maintain membership in the affiliate organization in accordance with the affiliation agreement.

“the Employees Committee agrees to process the grievance and function as the elected representatives of the [Association] only.” If, however, the “Employees Committee” declined to agree, article 9 would be used as a “guideline,” but with certain changes that would eliminate the role of the Association in the grievance process and require each employee to represent himself. The changes also would make decisions at step 3 of the grievance procedure final and would eliminate grievance arbitration. On April 24, 1992, Papa informed Pierson that neither he nor the other employees would agree to the proposal.

On about April 23, 1992, employee Frank Fink attempted to file a grievance, accompanied by Evevold, who presented himself as an officer of Local 405. Pierson refused to accept the grievance until the employees agreed to the Respondent’s April 3, 1992 grievance procedure proposal. A day later, Fink presented the grievance as an individual on his own behalf.

B. *The Parties’ Contentions*

The General Counsel and Charging Parties argue as follows. The Respondent has an obligation to recognize and bargain with Local 405, because the Respondent failed to show that the affected employees were denied an opportunity to vote on the Association’s affiliation with the AFGM in an election conducted with adequate due-process safeguards or that the affiliation resulted in a loss of substantial continuity between the pre- and post-affiliation union. Allowing an affiliation election to be decided by a majority vote of the employees actually voting is sufficient to meet the due-process requirements. Likewise, permitting all unit employees, including those who were not Association members, to vote in the election did not violate the due-process requirements. Further, loss of substantial continuity between the pre- and post-affiliation union has not been shown, as there was continuity in union officers and membership, and local autonomy was retained on approval of contracts and authorization of strikes. The Respondent’s bargaining obligation does not turn on whether the affiliation was valid under the Association’s bylaws. In any event, the Respondent is incorrect that the Association’s bylaws require an affiliation to be approved by a majority of all Association members. Finally, as the Respondent had an obligation to recognize and bargain with Local 405, the Respondent’s failure to do so, its direct dealing with employees over a new grievance procedure, and its unilateral implementation of the new grievance procedure violated Section 8(a)(5) and (1) of the Act.

The Respondent argues as follows. The complaint should be dismissed because the General Counsel has failed to meet his burden on both the due-process and continuity issues. Due process requires compliance with the procedural requirements that the union mem-

bers imposed on themselves through their constitution and bylaws. The affiliation vote did not satisfy due process because it failed to meet the Association’s bylaw requirement that affiliation be decided by a majority vote of Association members, not merely a majority of those voting. This view is supported by the district court’s decision dismissing the Association’s lawsuit; that decision should estop Local 405 and the Board from relitigating whether the affiliation vote was valid under the Association’s bylaws. The vote further failed to meet due-process requirements because all unit employees, regardless of whether they were Association members, were allowed to vote; thus, the vote failed to show that a majority of the 78 dues-paying Association members favored affiliation. Additionally, the identity of the Association will substantially change if the affiliation is recognized, because the AFGM’s constitution substantially restricts local unions’ autonomy in the areas of bylaws, grievances, decisions to strike, and approval of collective-bargaining agreements.

In a reply brief limited to the issue of the district court’s decision, the General Counsel contends that the court’s decision is not entitled to deference because the court lacked jurisdiction over the lawsuit; the bylaw issue decided by the court is not dispositive of the Respondent’s bargaining obligation; and the Board is not collaterally estopped by the court’s decision, as the Board was not a party to the lawsuit.

C. *Discussion*

1. *Applicable principles*

Once certified by the Board or voluntarily recognized by an employer as the majority representative of a unit of employees, a union enjoys a presumption of continuing majority support and the employer has a corresponding continuing obligation to recognize and bargain with the union. See *Burger Pits, Inc.*, 273 NLRB 1001 (1984), and cases cited therein. The union’s subsequent affiliation with a national or international organization does not, standing alone, affect the union’s representative status or terminate the employer’s duty to bargain with the union. See *Toyota of Berkeley*, 306 NLRB 893, 894 (1992). This is so because “[t]he basic purpose of the National Labor Relations Act is to preserve industrial peace,” *NLRB v. Financial Institution Employees (Seattle-First National Bank)*, 475 U.S. 192, 208 (1986), and

[t]he industrial stability sought by the Act would unnecessarily be disrupted if every union organizational adjustment were to result in displacement of the employer-bargaining representative relationship.” [Id. at 202–203, quoting *Canton Sign Co.*, 174 NLRB 906, 909 (1969).]

Thus, following a union's affiliation with a national or international organization, an employer's duty to bargain with the union continues unless the vote on affiliation was not conducted with adequate due-process safeguards or the changes caused by the affiliation were so "dramatic" that the postaffiliation union lacked substantial continuity with the preaffiliation union. See *Seattle-First*, 475 U.S. at 199, 206; *May Department Stores Co.*, 289 NLRB 661, 664-665 (1988), *enfd.* 897 F.2d 221 (7th Cir. 1990); *Hammond Publishers*, 286 NLRB 49, 50 (1987). Further, it is well established that the "party seeking to avoid an otherwise binding bargaining obligation by asserting the change in the bargaining representative following a merger bears the burden of demonstrating that change." *H. B. Design & Mfg.*, 299 NLRB 73, 73-74 (1990). Accord: *May Dept. Stores Co. v. NLRB*, 897 F.2d 221, 228 (7th Cir. 1990); *News/Sun Sentinel Co. v. NLRB*, 890 F.2d 430, 432 (D.C. Cir. 1989).

Our inquiry in this case is further informed by the Supreme Court's reasoning in *Seattle-First*, above. The Court there rejected the Board's then newly devised rule that due process required a union to allow all employees in the bargaining unit, not merely those who were union members, to participate in an affiliation vote. In this regard, the Court found that, under the Act, the Board could not discontinue a certified union's recognition by an employer without determining that a question concerning representation, which would warrant an election, had been raised. The Court further found that the Board's rule as to the scope of the affiliation vote violated the Act's policy against outside interference in union decisionmaking.

2. Due-process issue

Applying the foregoing principles to the facts of this case, we find, as an initial matter, that the Respondent has failed to show that the vote on the Association's affiliation with the AFGM was conducted without adequate due-process safeguards. We find without merit the Respondent's contention that the due-process requirement was not met because the Association failed to follow a bylaw provision that assertedly required the affiliation be approved by a majority of the Association's entire membership. We need not pass on whether the Respondent's interpretation of the bylaw in question is correct. The Board has long held on affiliation issues that strict adherence to the union's constitution is not a controlling factor; what is important is whether the members had a proper opportunity to express their desires.⁴ The Respondent does not con-

⁴See *Toyota of Berkeley*, *supra*; *F. W. Woolworth Co.*, 305 NLRB 775 (1991); *Santa Barbara Humane Society*, 302 NLRB 833, 837 (1991); *Chas. S. Winner, Inc.*, 289 NLRB 62, 68 fn. 22 (1988); *Ocean Systems, Inc.*, 223 NLRB 857, 859-860 (1976); *Newspapers, Inc.*, 210 NLRB 8, 9 fn. 3 (1974), *enfd.* 515 F.2d 334 (5th Cir.

tend, nor does the record show, that due process was not satisfied by the Association's notice of election to its members, the opportunity afforded them to discuss the election, or the precautions used to maintain ballot secrecy. Moreover, apart from any internal union rule, the Respondent has failed to show how the scope of participation in the affiliation vote here subverted due process to the extent that it raised a question concerning representation. Insofar as the Respondent argues that due process itself requires a majority vote of the entire membership, we note that the Board has held that an affiliation vote in which less than half of the members participated met the due-process safeguards. See *William B. Tanner Co.*, 212 NLRB 566, 567 (1974).⁵ Accordingly, we find that the Association's asserted failure to follow its bylaw did not cause the affiliation vote to lack adequate due-process safeguards.

Moreover, contrary to the Respondent's contention, the district court's decision in the Association's lawsuit does not affect our resolution of this issue, for two reasons. First, the district court lacked jurisdiction over the lawsuit. *West Point-Pepperell, Inc. v. Textile Workers Union*, 559 F.2d 304 (5th Cir. 1977), is authority directly on point. That case concerned a lawsuit, like the one here, seeking resolution of an employer's obligations following the merger of its employees' bargaining representative with another union. Noting that the Act vests exclusive authority in the Board to pass on issues of representation, the court of appeals affirmed dismissal of the complaint for lack of jurisdiction, explaining:

Whether or not a merged union should remain as the bargaining agent of a unit of employees depends on a factual determination, whether it is a continuation of the old union under a new name

1975); *Hamilton Tool Co.*, 190 NLRB 571, 574 fn. 8 (1971). The cases on which the Respondent relies in asserting that due process requires compliance with the union's constitution and bylaws do not support that proposition. In each case, the Board, in finding that the employer's bargaining obligation with the union *continued* after the union's affiliation, merely noted that the union had followed its constitution's provisions in undertaking the affiliation. The Board, however, did not indicate that compliance with the constitution was a minimum requirement for satisfying due process. See *Aurelia Osborn Fox Memorial Hospital*, 247 NLRB 356, 359 (1980); *Canton Sign Co.*, 174 NLRB 906, 908 (1969); *National Carbon Co.*, 116 NLRB 488, 502 (1956). Rather, as noted above, the Board has consistently stated the contrary.

⁵See also *Central Washington Hospital*, 303 NLRB 404, 414 (1991) (no inference drawn of due-process defects from low election turnout), *enfd.* sub nom. *NLRB v. Universal Health Systems*, 967 F.2d 589 (9th Cir. 1992). We further note that while union affiliation elections are not required to meet the standards of Board-conducted elections, *Toyota of Berkeley*, *supra*; *Aurelia Osborn Fox Memorial Hospital*, 247 NLRB 356, 359 (1980), even Board-conducted elections are determined by a majority of the valid votes cast, without regard to the total number of eligible voters. See *Lemco Construction*, 283 NLRB 459 (1987).

or is a substantially different organization. This calls for a resolution of the right to represent, a matter within the exclusive domain of the NLRB. [Id. at 307.]

Thus, the applicable precedent shows that, as the Board had exclusive jurisdiction over the issue presented by the Association's lawsuit, the district court lacked jurisdiction over the lawsuit.⁶

Additionally, even assuming *arguendo* that the court had jurisdiction, its ruling that the Respondent was not required to recognize the affiliation vote is not entitled to deference, because it was based on an incorrect test. As indicated above, the criteria used to determine whether a union's affiliation alters an employer's statutory duty to bargain are whether the affiliation vote was conducted with due-process safeguards and whether there was substantial continuity between the pre- and post-affiliation union. See *Seattle-First*, above, 475 U.S. at 199. In finding the Association's lawsuit without merit, however, the district court determined the Respondent's obligation to honor the affiliation vote merely on the basis of whether the vote complied with the Association's bylaws.⁷ Thus, the court failed to apply the appropriate test. In sum, we agree with the General Counsel that the court's decision need not be given deference.⁸

Our finding that, contrary to the court's decision, the Association's asserted failure to follow its bylaw did not relieve the Respondent of its obligation to recognize the postaffiliation union finds further support in the Supreme Court's decision in *Seattle-First*. In rejecting the Board's rule that nonmembers be allowed to vote on union affiliations, the Court, 475 U.S. at 209, stated:

[Under t]he Board's rule . . . an employer may invoke a perceived procedural defect to cease bargaining even though the union succeeds the organization the employees chose, the employees have made no effort to decertify the union, and the em-

ployer presents no evidence to challenge the union's majority status. Any uncertainty on the employer's part does not relieve him of his obligation to bargain collectively. "If an employer has doubts about his duty to continue bargaining, it is his responsibility to petition the Board for relief. . . . To allow employers to rely on employees' rights in refusing to bargain with the formally designated union is not conducive to [industrial peace]." *Brooks v. NLRB*, 348 U.S. 96, 103 (1954).

The same can be said of the Respondent's reliance, in refusing to recognize Local 405, on the possible rights of Association members to object to perceived defects in the Association's procedures.

We also find no merit in the Respondent's contention that the due-process requirement was not met because, as the Association allowed all unit employees to vote on affiliation with the AFGM, the election did not determine whether a majority of the Association's 78 dues-paying members favored the affiliation. In *Seattle-First*, as noted above, the Supreme Court rejected the Board's then-held position that, for an affiliation election to meet the due-process requirement, all unit employees, including nonmembers of the union, had to be permitted to vote. The Board's reason for imposing this requirement had been that, because the union served as the exclusive bargaining representative for all unit employees, not solely those who were union members, all unit employees should have a voice in deciding whether to approve the union's proposed affiliation. The Court found that the Act provided other mechanisms for deciding whether employees desire a change in a union's representative status and that the Board's rule exceeded its authority under the Act. The Court, however, gave no indication that a union could not voluntarily include the entire bargaining unit, rather than only the union membership, in the vote on the affiliation issue.

We therefore find it entirely fair and reasonable for a union to let a question of affiliation be determined by a vote of the entire bargaining unit that the union represents. Such a vote, of course, may not necessarily ascertain—at least to a mathematical certainty—the majority view of union members in the unit, although in most cases the views of union members probably are not likely to differ greatly from those of unit employees overall. In any event, we can hardly find that due process is subverted by a union's allowing all unit employees to vote on an affiliation involving the union that is *their* exclusive bargaining representative. To the contrary, this more inclusive procedure would seem to afford, if anything, a greater degree of certainty on the only question relevant to the Respondent—that of the

⁶ *West Point-Pepperell* has been cited with approval by the court of appeals in whose geographical jurisdiction the Respondent is located. See *Electrical Workers IBEW Local 204 v. Iowa Electric Light & Power Co.*, 668 F.2d 413, 416–417, 418 (8th Cir. 1982). The primary jurisdiction rationale considered in that case as an alternative to the exclusive jurisdiction theory would also militate in favor of the district court's declining jurisdiction over the Association's lawsuit, as the affiliation issue had been presented to the Board by Local 405's unfair labor practice charge.

⁷ Moreover, the court failed to explain why the Respondent, any more than the Board itself, would have a right to, in effect, enforce the Association's bylaws governing its relationship with its own members under these circumstances.

⁸ As indicated above, the Association's asserted failure to comply with its own bylaws is not determinative of whether the due-process standard was satisfied. This fact renders irrelevant the Respondent's argument that the Board is collaterally estopped by the court's decision from deciding whether the affiliation vote complied with the bylaws.

Union's continued majority status.⁹ The Act's policy against outside interference in union decisionmaking that the *Seattle-First*, Court invoked would surely be violated if we were to find that the Association's internal decision to permit all unit employees to vote on the affiliation jeopardized its representational status.¹⁰

3. Continuity issue

We further find that the Respondent has failed to show that the Association's affiliation with the AFGM changed the Association so dramatically that it lacked substantial continuity with the preaffiliation entity. Following affiliation, the Association, renamed Local 405, had many of the same officers as before. Its president remained the same, and the four Association shift representatives continued as officers of Local 405. Further, we find no merit in the Respondent's contention that Local 405 did not retain substantial autonomy concerning the important areas of contract bargaining, grievance handling, and calling strikes.¹¹ That the AFGM president or executive board possesses formal authority under the AFGM's constitution to take actions affecting such matters as a local's grievance han-

⁹In arguing that the Association improperly allowed all unit employees to vote, the Respondent took the position that the Association's membership was made up of its 78 dues-paying members. However, in arguing that the affiliation vote did not comply with the Association bylaw assertedly requiring approval by a majority of the entire membership, the Respondent took the position that the Association's membership was composed of all 280 unit employees. If the Respondent's latter position is correct, the Association, by permitting all unit employees to vote on the proposed affiliation, was merely attempting to allow its membership to decide the affiliation question—as the Respondent argues it was obligated to do. In resolving this case, we need not decide whether the Association's membership was composed of all unit employees or only those who paid dues.

¹⁰In finding that the Respondent was not obligated to recognize the AFGM because the affiliation vote did not meet the asserted requirement of the Association's bylaws that a majority of members approve an affiliation, our dissenting colleague misconceives the inquiry. As the Supreme Court stated in *Seattle-First*, 475 U.S. at 207:

In amending the union's certification or ordering the employer to bargain, the Board does not "sanction" the union's affiliation. Rather, it signifies only that the reorganized union continues as an ongoing entity that the employer should continue to recognize.

Thus, it is essentially irrelevant to the Board's inquiry whether the procedures followed in approving the affiliation were in accordance with the union's own governing documents. Rather, as described above, our proper focus in union affiliations is due process and substantial continuity, and we find these tests were met here. Moreover, the essential facts here are that in an election in which the 280 unit employees were afforded adequate notice, opportunity to discuss the issues, and ballot secrecy, they approved the Association's affiliation with the AFGM by a vote of 103 to 78. To find, under these circumstances, that, despite the clear vote in favor of affiliation with the AFGM, the Respondent is, nevertheless, not required to recognize the AFGM because a provision of the Association's bylaws was not met would truly exalt form over substance.

¹¹See *Central Washington Hospital*, 303 NLRB 404 fn. 7 and accompanying text (1991), enf. sub nom. *NLRB v. Universal Health Systems*, 967 F.2d 589 (9th Cir. 1992).

dling, contract approval, or decisions to strike does not support a finding of lack of substantial continuity absent evidence that the such authority was exercised with some regularity.¹² Thus, various provisions of the AFGM constitution cited by the Respondent are unpersuasive.

In particular, the Respondent argues that under article I, section 7 of the AFGM constitution, Local 405 will lack power to pursue its own grievances or make representational decisions. That section, however, authorizes the local union, as well as the international union, to act for members in any matters affecting their status as employees and to represent and bind them in the prosecution and settlement of all grievances, complaints, or disputes arising out of the employer-employee relationship.¹³ Thus, rather than depriving the local of power, this provision grants power to it. Moreover, there is no showing that the international limits the authority of its locals by routinely involving itself in prosecution and settlement of members' grievances, complaints, or disputes.

The Respondent argues that article II, section 8(g) of the AFGM Constitution removes authority from the local by granting the International president authority to instruct the local whether to pursue grievances. The provision, however, does much less than the Respondent suggests. Article II, section 8(g) solely concerns situations in which a grievance is terminated by a local union official. The section establishes a procedure for the grievant to protest the termination to the local president, in which case the matter is referred to the local executive board for review. The section provides that a decision of the board "to pursue or not to pursue the grievance . . . shall be final unless the Executive Board is otherwise instructed by the International President." Thus, this section does not give the international president general authority to instruct the local whether to pursue a grievance. Rather, the International president's authority under this section pertains only to a local executive board's determination of protests of terminated grievances. There is no evidence of how often such protests are made or how often local executive boards' decisions of such protests are re-

¹²See *Central Washington Hospital*, above, 303 NLRB at 405 fn. 10 and accompanying text.

¹³Art. I, sec. 7, provides as follows:

REPRESENTATION: The International Union and the Local Union to which the member belongs, and each of them, are by him irrevocably designated, authorized and empowered exclusively to appear and act for him and in his behalf before any court, arbitrator, board committee or other tribunal or agency in any matter affecting his status as an employee and exclusively to act as his agent, either in his name or the name of the Union as the case may be, to represent and bind him in the presentation, prosecution, adjustment and settlement of all grievances, complaints or disputes of any kind or character arising out of the employer-employee relationship, as fully and to all intents and purposes as he might or could do if personally present.

versed by the International president. Thus, the Respondent has failed to show that article II, section 8(g) significantly encroaches on Local 405's authority.

Contrary to the Respondent, article V, section 6 of the AFGM Constitution does not substantially limit the local's decisions regarding if and when to strike. That section provides that "[n]o strike action by any Local Union or group of Local Unions shall be deemed authorized actions, unless approved in advance by the General Executive Board, or if it is not in session, by the General President." Thus, this provision gives the AFGM no power to overrule a local's decision not to strike. Moreover, this section purports only to delineate conditions under which a strike action is authorized by the AFGM. There is no evidence concerning how often the AFGM's general executive board or general president deny approval to local unions' strike actions. Consequently, the Respondent has failed to show that article V, section 6 restricts Local 405's authority in any material way.

Similarly, the provision of article IV, section 13 requiring collective-bargaining agreements to be approved by the AFGM's president or his authorized representative has not been shown to significantly impinge on Local 405's autonomy, absent any evidence concerning the frequency with which collective bargaining agreements reached by AFGM locals are disapproved by the president or his representative.

Finally, we do not find that Local 405's autonomy is unduly restricted by the requirement in article II, section 8 of the AFGM constitution that each local's bylaws be substantially the same as model bylaws appended to the constitution and that amendments to local bylaws be approved by the AFGM's president. The Respondent does not contend that the model bylaws themselves vary substantively in any significant way from the Association's bylaws. Further, there is no evidence of how often or under what circumstances locals' proposed bylaw changes are disapproved by the AFGM president. In sum, the provisions of the AFGM constitution on which the Respondent relies do not establish that the Association's affiliation with the AFGM changed it so dramatically that it lacks continuity with the entity that was the Association prior to the affiliation.

Having found that the Respondent has failed to show that the vote on the Association's affiliation with the AFGM was not conducted with adequate due-process safeguards or that the affiliation with the AFGM changed the Association (renamed Local 405) so dramatically that it lacked substantial continuity with the preaffiliation entity, we conclude that the Respondent violated Section 8(a)(5) and (1) by failing and refusing to bargain with Local 405 as the exclusive bargaining representative of the Respondent's production and maintenance employees. We therefore find that the Re-

spondent also violated Section 8(a)(5) and (1) by directly dealing with unit employees concerning a proposal for a new grievance procedure¹⁴ and by unilaterally implementing a grievance procedure that excluded Local 405 from participation.¹⁵

CONCLUSION OF LAW

By failing and refusing since about August 29, 1991, to recognize and bargain with Local 405 as the exclusive bargaining representative of the Respondent's employees in an appropriate bargaining unit,¹⁶ by bypassing Local 405 and presenting directly to unit employees on about April 3, 1992, a proposal for a new grievance procedure that excluded Local 405 from participation, and by unilaterally implementing the proposed grievance procedure on about April 23, 1992, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order the Respondent to cease and desist and to take certain affirmative action to effectuate the policies of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, Minn-Dak Farmers Cooperative, Wahpeton, North Dakota, its officers, agents, successors, and assigns, shall

1. Cease and desist from (a) Refusing to recognize and bargain with American Federation of Grain Millers and its Local 405, as the exclusive bargaining representative of the employees in the following appropriate unit:

All specific regular and campaign employees designated by job classification in Article 18 of the collective bargaining agreement between Minn-Dak Farmers Cooperative Employees' Organization and Minn-Dak Farmers Cooperative effective from August 3, 1988 through May 31, 1991, excluding all other employees.

(b) Bypassing Local 405 and dealing directly with unit employees concerning a new grievance procedure.

¹⁴ See, e.g., *Allied-Signal, Inc.*, 307 NLRB 752 (1992).

¹⁵ See *Circuit-Wise, Inc.*, 306 NLRB 766 (1992); *Harowe Servo Controls*, 250 NLRB 958, 1049 (1980).

¹⁶ The complaint alleged and the Respondent's answer admitted that the following employees of the Respondent constitute an appropriate bargaining unit:

All specific regular and campaign employees designated by job classification in Article 18 of the collective bargaining agreement between Minn-Dak Farmers Cooperative Employees' Organization and Minn-Dak Farmers Cooperative effective from August 3, 1988 through May 31, 1991, excluding all other employees.

(c) Unilaterally implementing a grievance procedure that excludes Local 405 from participation.

(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) Recognize and, on request, bargain with Local 405 as the exclusive representative of all employees in the unit described in this decision with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) On the request of Local 405, set aside any grievance that was unilaterally adjusted by the Respondent pursuant to the grievance procedure that was implemented about April 23, 1992.

(c) Post at its Wahpeton, North Dakota facility copies of the attached notice marked "Appendix."¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt 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.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

MEMBER OVIATT, dissenting.

Unlike my colleagues, I cannot find that the Respondent was obligated to bargain with the Union. Rather, in my view, the Union's affiliation process was flawed because the Union did not comply with a basic and fundamental tenet of its bylaws.

In determining whether or not a union's affiliation or merger process is valid, I agree that it is not always necessary—to find the process valid—that the union comply with all requirements set forth in its constitution and bylaws. Indeed, the failure to comply with various procedural requirements may often have no effect on the minimal due-process requirements.

In *Toyota of Berkeley*, 306 NLRB 893 (1992), noted by my colleagues, the Board held, and I agreed, that a merger process was not flawed by the union's failure to comply with certain notice provisions, including notice by certified mail, set forth in the union's constitution and bylaws. In that case, the alternative notice

procedures used by the union assured full and fair notice to members.¹

Here, I am troubled because I must conclude that the Union failed to comply with a critical requirement of its bylaws. As I read the Union's bylaw chapter 1, section 5, it requires that a *majority of members* must approve an affiliation. Based on the vote held, no determination can be made that a majority of members in fact approved the affiliation in issue.

In these circumstances, where the Union did not observe a most significant requirement of its bylaws—i.e., that defining who must vote to approve an action—the Respondent was not obligated to honor the results of the affiliation vote. Certainly a majority of those who voted for affiliation may have been non-members, while a majority of those who voted against affiliation may have been members. In such a situation the rights of the members as guaranteed by the bylaws would be submerged and indeed lost.

¹ Similarly, in *Santa Barbara Humane Society*, 302 NLRB 833, 837 (1991), the Board rejected an employer's argument that a union merger ballot was invalid because the voting did not comply with the procedures set forth in the union's constitution and bylaws for the election of officers. In that case, it was questionable whether the procedures in question applied to a merger vote and in any event the vote fully met minimal due-process requirements.

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 the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to recognize and bargain with American Federation of Grain Millers and its Local 405, as the exclusive bargaining representative of our employees in the following bargaining unit:

All specific regular and campaign employees designated by job classification in Article 18 of the collective bargaining agreement between Minn-Dak Farmers Cooperative Employees' Organization and Minn-Dak Farmers Cooperative effective from August 3, 1988 through May 31, 1991, excluding all other employees.

WE WILL NOT bypass Local 405 and deal directly with unit employees concerning a new grievance procedure.

WE WILL NOT unilaterally implement a grievance procedure that excludes Local 405 from participation.

WE WILL recognize and, on request, bargain with Local 405 as the exclusive bargaining representative of all employees in the unit described above with respect

¹⁷ 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."

to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL, on the request of Local 405, set aside any grievance that we unilaterally adjusted pursuant to the

grievance procedure that we implemented about April 23, 1992.

MINN-DAK FARMERS COOPERATIVE