

CPS Chemical Company, Inc. and Oil, Chemical and Atomic Workers International Union, AFL-CIO, Local Union 8-397. Case 22-CA-20769

November 7, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On June 25, 1996, Administrative Law Judge James F. Morton issued the attached decision. The Respondent filed exceptions and a supporting brief,¹ the General Counsel filed an answering brief, and the Respondent filed a reply brief.²

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,³ and conclusions and to adopt the recommended Order.⁴

The Respondent operates a plant in Old Bridge, New Jersey, where it manufactures specialty organic products. Between 1984 and 1995, its plant employees

¹The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

²The General Counsel, in his answering brief, refers to his posthearing brief to the judge. In its reply brief, the Respondent notes that the General Counsel's posthearing brief is not part of the record and requests that the Board not consider it. We agree with the Respondent. Posthearing briefs are not part of the record as defined by Sec. 102.45(b) of the Board's Rules and Regulations. As the General Counsel did not attach his posthearing brief to his answering brief to the Board, we shall not consider the posthearing brief in this decision.

³The Respondent has 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. We also find no merit in the Respondent's assertions of bias on the part of the judge.

The judge inaccurately characterized the merger in *Sullivan Bros. Printers*, 317 NLRB 561 (1995), enfd. 99 F.3d 1217 (1st Cir. 1996), as that of two locals into a newly formed third local. In fact, two locals merged separately with a third, preexisting local of the same international union.

⁴In adopting the judge's recommended Order, we find it unnecessary to address his views on the appropriateness of rulemaking in the union affiliation context or his assessment of earlier Board decisions as reflecting a preference for using the procedures under Sec. 9 of the Act.

We correct certain inconsequential errors in the judge's decision. In the case caption, Willam K. Harvey is with the firm of Jackson, Shields, Yeiser, and Cantrell, of Cordova, Tennessee; Mark Rogart is general counsel of the Respondent, CPS Chemical Company, Inc., of Old Bridge, New Jersey. The members of the CPS Plant Employees Association had voted twice, not once, to pay themselves bonuses out of Association funds. Robert Devish served as secretary of the Association within the 5 years preceding the affiliation vote; however, he resigned that position before the affiliation vote was taken. Other errors are noted and corrected below.

were represented by an independent local union, the CPS Plant Employees Association (the Association).⁵ In May 1995,⁶ the Association members voted to affiliate with the Charging Party, Oil, Chemical and Atomic Workers International Union, AFL-CIO, Local Union 8-397 (Local 8-397). The Respondent, however, refused to recognize Local 8-397 as the unit employees' bargaining representative. The judge found that the Respondent's refusal violated Section 8(a)(5) and (1) of the Act. In reaching that conclusion, the judge found that the Respondent failed to demonstrate either that the affiliation vote was accomplished without adequate procedural safeguards or that continuity of representative was lost as a result of the affiliation.⁷ The Respondent has excepted to the judge's conclusions and to many of his underlying factual findings. For the following reasons, we agree with the judge that the Respondent violated the Act as alleged.

1. We first address the Respondent's contentions that it was disadvantaged by the Unions' failure to supply certain subpoenaed documents and that the judge should have required the Unions to produce those documents or drawn an adverse inference from their failure to do so. We reject those contentions.

The Unions did not engage in a blanket refusal to produce all subpoenaed documents. OCAW Local 8-397 supplied, or indicated that it would supply, many of the items requested in the subpoena; however, it filed a petition to revoke those portions of the subpoena that it contended were overly broad or that requested items that it contended were irrelevant or confidential. On the first day of the hearing, the Respond-

⁵The Respondent contends that the Association was recognized voluntarily, not certified by the Board, as the judge found. For purposes of this decision, the distinction is immaterial.

⁶Unless otherwise stated, all dates refer to 1995.

⁷As the judge correctly noted, the Respondent has the burden of proof on both points. *Sullivan Bros. Printers*, 317 NLRB at 562 (1995). The Respondent contends that the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251 (1994), requires a different result. We disagree. The Court held in that case that Sec. 7(c) of the Administrative Procedures Act places the burden of persuasion (not simply of going forward) on the "proponent of a rule." In so doing, however, it expressly reaffirmed its earlier holding in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), that once the General Counsel has shown that antiunion animus was a motivating factor in an employer's decision, the burden shifts to the employer to demonstrate, as an affirmative defense, that it would have taken the same action absent union considerations. Similarly, in the union affiliation context, an employer who is attempting to avoid an otherwise binding bargaining obligation on the basis that an affiliation either was accomplished without adequate procedural safeguards or resulted in the loss of continuity of representation has the burden of establishing its contention as an affirmative defense. *Insulfab Plastics*, 274 NLRB 817, 821 (1985), enfd. 789 F.2d 961 (1st Cir. 1986). The Board's imposition of this burden on the Respondent thus is entirely consistent with Supreme Court precedent, and we find no merit in the Respondent's contention that it is unfairly prejudiced by the application of this well-established principle.

ent's counsel raised the subject of alleged noncompliance with the subpoena. The judge replied that he would not rule at that time on all the subpoenaed items that were in dispute. Rather, he indicated that the hearing should proceed; that at appropriate points in the testimony, the Respondent could call for production of specific items; and that he would then ascertain whether the items existed and were relevant to the issues being adjudicated. If the Unions refused to produce existing, relevant documents, the judge stated that he might order production or the Respondent could request the judge to draw an adverse inference from the refusal to produce. Alternatively, the Respondent could request the General Counsel to institute proceedings in Federal district court for enforcement of the subpoena.⁸ The remainder of the hearing proceeded along the lines described by the judge.

The Respondent broadly asserts that the Unions failed to turn over "many properly subpoenaed books and records," and that, as a consequence, it was hampered in its attempts to prove that the affiliation was not accomplished with minimal due process safeguards and that substantial continuity of the bargaining representative was not preserved. However, the only documents that were not produced which are discussed in the Respondent's brief are the attendance list from the April 25, 1995 meeting at which members of the Association initially discussed the possibility of affiliating with Local 8-397, and documents naming the CPS employees who had become members of Local 8-397. We find no merit in the Respondent's contention that it was prejudiced by the Unions' failure to produce those documents.

The Respondent argues that, because the attendance list was not produced, the judge should not have accepted the testimony of the Association's president, Philip Nadal, that 16 of the 32 unit employees attended the April 25 meeting. However, Nadal testified that he had searched for the attendance list but could not find it. The Respondent advances no argument that Nadal's testimony in this regard is unworthy of belief. Moreover, Alan Borusovic, who was called as a witness by the Respondent, corroborated Nadal's testimony concerning attendance at that meeting. In these circumstances, we find that the Respondent was not prejudiced by the Unions' failure to produce the attendance list, and we decline to draw an adverse inference from that failure.⁹

We may, for the sake of argument, agree with the Respondent that the Unions' failure to produce documents identifying the CPS employees who had joined

Local 8-397 was not privileged, and that such failure undercuts the judge's finding that all members of the Association have been accepted into the Local.¹⁰ However, as we discuss below, the relevant issue for our purposes is not whether the CPS employees actually joined Local 8-397, but whether they are eligible to join.¹¹ The absence of these documents thus did not prevent the Respondent from proving any relevant point in this case. Accordingly, the Unions' failure to produce them did not prejudice the Respondent, and does not warrant drawing an adverse inference.

The Respondent identifies no valid point that it was unable to prove for lack of other requested documentation. We therefore find no prejudice to the Respondent resulting from the Unions' failure to produce any other documents, and no logical reason to draw an adverse inference from the Unions' failure to produce them.¹²

2. Concerning the question of whether the affiliation election was carried out with adequate procedural safeguards, we first note that, as the judge found, the affiliation vote was taken by secret ballot. Including the votes of 7 employees who were unable to attend the meeting at which the election was held but who cast absentee ballots, the vote was 22-0 in favor of affiliation, in a bargaining unit of approximately 32 employees. There is no evidence that the voters were not adequately apprised of the issues before them, that anyone objected to the voting procedures, or that the result did not accurately reflect the votes cast or the true sentiments of the Association members.

The judge also found that the Association held two membership meetings on the subject of affiliation with Local 8-397. The first took place on April 25; the second, at which the vote was taken, was held on May 17. The judge found that in early April, Nadal posted a notice on a bulletin board announcing the April 25 meeting. That finding apparently was based on Nadal's testimony. The Respondent notes, however, that two other employees, Borusovic and William Rutar, testified that they saw no such notice posted and that they would have seen such a notice had it been posted.

Although the judge did not explicitly resolve this testimonial dispute, we need not resolve this discrepancy. Borusovic testified that he received a copy of the notice of the April 25 meeting in the mail and attended the meeting, along with other employees. While the notice announced only that there would be an important meeting on April 25, Borusovic testified that "we knew what we were going there for." Whether the notice was posted or mailed, then, the fact that a meeting

⁸See Sec. 102.31(d) of the Board's Rules and Regulations. The Respondent does not contend that it ever asked the General Counsel to institute enforcement proceedings.

⁹See *Champ Corp.*, 291 NLRB 803, 803-804 (1988), enf. 933 F.2d 688 (9th Cir. 1991), cert. denied 502 U.S. 957 (1991).

¹⁰With particular respect to the issue of privilege, we note that similar information has been held privileged from disclosure in litigation on confidentiality grounds. *National Telephone Directory Corp.*, 319 NLRB 420, 421-422 (1995).

¹¹OCAW resisted this portion of the subpoena on this very basis.

¹²See *A. Duie Pyle, Inc.*, 263 NLRB 744, 756 (1982), enf. denied on other grounds 730 F.2d 119 (3d Cir. 1984).

would be held evidently was effectively communicated to unit employees, who knew that affiliation would be discussed, and around half of them attended.

Moreover, the April 25 meeting was not the one at which the vote was taken. That meeting took place more than 3 weeks later, and was announced in a notice, mailed to members on May 1, which explicitly stated that affiliation would be discussed and a vote taken. On the basis of the foregoing, we find that the Respondent has not shown that employees did not receive adequate notice of the affiliation vote.¹³

The Respondent further claims that the vote was invalidated by asserted irregularities. First, it notes that, contrary to Nadal's testimony that the use of absentee ballots was consistent with the Association's past practice, Borusovic testified that there had been no such practice. The Respondent also points out that, although the absentee voting procedure called for each absentee voter to sign the envelope containing his ballot, most of the envelopes were not signed by the voters. We find no merit to these contentions.

Even if the Association did not have a past practice of using absentee ballots, there is nothing inherently wrong with using such a procedure, especially where, as here, its use enables a larger number of employees to participate.¹⁴ And although the absentee balloting procedures may not have been followed to the letter in the case of each absentee voter, there is no contention that ballot secrecy was compromised. Contrary to the contentions of the Respondent, the Board does not require union affiliation elections to be conducted in the same manner as Board elections.¹⁵

In the absence of substantial irregularities, which we do not find here, the Board normally will not concern itself with a union's internal voting procedures.¹⁶ The reasons for this policy were well stated by the judge in *Insulfab Plastics*:

Since the participants in the election did not object to the manner in which the vote was taken, the Respondent is in a poor position to do so now simply because it does not like the way the vote turned out. The Union was under no obligation

¹³The Respondent argues that Rutar was inappropriately denied notice of the May 17 meeting. However, by Rutar's own admission, he had been promoted to a supervisory position before May 17. In any event, even if Rutar had been entitled to vote, his absence could not have affected the outcome of the election. See *Ocean Systems*, 223 NLRB 857, 860 (1976).

¹⁴The Respondent notes that one of the employees who voted absentee did so because he was attending a funeral, not because he was working, as the judge found. The point is entirely inconsequential.

¹⁵See, e.g., *Insulfab Plastics*, 274 NLRB at 823.

Chairman Gould notes that the Board itself has long permitted—and now increasingly utilizes—mail ballots by eligible voters in appropriate circumstances. See *London's Farm Dairy*, 323 NLRB 1057 (1997); *Reynolds Wheels International*, 323 NLRB 1062 (1997).

¹⁶*Sullivan Bros. Printers*, 317 NLRB at 563, citing *Ocean Systems*, 223 NLRB at 859.

arising out of statute or regulation to conduct its affiliation vote in a manner deemed suitable by the Respondent. The fact that it did not act in strict conformity with the procedures required for a representation election and chose instead to conduct its business more informally in accordance with the traditions of New England town meeting democracy is no basis for post hoc faultfinding. While flying the flag of "due process," the Respondent should bear in mind that one element of fundamental fairness is that the majority should rule and that its stated wishes should be accorded full weight. In question here is not free employee choice but whether petty obstructionism should be allowed to nullify that choice.¹⁷

For the foregoing reasons, as well as for those set forth in the judge's decision, we adopt the judge's finding that the Respondent failed to demonstrate that the affiliation was not accomplished with adequate procedural safeguards.

3. We turn now to the Respondent's contention that, as a result of the affiliation, substantial continuity of representation was not maintained and therefore that a question concerning representation exists which relieves it of its duty to bargain. To prevail, the Respondent must demonstrate that the affiliation resulted in changes that were sufficiently dramatic to alter the identity of the Association, and thus in the substitution of an entirely different union as the employees' representative.¹⁸

Initially, we note the Board's observations in *Sullivan Bros. Printers*:

[M]ost affiliations or mergers would change a union's organizational structure to some extent, but clearly such natural and foreseeable consequences would not automatically raise a question concerning representation. *Action Automotive*, 284 NLRB 251, 254 (1987). As the [Supreme] Court in [*NLRB v. Food & Commercial Workers Local 1182 (Seattle-First National Bank)*, 475 U.S. 192 (1986)] recognized, change is the natural consequence of ordinary, valid reasons for affiliations and mergers, such as increased financial support and bargaining power. *Seattle-First*, 475 U.S. at 199 fn. 5. In sum, as we have stated, "[t]he notion that an organization somehow loses its identity and becomes transformed . . . because it acquires more clout and becomes better able to do its job is an absurdity and one which flies squarely in the face of a clearly stated congress-

¹⁷274 NLRB at 823.

¹⁸*Western Commercial Transport*, 288 NLRB 214, 217-218 (1988).

sional objective. . . .” *Insulfab*, 27[4] NLRB at 823.¹⁹

Consequently, rather than adopting a mechanistic approach and using a strict checklist, the Board analyzes the totality of circumstances in order to give paramount effect to the employees’ desires.²⁰

Like the judge, we find that discontinuity of representation has not been demonstrated in this case. Thus, the judge correctly found that the Association’s president and chief functioning officer, Nadal, continued to represent the CPS employee group after the affiliation. He also found that the Association members have been accepted into Local 8–397. As we explain below, although that precise finding is subject to dispute, it is clear that the Association members are eligible to join Local 8–397 without paying its initiation fee and without an immediate significant increase in membership dues. We also agree with the judge’s finding that contracts will be negotiated in much the same way under Local 8–397 as they were under the Association, but with greater expertise as a result of the participation of an OCAW International representative. And we agree with him that neither the differences in size, bylaws, and internal procedures resulting from the affiliation, nor the transfer and commingling of Association assets with those of Local 8–397, compel a different result. For the reasons that follow, we reject the Respondent’s arguments to the contrary.

At the outset, we find no merit in the Respondent’s suggestion that the difference in size between the (approximately) 30-member Association and the 550-member Local 8–397 (or the 85,000 member OCAW International Union) establishes discontinuity of representation. The Board has consistently rejected such reasoning; so have most courts.²¹ Indeed, the Supreme Court in *Seattle-First* implicitly endorsed the Board’s view when it noted that

A local union may seek to affiliate with a larger organization for a variety of reasons. The larger organization may provide bargaining expertise or financial support, or may compensate for a lack of leadership within the local union. . . . The Board has recognized that a union “must remain largely unfettered in its organizational quest for financial stability and aid in the negotiating process.” *The Williamson Co.*, 244 NLRB 953, 955 (1979).²²

¹⁹ 317 NLRB at 562–563.

²⁰ Id. at 563 (citations omitted).

²¹ See, e.g., *Insulfab Plastics*, 274 NLRB at 823; *Sioux City Foundry*, 323 NLRB 1071 (1997); *NLRB v. Insulfab Plastics*, 789 F.2d at 967–968; *Seattle-First National Bank v. NLRB*, 892 F.2d 792, 797–798 (9th Cir. 1989); *May Department Stores v. NLRB*, 897 F.2d 221, 229 fn. 9 (7th Cir. 1990); *News/Sun Sentinel Co. v. NLRB*, 890 F.2d 430, 433 (D.C. Cir. 1989).

²² 475 U.S. at 199 fn. 5.

Accordingly, we reject any notion that the difference in size, financial resources, or bargaining power between the Association and Local 8–397 is in any sense dispositive of the issues before us.

Because this case arises in the Third Circuit, we take into account that, as the Respondent notes, that court of appeals has adopted a different view. In a series of decisions in the 1970s, the court enunciated a rule under which any affiliation of a small independent union with a larger international would be found to result in discontinuity of representation.²³ We respectfully suggest that, whatever the merits of the court’s views at the time they were set forth, their precedential value is questionable in light of the Supreme Court’s statements in *Seattle-First*.²⁴ Our opinion in this regard is shared by several courts of appeals. The Ninth Circuit observed:

[T]he Court’s statements cast doubt on the continuing validity of the Third Circuit’s jurisprudence in this area. . . . These factors [i.e., increase in economic power, size of the international’s membership] shrink in significance if one takes seriously the Supreme Court’s view that increased size, financial support, and bargaining power are the very reasons why independent unions join internationals. The very ordinariness of such factors strongly suggests that something more must change before an affiliation raises a question concerning representation.²⁵

The Seventh Circuit similarly stated:

We disregard [the employer’s] contention that the mere difference in numerical and geographic size between the URW and the UFCW “demonstrates a significant diminution in the ability of the union to represent the interests of its members.” If this argument was accepted, every merger or affiliation of a small independent union with an international would, *per se*, raise a question concerning representation. Yet, the increased size, financial support, and bargaining power that such mergers create are the very factors recognized by the Supreme Court in *Sea-First* as the ordinary, valid reasons for mergers. 475 U.S. at 198–99 & 199 n. 5. In this way and others, the Court in *Sea-First* strongly suggested that, without some actual evidence of loss of continuity, most mergers between independent unions and internationals do not raise a question concerning representation. To the extent that the trilogy of Third Circuit cases

²³ See *U.S. Steel Corp. v. NLRB*, 457 F.2d 660 (3d Cir. 1972); *NLRB v. Bernard Gloeckler North East Co.*, 540 F.2d 197 (3d Cir. 1976); *Sun Oil Co. of Pennsylvania v. NLRB*, 576 F.2d 553 (3d Cir. 1978).

²⁴ See *Action Automotive*, 284 NLRB at 254.

²⁵ *Seattle-First National Bank v. NLRB*, 892 F.2d at 798.

cited by [the employer; and by the Respondent here] support [the employer's] suggested per se rule, they are of questionable precedential value in light of *Sea-First*.²⁶

The First Circuit has expressed a similar view:

The Supreme Court's recent decision in [*Seattle-First*] likewise suggests that an increase in a union's bargaining power is not, standing alone, determinative of whether affiliation raises "a question concerning representation."²⁷

Therefore, with due respect to the Third Circuit's opinions noted above, we find that the disparity in size and strength between the Association and Local 8-397 did not, alone, cause a discontinuity of representative such as to raise a question concerning representation.

We now consider the other factors that, according to the Respondent, warrant a finding that continuity in representation was broken as a result of the affiliation. Concerning continuity in leadership, the judge found, and we agree, that Nadal, who was the Association's principal functioning officer at the time of the affiliation vote, remains the leader of the CPS group within Local 8-397. Nadal testified that he was held over as the group president pending elections, which will be held when the affiliation issue has been "accepted." Nadal also testified that he has attended two meetings of the Local 8-397 executive board.²⁸ This retention of the Association's president as CPS group leader establishes substantial continuity of leadership. That Nadal heartily wished to be rid of his duties as an officer is irrelevant. Turnover among local union officers is normal, and no one would contend that the Association had lost its identity had Nadal stepped down as its president before the affiliation election. The result should be no different if Nadal relinquishes his leadership role at some future point.²⁹

With regard to membership, the Respondent has accepted to the judge's finding that all Association members have been accepted into Local 8-397. We need

²⁶ *May Department Stores v. NLRB*, 897 F.2d at 229 fn. 9 (citing the Ninth Circuit's opinion in *Seattle-First* and the First Circuit's in *Insulfab*).

²⁷ *NLRB v. Insulfab Plastics*, 789 F.2d at 967-968.

²⁸ The executive board is made up of Local 8-397's officers, including the vice presidents from each of the 18 employee groups represented by the Local.

²⁹ See *Sullivan Bros. Printers*, 317 NLRB at 563-564. In any event, continuity of leadership is only one factor the Board considers in determining whether continuity of representative has been preserved; it is not determinative by itself. *Id.* at 563.

Borusovic was a trustee of the Association, but his duties were not nearly as extensive as Nadal's. The attempts by the General Counsel's witnesses to establish that Borusovic was a current trustee of Local 8-397 were unpersuasive. The judge, however, did not rely on Borusovic as a current trustee in finding continuity of leadership, and neither do we. The Association had no other functioning officers at the time of the affiliation vote.

not decide whether or not they have actually become members, however, because both the OCAW International constitution and the constitution and bylaws of Local 8-397 expressly provide that any individual employed in their jurisdiction is eligible for membership. Although Local 8-397 charges a \$100 initiation fee, the record establishes that it will waive the fee for employees who were members of the Association and that it informed the employees of that fact before the affiliation vote was taken.³⁰ There thus would seem to be no impediment, financial or otherwise, to any Association member's becoming a member of Local 8-397.

Concerning membership dues, the record establishes that the Association charged monthly dues of \$12,³¹ whereas Local 8-397's monthly dues are the equivalent of 2 hours' pay, or around \$30. The Respondent makes much of this prospective increase, and of the fact that around half of the dues paid to Local 8-397 are passed on to the OCAW International as a per capita tax. As the judge found, however, Local 8-397 intends to phase in the dues increase gradually over a 5-year period.³² Thus, the full effect of the increase will not be felt all at once. Moreover, the greater financial commitment asked of OCAW members undoubtedly reflects to some extent the fact that a large international union can provide more extensive services than a small independent like the Association. It is unlikely that the employees would expect to get stronger representation from OCAW absolutely free.³³

The Respondent contends that the power wielded by the OCAW International over its locals and bargaining groups is evidence of discontinuity of representation. We are unpersuaded.

The Respondent argues that article XIII, section 1, of the OCAW International constitution gives the international president an effective veto over contracts entered into by local unions. That provision states that if a contract does not meet the international's collective-bargaining standards, the international president may declare it null and void. The Respondent also relies on section 9 of the same article, which provides that no strike will receive the approval of, or financial assistance from, the OCAW International without the approval of the international president or executive

³⁰ At the time of the affiliation, the Association's initiation fee was \$60 (not \$7.50, as the judge stated). That Local 8-397 charges a higher initiation fee is immaterial, since it does not plan to collect the fee from members of the Association.

³¹ Not \$7, as the judge incorrectly stated.

³² Borusovic testified that the Local 8-397 representatives told the CPS employees that the dues increase would be phased in over 5 years. Nadal testified that the Local 8-397 representatives indicated, but did not promise, that such might be the case. Local 8-397 Secretary-Treasurer Robert Beck testified that the local had made equivalent arrangements for employees of Sunoco, and might do so for the CPS employees. We are satisfied that the evidence supports the judge's finding.

³³ See *Sioux City Foundry Co.*, supra.

board. There is no evidence, however, of how often (if ever) the international actually exercises these powers.³⁴ In any event, concerning the international's right to review and approve local contracts, the Board has held that "[t]hese reserved rights of approval, allowing the International only to react to initiatives of the local, do not serve to supplant the local as the entity primarily responsible for the conduct of its affairs."³⁵

Local 8-397 Secretary-Treasurer Beck testified that when a unit group, such as that comprising the CPS employees, negotiates a contract with an employer, the Local's officers are not involved. Rather, the group is represented by its own committee (as it was under the Association), usually with the assistance of a representative of the OCAW International union.³⁶ The international representative signs the contract, thereby conferring the approval of the international.³⁷ Moreover, under the OCAW constitution, any contract must be approved by the members covered by its terms in order to be effective. Thus, the CPS employees will not have contract terms imposed on them against their will; those terms will be negotiated by the employees' own committee, subject to their approval.

As for the International's power to withhold approval of strikes, and of strike funds, there is no evidence that the International can do anything about a strike that it disapproves *except* withhold strike funds. Since there is no evidence that the Association had any strike funds to disburse, there is no showing that the CPS employees' freedom to strike has been impaired in any material way as a result of the affiliation.³⁸

The Respondent also argues that the judge understated the degree to which OCAW controls local collective-bargaining negotiations. Contrary to the judge, who found that OCAW International Representative Barcellona "sits in" on local negotiations, the Respondent contends that Barcellona actually plays an active part in bargaining and in arbitration proceedings. Barcellona's testimony bears out the Respondent's contentions that he plays a more active role in negotiations and in arbitration proceedings than the judge indicated. Thus, he usually makes the closing argument in arbitration hearings, and signs collective-bargaining agreements. As noted above, however, the CPS group

will select its own bargaining committee, as it did under the Association. There is no evidence that Barcellona will serve as more than a valued source of expertise in negotiations and arbitrations, and certainly none that he will act inconsistently with the CPS employees' desires in either context. It is precisely to gain the benefit of such expertise that independent unions often affiliate with stronger internationals, as the Supreme Court observed in *Seattle-First*. Indeed, both the affiliation resolution and Nadal's testimony reflect that the desire for more professional representation was one reason for the CPS employees' decision. That they stand to benefit from Barcellona's expertise, as they hoped, does not indicate that continuity of representation has been broken.³⁹

In a similar vein, the Respondent notes that Local 8-397's bylaws provide that no employee unit group shall take action that conflicts with either the local union or International constitution, and that all actions not specifically authorized and all agreements negotiated by the unit group are subject to review and concurrence or nonconcurrence by the Local. The Respondent contends that the Local thus has veto power over any agreement negotiated by the CPS unit group. Again, however, such a reserved right of review does not, in itself, mean that the Local has supplanted the unit group as the primary bargaining entity for the CPS employees.⁴⁰ And there is no evidence that the Local exercises its authority with any significant frequency; in fact, Beck testified that he could recall no instance in which the Local refused to concur with a unit group's action.

The Respondent further argues that, unlike the Association, OCAW engages in national bargaining on issues that affect entire industries. Its constitution also provides that companywide councils, responsible to the International union, may be established when employees of a company are represented by more than one local. In consequence, the Respondent claims, the CPS employees' interests could be compromised in collective bargaining on either an industry- or companywide basis. There is no showing, however, that either of those provisions would directly affect CPS employees. Although the Respondent produced evidence of national bargaining in the oil industry, it offered no such evidence with regard to the chemical industry.⁴¹ Nor is there any contention that OCAW represents employ-

³⁴ *Minn-Dak Farmers Cooperative*, 311 NLRB 942, 948 (1993), enf. 32 F.3d 390 (8th Cir. 1994). As the Board has often held, it is actual practice rather than theoretical policy, which is controlling. *Sullivan Bros. Printers*, 317 NLRB at 564.

³⁵ *May Department Stores*, 289 NLRB 661, 666 (1988), enf. 897 F.2d 221 (7th Cir. 1990).

³⁶ Art. XII, sec. 2 of the Local bylaws provides that "[e]ach Bargaining Unit will select its committee and/or stewards and designate their areas of activity. The Committees shall be charged with the responsibility of negotiation and grievance handling as may be required by the collective bargaining agreement."

³⁷ There is no indication that the approval of contracts by the international representative is other than routine.

³⁸ *Seattle-First National Bank*, 290 NLRB 571, 573 (1988).

³⁹ *Seattle-First National Bank v. NLRB*, 892 F.2d at 798.

⁴⁰ *May Department Stores*, 289 NLRB at 666.

⁴¹ Accordingly, there is no merit in the Respondent's exception to the judge's rejection of its Exhs. 49 and 50, both of which concern industry bargaining in the oil industry. The information in those documents would be cumulative of other evidence regarding oil industry bargaining and would shed no light on national bargaining in the chemical industry.

ees at any other CPS facility.⁴² We shall not find that continuity of representation has been broken merely because the Respondent speculates that either or both of these issues might arise in the future.

The Respondent also argues that after the affiliation took place, the Association turned over its entire treasury (as well as dues subsequently collected) to Local 8-397, and that none of the former Association officers are empowered to write checks on the Local's account. We give that factor little weight, however, because the Respondent has failed to show that any of those assets are not available to the CPS employee group.⁴³ Thus, there is no showing that the CPS employees have fewer resources that can be committed to their representational needs by Local 8-397 than were available under the Association.

The Respondent cites various other factors that it argues constitute evidence of discontinuity of representation. As the Respondent notes, the Association had a policy under which any terminated member could insist that his termination be arbitrated, whereas Local 8-397 reserves to the membership the authority to decide whether grievances, including those concerning terminations, will be arbitrated.⁴⁴ (On the other hand, Local 8-397's bylaws require the approval of the local executive board before a termination grievance can be withdrawn.) Local 8-397's bylaws are more formal than those of the Association, and of course cannot be changed by the CPS employee group alone. Under the bylaws, the executive board acts for the membership between meetings; only one member of the executive board would be from the CPS group. Members of Local 8-397 may be charged, tried, and disciplined for violations of the bylaws or of the International constitution. By contrast, the Association's bylaws stated only that members should not discriminate against or do injustice to each other; there was no provision for charging, trying, or disciplining members for violations. Local 8-397 holds monthly meetings, whereas the Association held only two membership meetings in the year preceding the affiliation (both concerning the affiliation).

We do not agree that these factors establish that continuity of representation was lost as a result of the

⁴² The Respondent introduced evidence of previous attempts by OCAW to organize a CPS plant in Arkansas. Those attempts, however, were unsuccessful, and there is no contention that OCAW is still attempting to organize that plant.

⁴³ *Sullivan Bros. Printers*, 317 NLRB at 565; *Sullivan Bros. Printers v. NLRB*, 99 F.3d at 1229.

⁴⁴ This is not a merely theoretical power; the record establishes that the membership actually has rejected requests for arbitration of termination grievances. We note, however, that in its 11-year history the Association took only two grievances to arbitration, and only one of those involved a discharge. Thus, although the CPS employees will not have the absolute right to have termination grievances arbitrated by Local 8-397, that fact apparently will not effect a significant change in the actual representation of their interests.

affiliation.⁴⁵ As we have stated, the Board does not simply use a checklist to decide such issues, but instead considers all the circumstances in order to give paramount effect to the employees' desires.⁴⁶ Under all the circumstances recounted above, we find that the changes brought about by the affiliation were not so dramatic as to raise a question concerning representation.⁴⁷ Thus, the CPS employees are eligible to become full members of Local 8-397 without having to pay an initiation fee; their dues will increase to the higher level required by Local 8-397, but only over a period of 5 years. Their former president, Nadal, continues to be their representative on the executive committee. The CPS employees will elect their own group vice president. They will be, as under the Association, represented in collective-bargaining negotiations by a committee of their own members whom they will select. Grievances will still be handled, at least in the initial stages, by Nadal or a successor or a committee selected by the CPS employees. In these matters, they will have the assistance of an OCAW International representative if they so desire. The CPS employee group will not have contract terms imposed on them by OCAW or Local 8-397 without their consent, and there is no effective restriction on their right to strike. On this record, we find that the identity of the CPS employees' representative has not been lost as a result of the merger, and therefore that no question concerning representation exists.

The Respondent relies heavily on the Board's decisions in *Western Commercial Transport*,⁴⁸ *Garlock Equipment Co.*,⁴⁹ *Chas. S. Winner, Inc.*,⁵⁰ and *Quality Inn Waikiki*⁵¹ in contending that continuity of representation has been lost. We find those decisions distinguishable.⁵² In *Western Commercial Transport*, unlike this case, the smaller union's officers were unable to continue to have any major role in representing their fellow members; they were to be replaced by employees of the larger district lodge who had no prior connection with the unit. Also, the local union in that case could not strike without the international union's con-

⁴⁵ Indeed, the Respondent has overstated the importance of even these factors. Thus, even though it was the Association's policy to allow members to insist on the arbitration of termination grievances, the record reveals that the Association did not follow that policy in the case of two employees who were terminated—one who had found work elsewhere and one for whom arbitration would have been too expensive. Concerning Local 8-397's provisions for trying and disciplining members, Beck testified that he could not remember any trial's ever having been held.

⁴⁶ *Sullivan Bros. Printers*, 317 NLRB at 563.

⁴⁷ *Id.*

⁴⁸ 288 NLRB 214 (1988).

⁴⁹ 288 NLRB 247 (1988).

⁵⁰ 289 NLRB 62 (1988).

⁵¹ 297 NLRB 497 (1989).

⁵² We therefore need not decide, at this time, whether to overrule those cases or to find that they have been superseded by more recent decisions.

sent; that is not the case here. In *Garlock Equipment*, the international union could suspend a local if it struck without the international's approval, and it also could order a local to strike. Local agreements had to be negotiated and signed in the name of the district lodge by a district lodge business representative. No such provisions exist here.⁵³ In *Chas S. Winner*, as in *Western Commercial Transport*, the small local's leadership would have been replaced by officers of the larger Teamsters local. In *Quality Inn Waikiki*, the smaller local's officers were replaced by those of the larger, who also were responsible for collective-bargaining and grievance adjusting on behalf of the smaller group. Moreover, in that case, the merger was preceded by the international union's imposing a trusteeship on the smaller local (without the approval of the latter's membership), and most of the critical changes in the identity of the smaller local were imposed pursuant to the trusteeship rather than as a result of the merger. None of those factors are present here.

In summary, then, for all the reasons discussed above, we agree with the judge that the Respondent failed to demonstrate either that the affiliation between the Association and Local 8-397 was not carried out with adequate procedural safeguards or that it resulted in such dramatic organizational changes as to raise a question concerning representation. We therefore also adopt his finding that the Respondent violated Section 8(a)(5) and (1) by refusing to recognize and bargain with Local 8-397 as the exclusive collective-bargaining representative of the CPS employees.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, CPS Chemical, Inc., Old Bridge, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

⁵³ As we have noted, Local 8-397 officers do not take part in unit negotiations.

Richard Fox, Esq., for the General Counsel.
William K. Harvey, Esq., of Cordova, Tennessee, and *Mark Rogart, Esq.* (*Jackson, Shields, Yeisor and Cantrell*), of Old Bridge, New Jersey, for the Respondent.
David Tykulsker, Esq. (*Ball, Livingston & Tykulsker*), of Newark, New Jersey, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge. The complaint alleges that CPS Chemical Company, Inc. (the Respondent) has engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). Specifically, the Respondent is alleged to have unlawfully refused to recognize and bargain collec-

tively with Oil, Chemical and Atomic Workers International, Local 8-397 notwithstanding that the CPS Plant Employees Association (the Association), which had long represented the Respondent's plant employees, had affiliated with Local 8-397. In its answer, the Respondent contends, for reasons discussed below, that it had no obligation to recognize or to bargain with Local 8-397.

I heard this case in Newark, New Jersey, on February 5, 6, and 7, 1996. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent manufactures specialty organic products at its plant in Old Bridge, New Jersey. In its operations annually, it meets the Board's nonretail standard for asserting jurisdiction.

II. LABOR ORGANIZATIONS

The record establishes that the Association and Local 8-397 each meet the requirements set out in the section of the Act which defines the term, labor organization.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. Background

Local 469 of the International Brotherhood of Teamsters had represented the Respondent's plant employees at its facility in Old Bridge, New Jersey, until it was decertified in 1984. Later that year, these employees selected the Association, in a Board-conducted election, as their collective-bargaining representative. The Respondent and the Association have had several contracts covering the plant employee unit; the last of these contracts was effective from January 4, 1993, through January 3, 1996.

The General Counsel contends that Local 8-397 succeeded to the Association's status as the exclusive collective-bargaining representative of the Respondent's plant employees, assertedly by a valid affiliation vote held by the Association and on the ground that the affiliation did not result in a new and different representative, as contemplated in Board cases, discussed below. Local 8-397 requested the Respondent to recognize it as the representative of its plant employees. The Respondent denied the request; it challenges the affiliation vote and the question of continuity of Local 8-397 as bargaining representative.

All dates below are for 1995 unless stated otherwise.

B. The Affiliation Vote

In the early part of 1995, some of the plant employees at the Respondent's facility in Old Bridge began discussing the idea of having the Association affiliate with Local 8-397. In early April, the Association's president, Phillip Nadal, posted a notice on a bulletin board which informed the unit employees that an important meeting will be held at a cocktail lounge in Perth Amboy, New Jersey. On April 25, about 16 of the 32 employees in the unit met there. Nadal called the meeting to order. The members discussed the history of the

Association and their desire to join Local 8-397. John Barcellona, a representative employed by Oil, Chemical and Atomic Workers, AFL-CIO (OCAW), Local 8-397's International and Robert Beck, Local 8-397's secretary-treasurer, then entered the room and were introduced by Nadal. Barcellona discussed affiliating the Association with Local 8-397 and answered "many questions" put to him. The employees then decided to hold an election at a later date to determine whether the Association should affiliate with Local 8-397.

On May 1, Nadal, as president of the Association and with Barcellona's assistance, mailed notices to 26 of the 27 employees whose names were listed on a dues-checkoff roster for March. These notices recited that a special meeting of the Association is scheduled for May 17 at which a vote will be taken as to whether the Association will affiliate with Local 8-397. One of the notices that Nadal mailed was returned in late May as the addressee had moved. A notice was not sent to one of the employees whose name was listed on the checkoff roster, because Nadal viewed that individual as a supervisor. Two other names were written in at the bottom of the checkoff list, one of an individual who was, as of May 17, no longer in the Respondent's employ and the other of an individual whom Nadal also viewed as a supervisor and who was notified by the Respondent in the latter part of May that he was promoted to a supervisory position. That position had been nominally unfilled for over a year. Election notices were not sent to those two.

On May 17, a secret-ballot election was held, during which only the Association members were present. The vote was 22 to 0 in favor of affiliation; 7 of the 22 votes cast were mail-in ballots as the 7 employees who cast them were working on their shift at the time the meeting was conducted. After the votes were counted, the employees approved a resolution which set out the terms on which the Association would affiliate.

The Respondent, as the party seeking to avoid its bargaining obligation to the Association by virtue of the Association's affiliation with Local 8-397, has the burden of showing that the change was not accomplished with minimal due process. See *Sullivan Bros. Printers*, 317 NLRB 561, 562 (1995), and cases cited there. It has not met that burden. There is no evidence to support a finding that the vote was not accomplished with adequate procedural safeguards. The Respondent points out that the first notice did not specify why a special meeting was being held and that a copy of it was not produced pursuant to a subpoena it had served. These omissions and others by Nadal do not establish that the elections failed to satisfy the requisite minimal due process. Concededly and as the Respondent argues elsewhere respecting the continuity of representative issue, Nadal handled the Association's affairs in a very informal manner. The Respondent questions whether the Association met its obligation vis-a-vis notifying all members, observing that two were not because Nadal assumed that they were supervisors. Even assuming that the two individuals whom Nadal believed were supervisors were eligible to vote, their votes would not have materially affected the result. *Hamilton Tool Co.*, 190 NLRB 571, 574 (1971). At best, the Respondent suggests that there could have been improprieties in the voting procedures but suspicions are not a substitute for proof. The Board's standard of minimal due process respecting the affiliation vote has been satisfied.

C. *The Resolution of Affiliation; Local 8-397's Demand for Recognition; the Respondent's Reply*

The resolution approved on May 17 on the conclusion of the voting was signed by Nadal on behalf of the Association and by Barcellona, Beck, and Local 8-397's executive vice president, Michael Neidhardt, all on behalf of Local 8-397. It recited that the organization known as the Association shall, as a result of the affiliation vote, be thereafter known as Local 8-397. The resolution further provided that all assets of the Association, its collective-bargaining agreement with the Respondent and related pension and insurance agreements shall thereupon be held under Local 8-397's name, and that the organization shall continue its relationship with the Respondent as the collective-bargaining representative of the Respondent's plant employees.

On May 18, Nadal, as the Association's president, along with several representatives of Local 8-397 sent a letter to the Respondent notifying it of the affiliation. By letter of May 22 addressed to Nadal as president of the Association, the Respondent asked that he respond to 24 listed inquiries. The letter stated that, on receipt of the information requested, the Respondent will review the matter but that it will not recognize or deal with "any official of the OCAW in any manner." Its letter further stated that all contract issues will be between the Association and itself. During the last months of the collective-bargaining agreement covering the unit employees, the Respondent did not remit dues to Local 8-397. Article II of that agreement provided that the Respondent would deduct such dues and it had been its practice until late 1995 to deduct and transmit those dues to the Association.

On May 30, Barcellona, as an OCAW International representative, and Nadal, as president of the Association, responded to the May 22 letter by writing the Respondent, using an OCAW letterhead. Therein, they furnished copies of notices to employees that Nadal had sent the employees respecting the above meetings, a description of the voting procedure used and a copy of the minutes pertaining to that procedure, a sample of the ballot used, and a listing of the officers of Local 8-397 and those of the Association. They declined to furnish information as to the Respondent's other requests on the ground that the data sought was not relevant. Those requests sought, inter alia, minutes of meetings of the Association at which the matter of affiliation was introduced, the identity of OCAW officials present at those meetings, a listing of all members of the Association, the names of all employers with whom Local 8-397 has collective-bargaining agreements, data as to strikes called by Local 8-397 and strike benefits it paid, dues data, bank account records, and copies of all correspondence between OCAW and the Association since January 1, 1993.

D. *The "Continuity" Issue*

1. The Association's structure

There are about 32 employees in the unit of plant employees at Old Bridge. Nadal was the Association's president since 1990 and handled all its affairs. For the last 5 years, its only other official was Alan Borusovic, its trustee. His testimony is that, as trustee, his duties hardly required him to do anything. The Association has no constitution but only bylaws, a 2-page document with 18 provisions governing the

election of officers, the conduct of meetings, the handling of grievances and the maintenance of records to be kept of monetary receipts. The Association had held no meetings for about a year and a half prior to the April 24 meeting discussed above. While the Association's bylaws refer to a vice president and grievance chairman and also to the positions of treasurer, recording secretary, and sergeant-at-arms, none of those positions were filled as of the date of the affiliation. Nadal handled grievances filed by unit employees. No grievance had been taken to arbitration since 1988 because, as Nadal testified, arbitration was too costly. The only asset Local 8-397 held was a bank account of \$7, 448 which Nadal transferred to Local 8-397's treasury pursuant to the terms of the resolution of affiliation.

On one occasion, long before the affiliation vote, the unit employees had voted to withdraw from the Association's bank account moneys to pay each a "bonus" of \$50. Five unit employees had been chosen as the Association's bargaining committee for the negotiations that led to agreement on the last contract, 1993-1996. The Association charged a \$7.50 initiation fee and dues of \$7 monthly were checked off by the Respondent from the wages of the unit employees until the latter part of 1995. It stopped doing so then when it learned that Nadal was turning over those moneys to Local 8-397 pursuant to the affiliation resolution discussed above.

Local 8-397 has not collected initiation fees or dues from the Respondent's plant employees and does not intend to do so until such time as the Respondent recognizes Local 8-397 as the representative of its plant employees. Its dues for these employees will average about \$30 per month. It intends, when recognition is accorded it, to gradually increase their dues to that amount.

2. Local 8-397's structure

Local 8-397's International, OCAW, has approximately 85,000 members. It has its principal office in Denver, Colorado, and four regional offices, each of which has eight district offices. Local 8-397 is 1 of its constituent locals in its Atlantic district and has about 550 members. Local 8-397 itself comprises 18 "groups" of employees, 1 of which is the group of the approximately 32 plant employees of the Respondent. The other 17 groups are, respectively, employees of companies with which Local 8-397 either has collective-bargaining agreements or is in the process of negotiating agreements. Each of the groups within Local 8-397 is headed by a member who is referred to as unit chairman, or unit vice president, or union steward, depending on the group involved and who is chosen by the members of the respective groups. Each such person is, ex officio, a trustee of Local 8-397. Nadal heads the group composed of the Respondent's plant employees, a group referred to here for convenience as the CPS group. It appears, from the overall testimony, that the CPS group within Local 8-397 is at an inchoate stage and that it will function fully only when the Respondent's recognizes and bargains collectively with Local 8-397.

Local 8-397 has four general officers (president, vice president, treasurer, and recording secretary). The LM-2 it filed with the Department of Labor lists, as its officers, those four and also the leaders of the respective groups within Local 8-397 as vice presidents. Its executive board is composed of all those individuals, along with trustees, its guard/sergeant-at-arms, and a guide.

Local 8-397 has held regular meetings of its executive board and also regular membership meetings.

OCAW's constitution and bylaws provide that OCAW must approve all collective-bargaining agreements negotiated by its constituent locals. Barcellona, OCAW's International representative, testified that he sits in on virtually all negotiations of Local 8-397 and that his signing the agreements so negotiated satisfies that requirement. While his principal duties involve organizing, he also is called on by the leaders of the respective groups in Local 8-397 to assist in grievance handling and at arbitration hearings.

Any grievance filed under the provisions of a Local 8-397 contract, if not settled, is reviewed by its executive board as to whether to proceed to arbitration. That board then submits its recommendation thereon to Local 8-397's members at a general meeting. The membership then votes as to whether to proceed to arbitration. Grievants can appear at executive board meetings and at general membership meetings to present their cases for review.

Local 8-397 bought, for \$100,000, the building which houses its office. It files annual financial and related reports with the U.S. Department of Labor. Its membership dues are set at conventions held by OCAW. Currently, dues are to be paid each month at a rate equal to 2 hours of the average hourly rate of employees in their respective groups. About half of the monthly dues it collects is sent to the OCAW as a per capita tax.

3. Analysis

Long ago, the Board, in ruling as to whether it should change the name of a union with whom it had ordered an employer to bargain, held that "continuity of [the employees' own] organization (is) the governing test in determining whether one labor organization is identical with another having a different name and affiliation." *Harris-Woodson Co.*, 85 NLRB 1215, 1217 (1949). In retrospect, it may be that that test was devised because of a reluctance to defer to election processes other than those provided by Section 9 of the Act. In any event, the application of that test in cases since then has left little in the way of clear precedent as is evident from the cases discussed below and from other cases.¹

More than a few years ago, the then chairman of the Board observed that, in cases involving the question as to whether there was a change in the identity of a collective-bargaining representative resulting from a merger or an affiliation, it would be better to use the Board's rulemaking powers to decide that question, rather than the "very questionable" procedures used in a case-by-case analysis. *Hamilton Tool Co.*, supra at 576 (1971). Board decisions prior to that case and those since tend to support this observation. Earlier cases, for the most part, fixed summarily on the "Act and the Board's policy" which generally required denial of motions to amend certifications and held that such matters must be determined through a petition and secret ballot. The Board

¹ *City Wide Insulation*, 307 NLRB 1 (1992); *Toyota of Berkeley*, 306 NLRB 893 (1994); *H. B. Design & Mfg.*, 299 NLRB 73 (1990); *Quality Inn Wakiki*, 297 NLRB 497 (1989); *News/Sun-Sentinel Co.*, 290 NLRB 1171 (1988); *May Department Stores Co.*, 289 NLRB 661 (1988); *Garlock Equipment Co.*, 288 NLRB 247 (1988); *Pacific Southwest Container*, 283 NLRB 79 (1987); *Insulfab Plastics*, 274 NLRB 817 (1985); and *Yates Industries*, 264 NLRB 1237, 1250 (1982).

professed its concern that the changes contemplated by such a motion may not “insure to the employees . . . continuity in representation.” See *Gulf Oil Corp.*, 135 NLRB 184, 185 (1962), and cases cited there at fn. 5. Cf. *Emery Industries*, 148 NLRB 51, 53 (1964), and cases cited there at fn. 5.

In a later case, *Newspapers, Inc.*, 210 NLRB 8, 9 at fn. 2 (1974), the Board, in determining that a new bargaining entity was a continuation of the same bargaining entity, held that the paramount concern of the Board is the employees’ Section 7 right to choose their own bargaining representative. In disagreeing with the findings of an administrative law judge in that case that the merger resulted in a different union, the Board stated that the judge had exalted form over substance. However, very shortly afterwards, the Board appears to have abandoned that view. See *Independent Drug Store Owners of Santa Clara*, 211 NLRB 701, (1974); there, the Board majority revisited *Gulf Oil Corp.*, supra. The dissenting members asserted that the case should not be decided on technicalities but that the wishes of the employees should be honored. The view of the dissent in that case was followed by the panel majority in *Ocean Systems, Inc.*, 223 NLRB 857 (1976). There, the panel majority appeared to give controlling weight to the votes cast by the employees for affiliation over the factors cited by the dissenting member, who would find a lack of continuity of representation.

In *Quemetco, Inc.*, 226 NLRB 1398 (1976), the panel majority gave controlling weight to the employees’ affiliation vote, stating that it is “much more concerned with giving effect to their free choice than with the so-called ‘continuity of representation’ which might be disrupted by such election.” The dissent in that case was predicated on the Board’s representation procedures being the appropriate vehicle to resolve the matter of representation. The Board followed *Quemetco* with *New Orleans Public Service*, 237 NLRB 919, 921 (1978), where it amended a certification on an overwhelming affiliation vote and after noting that all contractual commitments made by the predecessor union with the employer there will be honored. To substantially the same effect, see *Williamson Co.*, 244 NLRB 953 (1979); the dissenting member in that case would dismiss the requested amendment of certification on the ground that the affiliation of a small, independent local union with an International union affects a substantive change in the identity of the bargaining representative, such that a question concerning representation is raised which can only be resolved by a Board-conducted election.

The holding in *Quemetco*, supra, was overruled in *Western Commercial Transport*, 288 NLRB 214, 218 at fn. 13 (1988). There the majority opinion relied on language in the Supreme Court’s decision in *NLRB v. Financial Institution Employees Local 1182*, 475 U.S. 192 (1986), i.e., “affiliation implicates the employees’ right to select a bargaining representative, and to protect the employees’ interest, the situation may require that the Board exercise its authority to conduct a representation election.” The dissenting member of the Board in *Western* would find sufficient that the change in the bargaining representative was brought about by an affiliation which was intended and desired by the employees themselves.

Western also noted that factors to be considered in determining whether there has been a continuity in representation include: continued leadership responsibilities by the existing

union officials; the perpetuation of membership rights and duties, such as eligibility for membership, qualification to hold office, oversight of executive council activity, the dues/fees structure, authority to change provisions in the governing documents, the frequency meetings, the continuation of the manner in which contract negotiations, administration, and grievance processing are effectuated; and the preservation of the certified union’s physical facilities, books and assets. To the same effect, see *Chas S. Winner, Inc.*, 289 NLRB 62 (1988).

The Board, in a more recent case, held that an affiliation met the Board’s continuity of representative test. It emphasized that the former unit continued to select its own chair to serve as a conduit between it and the local into which it merged, and that the collective-bargaining and grievance handling responsibilities continued to function after the affiliation with increased staff support. See *Central Washington Hospital*, 303 NLRB 404 (1991). However, and not much later in *Service America Corp.*, 307 NLRB 57 (1992), the Board, while upholding a merger, clearly supported the results and reasonings in *Western*, supra, *Winner*, supra, and *Independent Drug Store Owners*, supra.

Minn-Dak Farmers Cooperative, 311 NLRB 942 (1993), held that the employer there refused to bargain collectively with a local formed by an International to receive the members of an independent union pursuant to a vote of 103 to 78 for affiliation. As to the continuity issue, the majority followed *Central Washington*, supra, noting particularly that the successor union retained substantial autonomy concerning the important areas of contract bargaining, grievance handling, and calling strikes. It observed that the affiliation enhanced the rights of the employees in these areas and that there was no showing that the International there routinely involved itself in the prosecution and settlement of members’ grievances, complaints, or disputes.

The Board, in its most recent Board decision in this area, *Sullivan Bros. Printers*, 317 NLRB 561 (1995),² stated that, consistent with the Supreme Court’s admonition in *NLRB v. Food & Commercial Workers Local 1182*, supra, it will intersect itself only in the most limited of circumstances in cases involving internal union changes in the interests of preserving industrial peace. Thus, it will do so “only . . . where the organizational changes are so dramatic that the post affiliation lacks substantial continuity with the preaffiliation union”; the Board further noted that its intervention in essentially internal union matters has frequently been held unnecessary by the appellate courts. It went on to state that the appropriate analysis, rather than being mechanistic and using a strict checklist, is to be directed at evaluating the totality of the circumstances in order to give paramount effect to employees’ desires. It proceeded to examine at some length the evidence as to a number of factors, many of those listed in *Western Commercial*, supra, and concluded that the respondent there failed to demonstrate any dramatic differences. Thus, it upheld the merger of two locals into a newly formed third.

The cases discussed above indicate that the desires of employees as to affiliation are to be controlling unless there has

² *Paragon Paint & Varnish Corp.*, 317 NLRB 747 (1995), was decided a week later but dealt only with the validity of the procedures in conducting the merger election.

been a showing of such dramatic change between the organization that represented them and the one with which they voted to affiliate. The exception, as suggested above, appears to be premised on the Board's preference for the utilization of its processes under Section 9 of the Act. Putting that aside and for the immediate purpose of deciding the issue before me, the controlling precedent the most recent Board decision in this area, i.e., the reasoning in *Sullivan Bros.*, supra. In light of the unanimous vote of the members of the CPS Group in the instant case, a vote they held after due deliberation, and in view of the structure of the CPS Group within Local 8-397, I find that the Respondent has failed to demonstrate that the affiliation of the Association with Local 8-397 resulted in such dramatic changes as to raise a question concerning representation. Nadal was the leader in the Association and, as the leader of the CPS Group, he is the conduit between the members of that group and the officials of Local 8-397. All of the Association's members have been accepted into Local 8-397. There is no showing that the bylaws or the constitution of Local 8-397 or those of OCAW have or will infringe on the rights of the CPS Group members, no showing that the manner in which the Association's contract with the Respondent is to be administered will change materially, and no showing that method of negotiating a renewal contract will vary materially than that used in the past. At most, the evidence indicates that the members of the CPS Group may have enhanced their status by better staff support. The size of the employee complement prior to the affiliation relative to the size of the successor union and the fact that the OCAW internal procedures are quite detailed in contrast to the relatively primitive structure of the Association are not dispositive nor are the transfer and commingling of assets, as such changes are the natural consequence of ordinary and valid reasons for affiliations. *NLRB v. Food & Commercial Workers*, supra. I therefore find that the Respondent was obliged to bargain collectively with Local 8-397 as the representative of its plant employees and that it has failed to do so.

The Respondent, while recognizing that I am bound by Board precedent, urges consideration to holdings of the U.S. Court of Appeals for the Third Circuit which have refused to enforce Board Orders based on affiliations. In those cases, the court has held that, when a local independent labor union affiliates and become a local unit of an International union and transfers control over the rights of its members to the International whose constitution and bylaws make substantial changes in the rights of employees to contract, affects their obligations to management and links their concerns with thousands of other members of the international throughout the country, a change is effected in the bargaining agent of such employees. *Sun Oil Co. of Pennsylvania v. NLRB*, 576 F.2d 553 (3d. Cir. 1978), and cases cited there. The Board may want to consider whether to defer to the Third Circuit's summary approach rather than undertake its own analysis but it would be inappropriate for me to so recommend. It is, however, appropriate to offer the following.

The procedures used in litigating issues in merger-affiliation cases are unduly cumbersome, costly, and perhaps even unnecessarily intrusive into internal union matters. The Board has repeatedly stated that, in these cases, its paramount concern is to accommodate the desires of the employees. It has also said, as to the continuity of representative issue, that the

primary consideration is to ensure that the employees' Section 7 rights are protected. It is difficult to understand why the Board has viewed, as a competing consideration, its apparent preference for its established election procedures. In doing so, it has allowed employers to conduct intensive examinations into the meetings their employees have held among themselves concerning their desires to affiliate, into minutes and other records related thereto, into lists of the employees who attended union meetings and of those who voted, and even into the markings on the ballots they had cast. Some, if not all, of those matters may well be privileged from disclosure. Cf. *National Telephone Directory Corp.*, 319 NLRB 420 (1995). The Board, in merger-affiliation cases, has allowed the subpoenaing of voluminous data including bylaws, constitutions, collective-bargaining agreements, minutes of union membership, minutes of executive meetings, copies of grievances and related records, arbitration awards, and more—all purportedly to determine whether the employees were truly cognizant of what they were doing when they voted for affiliation. It may now be time for the Board to invoke its rule-making powers, as was urged some years ago by the then Board chairman, and there to consider whether it is feasible to develop a less intrusive method which would allow for an affiliation when favored by an overwhelming majority of unit employees.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Local 8-397 is a labor organization as defined in Section 2(5) of the Act.
3. The Respondent has engaged in an unfair labor practice within the meaning of Section 8(a)(1) and (5) of the Act by having refused to bargain collectively with Local 8-3978 as the exclusive collective-bargaining representative of the employees in the following described unit:

All plant employees, including operators, mechanics and laborers employed by the Respondent at its Old Bridge, New Jersey facility but excluding all office and administrative employees, professional employees, quality control and research and development laboratory personnel and other technical employees, salespersons and guards, watchpersons and supervisors as defined in the National Labor Relations Act, as amended.

4. This unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in an unfair labor practice, it should be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

It should further be ordered to transmit to Local 8-397 any and all fees and dues owed under the collective-bargaining agreement which covered the employees in the the above-described unit and which expired on January 3, 1996, with interest thereon in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, CPS Chemical Company, Inc., Old Bridge, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain collectively with Oil, Chemical and Atomic Workers International Union, Local 8-397 as the exclusive representative of the employees in the unit described the Conclusions of Law section of this decision.

(b) 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) On request, bargain with the Union as the exclusive representative of the employees in the above-described appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(b) Transmit to Local 8-397 any and all fees and dues owed under the collective-bargaining agreement which expired on January 3, 1996, with interest thereon as provided for in the remedy section of this decision.

(c) Within 14 days after service by the Region, post at its facility in Old Bridge, New Jersey, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 22, 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. In the event that, during the

³If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁴If 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."

pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 23, 1995.

(d) 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.

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.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize or bargain collectively with Oil, Chemical and Atomic Workers Union, Local 8-397 as the exclusive representative of our plant employees, including operators, mechanics, and laborers, employed at our Old Bridge, New Jersey facility.

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

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our plant employees, including operators, mechanics and laborers employed at our Old Bridge, New Jersey facility and WE WILL transmit to the Union, with interest, all dues and fees owed them under the contract which expired on January 3, 1996.

CPS CHEMICAL COMPANY, INC.