

Lockheed Martin Tactical Aircraft Systems and Alma Paulette Beveridge

Office and Professional Employees International Union, Local 277, AFL-CIO and Alma Paulette Beveridge. Cases 16-CA-17464, 16-CA-17588, 16-CB-4764, and 16-CB-4805

August 25, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On September 23, 1996, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent and the Union filed exceptions and supporting briefs, and the General Counsel filed an answering brief to the Respondent's exceptions.

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

The Board has reviewed the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,¹ findings,² and conclusions to the extent consistent with this Decision and Order and to adopt the recommended Order as modified and set forth in full below.

Reclassification of P&A Employees

The judge found that the Respondent Employer violated Section 8(a)(1), (2), and (3) and that the Respondent Union violated Section 8(b)(1)(A) and (2) of the Act by, *inter alia*, entering into an unlawful agreement to accrete previously unrepresented salaried professional and administrative employees (P&A) in Department 17-4 (Graphic Arts) into the existing bargaining unit at a time when the Union did not represent a majority of these previously unrepresented P&A employees and by applying the terms of the Respondent's collective-bargaining agreement to them.

The Respondents except to the judge's findings, contending that this case involves only the lawful return of bargaining unit work which had seeped out over time from the bargaining unit. We find merit in the Respondents' exceptions and, for the following reasons, we reverse the judge's findings in this respect.

The basic facts are not in dispute. The judge found that the Respondents have had a collective-bargaining rela-

tionship since 1951 and have signed successive collective-bargaining agreements over the years covering a unit of all office and clerical employees. It is also undisputed that the P&A employees have been historically excluded.

In 1993, at the time of the negotiations surrounding the collective-bargaining agreement effective from December 13, 1993, to May 4, 1997, the Respondents discussed the growing number of grievances filed by unit employees alleging that nonunit employees were performing bargaining unit work.³ In an effort to resolve these disputes, the parties agreed to perform audits of jobs and their tasks, particularly those in departments that were involved in the grievances. Pursuant to that agreement, in the summer of 1994, the Respondents formed an audit committee that consisted of representatives from Lockheed's management and the Union. As the judge found, their mission was to examine the jobs/tasks that were the subject of the grievances, interview the nonunit employees who were performing those tasks, and make recommendations as to whether the disputed tasks were bargaining unit work. This resulted in audits being performed in several departments, including department 17-4, whose work involved editing and the development of graphics for brochures, sales proposals, posters, and internal newspapers. By March 1995, the audits were completed. In department 17-4, 76 jobs were audited, and 26 were determined to comprise primarily bargaining unit work. These jobs were then reclassified as bargaining unit positions with new job titles of document editor and computer graphics technician. The Respondents agreed that since there were no unit employees on layoff status with recall rights, the nonunit P&A employees who had been performing this work would be offered transfers to these new unit positions.

The judge found, in agreement with the General Counsel, that the P&A employees who transferred into the unit were unlawfully accreted to the unit because they had been historically excluded from the unit and they had never designated the Union as their collective-bargaining representative. The Respondents except, contending, *inter alia*, that the judge erred in applying the Board's accretion analysis to the events in this case. Contrary to our dissenting colleague, we find merit in this exception.

The Respondents in this case were faced with a problem of a growing number of grievances alleging that nonunit employees were performing unit work. They decided through collective bargaining to resolve the problem through a job audit of the departments involved in these grievances, including department 17-4. The audit revealed that of the 76 nonunit P&A jobs in department 17-4, 26 consisted of bargaining unit work. In other words, through the course of time, bargaining unit

¹ The Respondent Employer has renewed its motion to reopen the record to submit transcript testimony from a 10(j) hearing which was previously denied by the judge. For the reasons stated by the judge and in light of our decision in this matter, we deny the motion.

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

² The Respondent Employer has also 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.

³ Because of defense spending cutbacks, the Union was also losing members who were either being laid off or retired. In 1990, the Union's bargaining unit was about 2000 members, but by 1993 the bargaining unit had shrunk to approximately 1095 members.

worked had “seeped out” of the unit, and the Respondents agreed that the work performed by these 26 nonunit employees should be returned to the bargaining unit.

The Respondents then negotiated a procedure for the return of this work to the bargaining unit. Since there were no bargaining unit employees on layoff status with recall rights, the Respondents agreed that the nonunit P&A employees who had been performing this bargaining unit work would be allowed to “follow the work” and would therefore be offered transfers to the unit. If they chose not to accept the transfers, they could bid on any existing vacancies in jobs for which they were qualified or they could risk being laid off.

Under these circumstances, we do not find that the P&A employees who accepted transfers to the bargaining unit constituted an accretion to the bargaining unit. Significantly, the General Counsel did not allege that the Respondents’ agreement to conduct a job audit was in any way unlawful or that the audit process was in any way tainted. Thus, the General Counsel is not contesting the finding of the audit that the work of 26 nonunit P&A positions in department 17-4 was bargaining unit work.⁴ Further, the General Counsel did not allege that the Respondents were attempting to expand the unit description to include the historically excluded classification of P&A employees.

In sum, the General Counsel is not contesting the right of the Respondents to return work to the bargaining unit. Rather, his argument seems to be that even if P&A employees have been assigned what is concededly bargaining unit work, they cannot be treated as bargaining unit employees and covered by the collective-bargaining agreement because at the time the unit was established, the P&A employees did not perform bargaining unit work and were therefore not included in the bargaining unit.

The fallacy of the General Counsel’s theory can be easily demonstrated. Had there been bargaining unit employees on layoff status and had they been recalled to do the returned unit work, there could be no contention that the recalled unit employees constituted an accretion to the unit. Similarly, had the Respondents agreed to hire 26 new employees to do the bargaining unit work that had been returned to the unit, there could be no contention that the new hires constituted an accretion. Yet, the operative facts in these scenarios are the same as in the scenario agreed to by the Respondents whereby nonunit employees were allowed to transfer into the unit. In each case, work that belongs in the bargaining unit is being returned to the unit and thus the unit is being increased

⁴ Our dissenting colleague repeatedly suggests that the work in question was not in fact bargaining unit work, but was really “nonunit” work by some sort of “sleight of hand.” The dissent cites no evidence in support of this contention, as there is none.

by 26 positions.⁵ That the Respondents agreed to offer nonunit employees transfers to the bargaining unit rather than laying them off and hiring new employees should not and does not require a different analysis.⁶ Indeed, because they were offered transfers, these employees are actually better off than they would have been had the Employer followed the entirely lawful alternative course of simply laying them off and hiring new employees to perform the bargaining unit work.

Accordingly, we find that the transfer of nonunit employees into the unit did not constitute an accretion and that the Respondents did not violate the Act in this regard, as alleged. We therefore dismiss these complaint allegations.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that

A. Respondent Lockheed Martin Tactical Aircraft Systems, Fort Worth, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge if they did not agree to join the Union or sign a union dues-checkoff authorization card.

(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) Within 14 days after service by the Region, post at its facility in Fort Worth, Texas, copies of the attached notice marked “Appendix A.”⁷ Copies of the notice, on forms provided by the Regional Director for Region 16,

⁵ Contrary to our dissenting colleague, we are not “ignoring” the Sec. 7 rights of the P&A employees. Under Sec. 7 and Sec. 8(a)(3) of the Act, an employee hired into an appropriate bargaining unit represented by a union does not have a right to choose to perform unit work but be unrepresented by the union or exempt from the obligations imposed by a lawful union-security agreement covering that unit. The choice the P&A employees did have, consistent with their Sec. 7 right to remain unrepresented, was to refuse a transfer into the unit. Cf. *The Sun*, 329 NLRB 854, 856 (1999) (new employees who perform job functions similar to those performed by unit employees, as defined by unit description, presumed to be part of that unit unless the unit functions they perform are incidental to their primary work function or are otherwise an insignificant part of their work).

⁶ The accretion cases, relied on by the judge and our dissenting colleague, are simply not applicable in this case. The Respondent and the Union did not attempt to expand the unit by adding the P&A job classification to the unit. Rather, they sought to adhere to the scope of the bargaining unit to which they had agreed by returning unit work to the unit to be performed by employees in the job classification that, by their agreement, should have been performing the work all along.

⁷ 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.”

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 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 July 3, 1995.

(b) 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.

B. Respondent Office and Professional Employees International Union, Local 277, AFL-CIO, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Threatening employees that the Union would seek their discharges if they refused to sign a union membership application and dues-checkoff authorization card.

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

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

(a) Within 14 days after service by the Region, post at its union office copies of the attached notice marked "Appendix B."⁸ Copies of the notice, on forms provided by the Regional Director for Region 16, 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 pendency of these proceedings, the Respondent has gone out of business or closed its office involved in these proceedings, the Respondent Union shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent Lockheed at any time since July 3, 1995.

(b) 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.

MEMBER BRAME, dissenting in part.

The primary issue here is whether Lockheed (the Employer) and the Union (collectively, the Respondents) violated the Act by compelling unrepresented nonunit employees to join the bargaining unit.¹ The judge found that they did. Concentrating their analysis on the work performed rather than on the Section 7 rights of the employees who performed it, my colleagues find that the Respondents' conduct of forcing unrepresented nonunit employees into the bargaining unit was lawful because the Respondents, they assert, were merely reabsorbing into the bargaining unit work that had "seeped out" from it. For the reasons set out below, I find my colleagues' reasons for reversing the judge unconvincing, their "analysis" without legal significance, and their result contrary to the Board's longstanding and well-established policy of protecting the Section 7 rights of employees in matters of unit placement. I therefore dissent.

The facts are straightforward. Lockheed operates a military aircraft manufacturing facility in Fort Worth, Texas. Lockheed and the Union have had a collective-bargaining relationship at the Fort Worth facility since 1951. Since about 1966, the Union has represented the following unit of employees at the Fort Worth facility:

Included: All office and clerical employees in the Employer's Fort Worth, Texas Division and all employees of the Employer employed at its Fort Worth, Texas plant in the classification of Photographer A and B, and Photographic Laboratory Man A and B. Excluded: All other employees, including confidential employees, professional employees, guards, and supervisors as defined in the Act.

Lockheed's Fort Worth facility is considered a Federal enclave and at all material times the Respondents' collective-bargaining agreement has contained a union-security provision. The Respondents' most recent collective-bargaining agreement was effective from December 13, 1993, to May 4, 1997. During the negotiations for that agreement, the Respondents discussed the increasing number of grievances alleging that nonunit employees were performing unit work. The impetus for the grievances was, in part, the number of unit employee layoffs caused by a reduction in national defense spending. In fact, there were about 2000 employees in the bargaining unit in 1990, but this number had shrunk to approximately 1095 by 1993. In summer 1994, the Respondents formed audit committees consisting of Lockheed em-

⁸ See fn. 7, above.

¹ A secondary issue here is whether Lockheed and the Union violated Sec. 8(a)(1) and (2), and Sec. 8(b)(1)(A), respectively, by unlawfully threatening certain employees that they would have to join the Union and sign dues-authorization cards or be terminated. I join my colleagues in adopting the judge's findings of these violations.

ployees and union representatives to examine the tasks that were the subject of the grievances.

Unrepresented professional and administrative (P&A) employees in Lockheed's department 17-4 performed some of the contested work which was the subject of the audit. Based on an audit of 76 of the P&A jobs in department 17-4, it was concluded that 26 of the employees in that department performed unit work and that therefore their jobs should be reclassified as unit positions. Two new unit titles were created for the reclassified employees, document editor and computer graphics technician. Since there were no unit employees on layoff status with recall rights, the Respondents agreed to offer the 26 nonunit P&A employees transfers to these newly classified unit positions.

On March 10, 1995, the Respondents told the affected employees that they were being reclassified as represented unit employees although none of these employees had designated the Union as his bargaining representative prior to the March 10 meeting.² The change officially took place on March 13. Several of the P&A employees testified that they had been performing their jobs prior to the 1993 negotiations and that these jobs had remained the same after they were reclassified as bargaining unit positions.

As relevant here, the General Counsel alleged that the Respondents, by reclassifying the unrepresented P&A employees as bargaining unit employees and then extending the Union's recognition to them, interfered with, and/or restrained and coerced those employees in the exercise of their Section 7 rights. Specifically, the complaint alleged that Lockheed violated Section 8(a)(1) of the Act by reclassifying "a group of previously unrepresented employees in Department 17-4 and similarly situated employees" from salaried positions to hourly bargaining unit positions; that it violated Section 8(a)(2) by granting recognition to the Union as the exclusive representative of those employees at a time when the Union did not represent a majority of those employees; and that it violated Section 8(a)(3) by applying the terms of the collective-bargaining agreement to these previously unrepresented employees. The complaint further alleged that the Union violated Section 8(b)(1)(A) and (2) by accepting recognition as the representative "of a group of previously unrepresented employees in Department 17-4 and similarly situated employees" at a time

² Also at the March 10 meeting, Union Representative J. B. Moss stated that if a P&A employee did not sign his union membership and dues-authorization cards within 30 days, the employee would be terminated. On March 20, Supervisor Mickey Winchester told P&A employee Monte Richardson, who was on vacation at the time of the reclassification, that he would have to join the Union or be discharged, and on April 8, Supervisor Larry Crook told P&A employee Stacy Jobe that if she did not sign the dues authorization card, Lockheed would have to initiate the process of discharging her. These events form the factual predicate for the judge's findings of the 8(a)(1) and (2) and 8(b)(1)(A) violations discussed above at fn. 1.

when the Union had not been designated as the exclusive representative by a majority of those employees and by applying the terms of the collective-bargaining agreement to these previously unrepresented employees.

Since the complaint alleged, in effect, that the Respondents unlawfully added nonunit employees to the bargaining unit, the judge applied an accretion analysis to determine the legality of the Respondents' conduct.³ It being undisputed that the P&A employees had been historically excluded from the bargaining unit, the judge found that under the Board's *Laconia Shoe* doctrine,⁴ which forbids the accretion to a bargaining unit of employees who have been historically excluded from it, the Respondents' accretion of the P&A employees into the bargaining unit was unlawful. In reaching this conclusion, the judge considered and rejected as "a distinction without substance" the Respondents' sophistic gambit that the reclassification applied only to the audited work and not to the nonunit employees who performed that work. This should be the end of the matter.

Unfortunately, however, my colleagues seize on the Respondents' gambit as their own to proclaim that the judge erred by finding a "distinction without substance" the Respondents' characterization of the reclassification as one of work rather than employees. My colleagues then use this gambit as an analytical springboard from which first to detach the work performed from the employees who perform it, and then those employees from their Section 7 rights. For the reasons set out below, my colleagues' decision cannot stand because they can neither justify their result nor explain why such a departure from Board precedent is warranted.

The fallacy of my colleagues' "analysis" that leads to their wrongheaded result is easily revealed. Simply put, my colleagues vest with legal significance that which has no legal significance, i.e., the Respondents' agreement between themselves to reclassify the audited work as bargaining unit work. Relying on negative inferences, including, inter alia, that "the General Counsel did not allege that the Respondents' agreement to conduct a job audit was in any way unlawful or that the audit process was in any way tainted," and that the General Counsel did not "contest" the results of the audit, my colleagues finesse a finding that the Respondents' agreement to reclassify the nonunit work as bargaining unit work had the legal effect of actually transforming that work into bargaining unit work. Based on this sleight of hand, my colleagues can then assert positively that the transferred employees were merely assigned what is "concededly" bargaining unit work, and that therefore under the "scenario" agreed to by the Respondents, the nonunit em-

³ As explained in *Gould, Inc.*, 263 NLRB 442, 445 (1982) (footnote omitted): "An accretion, as the term has been employed by the Board and the courts, is merely the addition of new employees to an already existing group or unit of employees."

⁴ *Laconia Shoe Co.*, 215 NLRB 573 (1974).

ployees allowed to transfer into the bargaining unit to perform this new work were analytically no different from employees recalled from layoff to perform the work, or from new employees hired to perform it. Having thus stripped the unrepresented P&A employees of their Section 7 rights,⁵ my colleagues conclude that the mere fact that these employees were transferred into the unit from nonunit positions rather than recalled from layoff or hired as new employees neither changes the analysis nor constitutes an accretion.

By thus shifting the analysis from the issue presented, i.e., whether the unrepresented P&A employees' Section 7 rights were violated when they were forced into the bargaining unit, to an issue of no legal significance, the Respondents' agreement to reclassify the audited work as bargaining unit work, and then feigning that this issue is actually dispositive of the issue presented, my colleagues avoid any discussion of the Section 7 rights of the unrepresented P&A employees. By ignoring these Section 7 rights, my colleagues find that the Respondents did not violate them. Such is the thrust of the Respondents' gambit and their agreed-on "scenario." Such is the result of my colleagues' "analysis."

However, contrary to my colleagues' findings, the fact that the Respondents fixed on, as my colleagues put it, a "scenario" whereby they could agree that the audited work was bargaining unit work, does not resolve the issue of whether they could lawfully compel the unrepresented P&A employees to join the bargaining unit. For the fact that the Respondents agreed between themselves to reclassify the audited work as bargaining unit work has no legal significance and, indeed, is totally irrelevant to the issue presented, which is, after all, an issue of unit placement. Thus, whether the unrepresented P&A employees can be added to the bargaining unit by agreement of the parties is, as the judge correctly found, fundamentally an issue of accretion. And, as explained in *Honeywell, Inc.*⁶:

Issues of accretion are representational issues for the Board to determine. . . . Although unions and employers are not precluded from initially attempting to resolve such issues through contractual grievance and arbitration machinery, the Board's determination takes precedence.

But in resolving representational issues involving the placement of employees in a bargaining unit, including issues of accretion as we have here, the Board has assigned

⁵ As relevant here, Sec. 7 states (emphasis added):

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities[.]

⁶ 307 NLRB 278, 283 (1992), reconsideration granted in part 310 NLRB 517 (1993).

primary importance to the very issue which my colleagues have ignored here, the vindication of the employees' Section 7 rights, "which rights, of course, include both joining a labor organization or refraining from doing so[.]"⁷ As the Board explained in *Melbet Jewelry*, 180 NLRB 107, 109 (1969) (footnote omitted; emphasis added):

The Board . . . must examine fundamentals and put the Section 7 rights guaranteed the employees and the appropriate unit concept of Section 9(b) into proper perspective.[⁸] Excessive preoccupation with "appropriate unit" . . . leads to the abrogation of those rights. Section 7 of the Act is not subordinate to Section 9(b). As the Board indicated in *Haag Drug* [169 NLRB 877], quite the opposite is true. Section 9(b) directs the Board to select units to "assure to employees the fullest freedom in exercising the rights guaranteed by this Act . . ."—*which rights, of course, are those set out in Section 7.*

Since the Board has given preeminence in unit placement issues to the Section 7 right of employees to "assure to employees the fullest freedom in exercising the rights guaranteed by [the] Act," it naturally follows, as explained by the judge, that "[t]he Board has followed a restrictive policy in finding accretion because it forecloses the employees' basic right to select their bargaining representative." *Towne Ford Sales*, 270 NLRB 311, 311 (1984), *affd. sub nom. Machinists v. NLRB*, 759 F.2d 1477 (9th Cir. 1985).

A corollary to the Board's application of a restrictive policy in finding accretion is set out in *Laconia Shoe*, *supra*, 215 NLRB at 576 (footnote omitted), where the Board explained that

[t]he single most crucial factor in any "accretion case" under settled Board law is whether the group sought to be accreted has been in existence at the time of recognition or certification, yet not covered in an ensuing contract, or, having come into existence, has not been part of the larger unit to which their accretion is sought or granted. . . . When a group has in fact been excluded for a significant period of time from an existing production and maintenance unit, the Board will not permit their accretion without an election or a showing of majority among them even if no other union could attain representative status for them.

In other words, when employees have been historically excluded from a bargaining unit, that "'historical exclusion . . . is determinative' against their later accretion absent evidence of the majority's preference." *Teamsters National UPS Negotiating Committee v. NLRB*, 17 F.3d 1518, 1521

⁷ *Haag Drug Co.*, 169 NLRB 877, 877 (1968).

⁸ As relevant here, Sec. 9(b) provides:

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof[.]

(D.C. Cir. 1994).⁹ In approving the Board's application of *Laconia Shoe*, the court explained that "[b]oth the Board and the courts recognize that the *Laconia Shoe* doctrine is critical to the protection of employees' Section 7 right to choose whether to belong to a union and if so to which one." *Id.*

In the present case, where the fact of the P&A employees' historical exclusion from the bargaining unit is uncontested, the judge correctly applied the Board's *Laconia Shoe* doctrine to find that their historical exclusion precluded their accretion into the bargaining unit. In so doing, the judge vindicated the Section 7 right of these employees "to choose whether to belong to a union and if so to which one." In refusing the Respondents' gambit to detach the work performed from the employees who perform it, the judge properly declined to follow the Respondents' "logic" which must inevitably lead, as the majority's decision shows, to the sacrifice of the P&A employees' "Section 7 right to choose whether to belong to a union and if so to which one." Since such a sacrifice of Section 7 rights would, as shown above, be wholly contrary to the Board's policy of protecting these fundamental employee rights which informs the Board's analysis of unit placement and accretion issues, the judge did not err in finding that the Respondents violated the Act by accreting the employees at issue here into the bargaining unit.

While my colleagues may desire to check the declining membership of a bargaining unit by absorbing into the unit work that they assert has "seeped out" from it, they cannot do so by conducting a mopping up operation that effectively wipes out the Section 7 rights of unrepresented employees.¹⁰ My colleagues' failure to mention, much less to consider, much less to vindicate these Section 7 rights marks a clear departure from well-established Board precedent.¹¹ That my colleagues can

⁹ As the Board explained in the underlying decision, *United Parcel Service*, 303 NLRB 326, 327 (1991) (emphasis in original):

The limitations on accretion . . . applied in *Laconia Shoe* and related precedent require neither that the union have acquiesced in the historical exclusion of a group of employees from an existing unit, nor that the excluded group have some common job-related characteristic distinct from unit employees. *It is the fact of historical exclusion that is determinative.*

¹⁰ Stated otherwise, even though the *Laconia Shoe* "fits," my colleagues decline to "wear it."

¹¹ My colleagues can only assert that they are "not 'ignoring' the Sec. 7 rights of the P&A employees" by analogizing the Sec. 7 rights of those employees to those of newly hired employees who in my colleagues' words, "[do] not have a right to choose to perform unit work but be unrepresented by the union[.]" By making such an argument, my colleagues only prove what they attempt to disprove: that they are ignoring the Sec. 7 rights of the P&A employees. For by passing over the fact that the P&A employees are *not* newly hired employees, my colleagues ignore the fact that they have *already* exercised their Sec. 7 rights by choosing *not* to be represented by the Union. Given that the P&A employees have already exercised their Sec. 7 rights in this matter, it is disingenuous for my colleagues now to assert that they are not "ignoring" the Sec. 7 rights of those employees when, by their decision,

only justify their departure from Board precedent by relying on negative inferences to find legally dispositive an issue which is, in fact, of no legal significance only underscores the poverty of analysis. That such an analysis is bereft of any supporting case citation can hardly be deemed surprising.

For all these reasons, I find that my colleagues' "reasons" for reversing the judge only confirm the soundness of the judge's decision. Accordingly, contrary to my colleagues, I would adopt the judge's findings that the Respondents violated the Act as alleged and would require the Respondents to abide by the judge's recommended Orders to remedy the violations found.¹²

APPENDIX A

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.

they compel the P&A employees to join the bargaining unit or risk the loss of their jobs.

¹² As noted above, the complaint's allegations encompassed the department 17-4 employees and other "similarly situated" employees. The Respondents except to the judge's inclusion of such "similarly situated" employees in the remedy section of his decision. For the following reasons, I find the Respondents' exceptions without merit.

As explained in *Morton Metal Works*, 310 NLRB 195, 195 (1993), enfd. mem. 9 F.3d 108 (6th Cir. 1993):

It is well established that both named and unnamed discriminatees are entitled to a reinstatement and make-whole remedy in a situation, as here, where the General Counsel has alleged and proven discrimination against a defined and easily identified class of employees.

I find that these criteria are met here. As established by the General Counsel, the class of affected employees is easily definable as all unrepresented employees who were historically excluded from the bargaining unit and (1) who were reclassified to bargaining unit positions; (2) who had the collective-bargaining agreement applied to them by the Respondents; and (3) as to whom Lockheed granted recognition to the Union as their exclusive bargaining representative from about Jan. 5, 1995, to the present. The General Counsel has also established that the affected employees are easily identifiable as the specific identification of known affected individuals are set forth in GC Exhs. 30 and 33 which list, respectively, the names of 26 employees in department 17-4 and 3 employees in department 88 (material finance) who were reclassified from unrepresented salaried positions to bargaining unit positions and otherwise meet the criteria which defines the affected class of employees set out above. I agree with the judge that the extent to which the remedy would apply to such "similarly situated" employees should be resolved at the compliance proceeding.

WE WILL NOT threaten employees with discharge if they refuse to join the Union or sign union dues-checkoff authorization cards.

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.

LOCKHEED MARTIN TACTICAL
AIRCRAFT SYSTEMS

APPENDIX B

NOTICE TO MEMBERS
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 threaten employees that the Union will seek their discharges if they refuse to sign a union membership application and dues-checkoff authorization card.

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

OFFICE AND PROFESSIONAL
EMPLOYEES INTERNATIONAL UNION,
LOCAL 277, AFL-CIO

Timothy L. Watson, Esq. and *David Garza, Esq.*, for the General Counsel.

Gary L. Ingram, Esq., of Fort Worth, Texas, for the Respondent Company.

James L. Hicks Jr., Esq., of Dallas, Texas, for the Respondent Union.

Alma Paulette Beveridge, of Fort Worth, Texas, Charging Party.

DECISION

Introduction

ALBERT A. METZ, Administrative Law Judge. This case was heard at Fort Worth, Texas, on May 28–30, 1996.¹ Alma Paulette Beveridge has charged that Respondent Lockheed Martin Tactical Aircraft Systems (Lockheed) and Respondent Office and Professional Employees International Union, Local 277, AFL-CIO (the Union) have respectively violated Section 8(a)(1), (2), and (3) and Section 8(b)(1)(A) and (2) of the Na-

tional Labor Relations Act (the Act).²

The primary issue is whether the Respondents violated the Act by agreeing to accrete certain previously unrepresented salaried employees into the bargaining unit represented by the Union. Additionally, there is an issue of whether the Respondents made various threats to employees that they would be discharged if they did not join the Union and/or sign dues deduction authorization cards.

Both Respondents admit that Lockheed is an employer engaged in commerce within the meaning of Section 2(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.

I. RULINGS ON POSTHEARING MOTIONS

Subsequent to the hearing Lockheed and the Government filed various motions.

A. Lockheed's Motion to Reopen the Hearing

Lockheed filed a motion seeking to reopen the hearing. Lockheed asks that portions of a transcript from an ancillary Section 10(j) Federal District Court proceeding be accepted as part of this record. The Respondent particularly focuses on arguments made by Government counsel before the District Court and testimony of witnesses who had also testified in the instant hearing. The latter is characterized in Lockheed's motion as "merely additional testimony from witnesses who appeared previously . . . [and] would not represent entirely new evidence." The Government filed an opposition to this motion asking that it be denied.

Lockheed's request does not meet the test of a motion to reopen the record. Section 102.48(d)(1), Board's Rules and Regulations. Lockheed's motion to reopen the hearing is denied.

B. Government's Motion to Strike Portions of Union's Brief

Counsel for the General Counsel moves to strike a reference in the Union's brief to the Government's memorandum submitted in the 10(j) injunction proceeding. (U. Br. at 4 and attached portion of memorandum.) The motion points out that the material cited has not been made a part of the record in the instant case. On that basis the Government's motion relative to the Union's brief is granted. The noted portions of the Union's brief are stricken. *United Parcel Service*, 303 NLRB 326 fn. 2 (1991).

C. Government's Motion to Strike Lockheed's Brief

The Government moves to strike Lockheed's brief for the reason a copy was not served on the Charging Party, Alma Paulette Beveridge. In the alternative the motion asks that portions of Lockheed's brief which make reference to matters that are not a part of the record in this case be stricken. (App. A, any reference thereto, and last sentence of fn. 4.) Service of briefs is required to be made on all parties. Section 102.42, Board's Rules and Regulations. The service sheet of Lockheed's brief does not show that its brief was served on the Charging Party. Lockheed explained this was an oversight and has now served its brief on the Charging Party. On balance I find that the Charging Party was not prejudiced by this oversight. Alma Beveridge relied on Government counsel to represent her inter-

¹ All subsequent dates refer to 1995 unless otherwise indicated.

² The Government withdrew charges relating to Cases 16-CA-17681 and 16-CB-4927 (concerning the suspension and discharge of Alma Paulette Beveridge).

ests in the case and there has been no assertion that she was prejudiced by receiving the brief late.

Counsel for the General Counsel's motion to strike Lockheed's brief in its entirety is denied. The motion is also denied as to the references in footnote 4. The motion is granted with respect to Appendix A, which is material not introduced into evidence in this hearing.³

II. BACKGROUND

Lockheed operates a military aircraft manufacturing facility in Fort Worth, Texas. The Union and Lockheed have had a collective-bargaining relationship at the facility since about 1951. Since approximately 1966 the Union has continuously represented a unit of employees in the following unit:

Included: All office and clerical employees in the Employer's Fort Worth, Texas Division and all employees of the Employer employed at its Fort Worth, Texas plant in the classification of Photographer A and B, and Photographic Laboratory Man A and B. Excluded: All other employees, including confidential employees, professional employees, guards, and supervisors as defined in the Act.

The Respondents have signed successive collective-bargaining contracts over the years covering the unit. Lockheed's Fort Worth facility is considered a Federal enclave and at all material times the Respondents' collective-bargaining agreement has contained a union-security clause that requires financial support from unit employees after a 30-day waiting period.

III. P&A EMPLOYEES ARE ACCRETED INTO THE UNIT

The most recent collective-bargaining agreement between the Respondents is effective from December 13, 1993, to May 4, 1997. At the time of the negotiations for this agreement the Respondents discussed the increasing number of grievances that were being filed alleging that nonunit employees were doing unit work. This influx of grievances was fueled, in part, by a reduction in national defense spending and the consequent layoff of Lockheed workers.

In approximately the summer of 1994 the Respondents formed audit committees consisting of members from Lockheed and the Union. Their mission was to examine some of the tasks that were the subject of grievances. The unrepresented employees who were allegedly doing the unit work were interviewed by the audit committees and a recommendation was then made as to whether the disputed tasks were unit work.

Some of the contested work was being done by salaried professional and administrative (P&A) employees in department 17-4. Their work involves editing and graphics of such things as brochures, sales proposals, posters, and internal newspapers. These P&A employees were not represented by the Union. The audit of department 17-4 examined 76 P&A jobs. The conclusion of the audit process was that 26 of these employees performed unit work and their jobs would be reclassified as unit positions. Lockheed recognized the Union as the exclusive representative of these P&A employees and the Respondents applied the terms of the existing collective-bargaining contract

to them. Two new unit titles were created for this reclassified work—document editor and computer graphics technician.

On March 10, 1995, the effected P&A employees were called to a joint Union-Company meeting and told they were being reclassified as represented unit employees. The change officially took effect the next Monday, March 13. It is undisputed that none of the P&A employees had designated the Union as their collective-bargaining representative prior to the March 10 meeting. Several reclassified P&A employees testified they had been performing their jobs before the 1993 negotiations and their jobs remained the same after they were reclassified to unit positions.

The reclassification had the effect of diminishing the P&A employees' sick leave, vacation benefits, and the number of funds they could invest in under their 401(k) plans. Their insurance plans were changed and matching funds in investment plans were reduced. There was a similar diminution of benefits in other areas such as flexible scheduling, lack of eligibility for bonuses, and reduced amounts of raises. The collective-bargaining contract applied to the reclassified employees also states that "under normal circumstances bargaining unit employees will not be offered promotions to Professional and Administrative (P&A) positions within their departments or transfer to Management Support classifications." The reclassified employees' wages were "red-circled" so they would not suffer a reduction in pay on transfer to the unit.

IV. ANALYSIS OF THE ACCRETION

The Board takes a prudent and limiting position in accretion representation situations:

The Board has followed a restrictive policy in finding accretion because it forecloses the employees' basic right to select their collective bargaining representative. We stated in *Melbet Jewelry Co.*, 180 NLRB 107, 110 (1969), that the Board "will not, . . . under the guise of accretion, compel a group of employees, who may constitute a separate appropriate unit, to be included in an overall unit without allowing those employees the opportunity of expressing their preference in a secret election." *Towne Ford Sales*, 270 NLRB 311 (1984).

In *Laconia Shoe Co.*, 215 NLRB 573, 576 (1974), the Board expounded upon its accretion policy by discussing the following principle:

The single most crucial factor in any 'accretion case' under settled Board law is whether the group sought to be accreted has been in existence at the time of recognition or certification, yet not covered in an ensuing contract.

In *United Parcel Service*, 303 NLRB 326, 327 (1991), the Board explained further that:

The limitations on accretion . . . require neither that the union have acquiesced in the historical exclusion of a group of employees from the existing unit, nor that the excluded group have some common job-related characteristic distinct from unit employees. *It is the fact of historical exclusion that is determinative.* [Emphasis in the original.]

The Respondents argue that they did not transfer employees into the unit but rather reabsorbed unit work that had "seeped" away from the unit. It is asserted that the only reason the P&A employees kept their jobs was because no laid-off unit employees were available to take the positions. The Respondents'

³ The Government objected to Lockheed's method of requesting an extension of time to file a response to the Government's motions. The granting of the extension has been reconsidered and, in light of all the circumstances, is affirmed.

characterization of the reclassification as involving only job tasks and not the individuals who performed the work is a distinction without substance. The P&A employees performing the work were clearly transferred into the unit. They had been performing the same tasks since before the 1993 collective-bargaining contract was negotiated and their positions were not covered by the 1993 contract. Importantly, these historically unrepresented P&A employees' desires as to representation were never determined. Finally, the Union did not represent a majority of these employees before their accretion into the unit.

The previously unrepresented P&A employees did not constitute a proper accretion to the office clerical unit. I find that Respondent Lockheed violated Section 8(a)(1), (2), and (3) of the Act by accreting the P&A employees into the bargaining unit, granting exclusive collective-bargaining recognition to the Union when it was not the designated majority representative of the P&A employees, and applying the terms of the collective-bargaining contract to them. Likewise the Union violated Section 8(b)(1)(A) and (2) of the Act by accepting recognition of the P&A employees when it did not represent a majority of these employees and applying the terms of the Respondents' collective-bargaining contract to them. *Teamsters National UPS Negotiating Committee v. NLRB*, 17 F.3d 1518 (D.C. Cir. 1994).

V. BREADTH OF THE REMEDY

The complaint alleges that since January 3, 1995, the department 17-4 employees and others "similarly situated" were harmed by the Respondents' unlawful accretion actions. The Government argues that the remedy should be broad enough to cover such others. The Respondents assert that there is insufficient evidence to support more than a violation with respect to department 17-4.

The record shows that grievances were resolved by reclassification in departments other than 17-4. In January 1996, three unrepresented P&A employees were reclassified and accreted to Union represented positions in material finance, department 88. Background evidence demonstrated that a large number of employees in the engineering department were also reclassified from unrepresented to represented positions.

The Government has made a sufficient showing that the Respondents' use of the audit/reclassification process was more far reaching than department 17-4. Therefore, I find that it is appropriate to order a remedy that includes others similarly situated who have been unlawfully effected by this process within the 10(b) period. The extent to which this remedy applies to other employees will be left to the compliance process. *Morton Metal Works*, 310 NLRB 195 (1993), enfd. 9 F.3d 108 (6th Cir. 1993); *Iron Workers Local 433 (Reynolds Electrical)*, 298 NLRB 35, 36 (1990), enfd. 931 F.2d 897 (9th Cir. 1991).

VI. ALLEGED THREATS TO EMPLOYEES

The Government alleges that both Lockheed and the Union unlawfully threatened certain employees that they must join the Union and sign dues authorization checkoff cards or they would be terminated. The Respondents deny any such threats were ever made.

A. March 10 Statements by Union Representative Moss

Union Representative J. B. Moss was among the persons who addressed the employees at the March 10 meeting announcing their incorporation into the unit. Employee Stacy Jobe testified that the employees received a dues-checkoff authoriza-

tion card and a union membership card during the course of the meeting. Moss was asked a question as to what would happen if the employees did not sign the cards. Jobe remembered Moss replying that the employee would be terminated. P&A employee Paula Beveridge had the same recollection of Moss' statement about the cards. Employee Lowell Perkins recalled Moss saying that one of the cards (union membership) had to be signed that day and the other (dues checkoff) had to be signed within the next 30 days or the employees would be terminated.

Moss denied telling the assembled employees that they would be discharged if they did not join the Union or sign a checkoff authorization. He was supported in this denial by Lockheed's director of employee relations, Charles Bartek, who denied that Moss said the employees would be required to sign a union card within 30 days or be terminated. Additionally, Lori Hunter, a human resources specialist for Lockheed, was called to testify by her Employer. She was asked if while she was in the meeting she heard Moss say anything about termination if employees did not sign union cards. She denied hearing Moss make such a statement. On cross-examination Hunter admitted that she was only present in the meeting for about 15 minutes and was not present when Moss addressed the employees.

I find the demeanor of Moss and Bartek when testifying regarding threats of termination during the March 10 meeting not to be persuasive. Likewise their general denials were not compelling. In contrast the three employees' testimony presented the impression of persons who were directly and deeply effected by the threat of discharge they attributed to Moss. The demeanor of each of these employees was that of a person who was recalling the event as accurately as memory allows. I credit the employees' version of the meeting and find that Moss did make the threat of discharge if the employees did not sign the cards. The Union violated Section 8(b)(1)(A) of the Act when this threat was made to the assembled employees. *Communications Workers Local 1101 (New York Telephone Co.)*, 281 NLRB 413 (1986); and *Service Employees Local 680 (Leland Stanford University)*, 232 NLRB 32 (1977).

B. March 20 Statements by Supervisor Winchester

P&A employee Monte Richardson was on vacation when his department 17-4 administrative services representative job was reclassified. When he returned to work on about March 20 his supervisor, Mickey Winchester, explained to him that his job tasks had not changed. According to Richardson, Winchester also told him that he would need to join the Union or he would be discharged. Winchester denied that he told Richardson he had to join the Union or he would be terminated.

Richardson's testimony was certain and his demeanor was believable as to what he was told by Winchester about having to join the Union. Winchester's general denial and his unconvincing demeanor lead me to find that Richardson's testimony was the most accurate account as to what was said. I find that Lockheed violated Section 8(a)(1) and (2) of the Act by the statement requiring union membership under the threat of discharge. *Honeywell, Inc.*, 307 NLRB 278, 284 (1992).

C. April 8 Statements by Supervisor Crook

Department 17-4 employee Stacy Jobe testified that after the March 10 meeting she had told a union steward she was not going to join the Union. On approximately April 8 Jobe was

summoned to Supervisor Larry Crook's office. In addition to Jobe and Crook, Union Stewards Gene Patton and Sue Mitchell were also present. According to Jobe, Crook said she did not understand what she was doing by not signing "the card." He said if she did not sign the card Lockheed would have to initiate the process of discharging her. Jobe explained she did not want to join the Union. Patton spoke up and said she need not join the Union but she had to sign a dues deduction card. Jobe said she wanted to think the matter over. Jobe later signed a union dues-checkoff card.

Crook denied telling Jobe she would be discharged if she did not sign a dues-checkoff card. He did concede that he was unaware of any employees who paid their financial obligations to the Union by means other than payroll deductions. He also testified that the meeting was called because Jobe had not executed a dues card although he was uncertain whether she was late in this regard. Patton testified that he told Jobe she did not have to join the Union but did have to pay an amount equal to union dues. She could pay the Union directly or could sign a checkoff and have the amount deducted from her pay. Patton denied anyone present said Jobe would be fired if she did not sign a card or that anything was said as to the consequences if she did not pay dues. Union Steward Mitchell did not testify.

Jobe was a credible witness whose demeanor and detailed testimony of the meeting were convincing. Crook was evasive and his and Patton's demeanors were not persuasive as to what was said to Jobe. I credit Jobe's version of what took place in this meeting. Crook's statement to Jobe that she would be discharged if she did not sign a dues authorization card is found to be a violation of Section 8(a)(1) and (2) of the Act.

CONCLUSIONS OF LAW

1. Lockheed Martin Tactical Aircraft Systems is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Office and Professional Employees International Union, Local 277, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent Lockheed violated Section 8(a)(1) and (2) of the Act by threatening employees with discharge if they did not agree to sign a union dues-checkoff authorization card and/or join the Respondent Union.

4. Respondent Lockheed violated Section 8(a)(1), (2), and (3) of the Act by entering into an unlawful agreement with the Respondent Union to accrete unrepresented P&A employees into the collective-bargaining unit represented by the Respondent Union and enforcing the Respondents' collective-bargaining contract against such employees at a time when the Union did not represent a majority of the accreted employees.

5. Respondent Union violated Section 8(b)(1)(A) of the Act by threatening employees that the Union would seek their discharges if they refused to sign a union membership application and dues checkoff authorization card.

6. Respondent Union violated Section 8(b)(1)(A) and (2) of the Act by entering into an unlawful agreement with the Respondent Lockheed to accrete unrepresented P&A employees into the collective-bargaining unit represented by the Respondent Union and enforcing the Respondents' collective-bargaining contract against such employees at a time when the Union did not represent a majority of the accreted employees.

7. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent Lockheed unlawfully recognized and entered into an agreement with the Respondent Union as the representative of previously unrepresented P&A employees, I shall order Respondent Lockheed to withdraw and withhold all recognition from the Respondent Union as the collective-bargaining representative of those employees, and shall order both Respondents to cease applying to those employees the terms of the Respondents' December 13, 1993 collective-bargaining agreement, or any extension, renewal, modification, or superseding agreement, unless and until the Respondent Union is certified by the Board as such representative. Nothing in this decision should be construed as requiring Respondent Lockheed to rescind benefits conferred on the group of previously unrepresented P&A employees as the result of the unlawful application of contract provisions to them.

I shall order that the Respondent Union and Respondent Lockheed, jointly and severally, reimburse the previously unrepresented P&A employees, present and former, for any initiation fees, dues, or other moneys involuntarily exacted from them as a result of the union-security clause in the Respondents' collective-bargaining agreement. Additionally, I shall order that Respondents be jointly and severally liable to reimburse these employees for any losses they suffered to vacation time, sick leave, fund investments, employer matching funds, bonuses, raises, retirement benefits, savings plans, or any other similar benefits previously enjoyed as unrepresented employees. All monetary reimbursements shall be with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]