

# No. 07-13132-JJ

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## UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

ROME ELECTRICAL SYSTEMS, INC.

Respondent

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ON APPLICATION FOR ENFORCEMENT OF AN ORDER  
OF THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD

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UNITED STATES COURT OF APPEALS  
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NATIONAL LABOR RELATIONS BOARD	*	
	*	
Petitioner	*	
	*	No. 07-13132-JJ
v.	*	
	*	
ROME ELECTRICAL SYSTEMS, INC.	*	Board Case No.
	*	10-CA-35458
Respondent	*	

**CERTIFICATE OF INTERESTED PERSONS AND  
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1-1 of the Court's Rules, Petitioner National Labor Relations Board (the "Board"), by and through its undersigned attorneys, hereby certifies that the following persons and entities have an interest in the outcome of this case:

Arlook, Martin M., Regional Director, Board Region 10

Battista, Robert J., Board Chairman

Bollen, Danny, President, Respondent Rome Electrical Systems, Inc.

Broido, Julie, Board Counsel

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Dated at Washington, DC  
this 2nd day of January, 2008



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**ON APPLICATION FOR ENFORCEMENT OF AN ORDER  
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**BRIEF FOR  
THE NATIONAL LABOR RELATIONS BOARD**

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**STATEMENT OF SUBJECT MATTER AND APPELLATE  
JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce its Decision and Order against Rome Electrical Systems, Inc. (“the Company”). The Decision and Order of the Board issued on April 12, 2007, and is reported at 349 NLRB No. 72. (D&O 1-7.)<sup>1</sup> The

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<sup>1</sup> “D&O” refers to the Board’s Decision and Order, located in the record at Volume 1, Document 13. “Answer” refers to the Company’s answer to the unfair

International Brotherhood of Electrical Workers, Local 613 (“the Union”) was the Charging Party before the Board. The Board’s order is final with respect to all parties under Section 10(e) of the National Labor Relations Act, as amended (“the Act”) (29 U.S.C. §§ 151, 160(e)).

The Board had subject matter jurisdiction under Section 10(a) of the Act (29 U.S.C. § 160(a)). The Court has jurisdiction over this proceeding pursuant to Section 10(e) of the Act (29 U.S.C. § 160(e)) because the unfair labor practices occurred in Rome, Georgia. The Board filed its application for enforcement on July 9, 2007; this filing is timely because the Act places no time limit on the institution of proceedings to enforce Board orders.

### **STATEMENT OF THE ISSUE PRESENTED**

Whether the Board reasonably found that the Company did not timely withdraw AECA’s authority to bargain on the Company’s behalf and, consequently, violated Section 8(a)(5) and (1) of the Act by:

- withdrawing authorization from AECA at a time when the Company remained obligated to bargain through AECA on a multiemployer basis;

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labor practice complaint before the Board, located in the record at Volume 1, Document 5. “Stip” refers to the parties’ (the Company, the Union, and the Board’s General Counsel) joint motion and stipulation of facts before the Board, located in the record at Volume 1, Document 6. The parties agreed (D&O 1 n.1; Stip 1-2) that their stipulation and exhibits constitute the entire record in this case.

- insisting on bargaining with the Union on an individual basis when the Company was obligated to bargain through AECA; and
- unilaterally changing the terms and conditions of employment and failing to abide by the collective-bargaining agreements that AECA negotiated on the Company's behalf.

### **ORAL ARGUMENT STATEMENT**

The Board believes that this case involves the application of well-settled principles to straightforward facts and that argument would therefore not be of material assistance to the Court. If the Court decides that argument is necessary, however, the Board believes that 10 minutes per side will be sufficient for the parties to present their respective positions and requests that it be permitted to participate.

### **STATEMENT OF THE CASE**

Based on unfair labor practice charges filed by the Union, the Board's General Counsel issued a complaint alleging that the Company violated Section 8(a)(5) and (1) of the Act (28 U.S.C. § 158(a)(5) and (1)) by refusing to bargain collectively with the Union. The parties agreed to waive a hearing before an administrative law judge and to submit the case to the Board with a joint stipulation of facts and exhibits, which the parties agreed constituted the entire record in this case. (D&O 1 n.1; Stip 1-2.) Based on the stipulated record, the

Board found, in agreement with the General Counsel, that the Company violated Section 8(a)(5) and (1) as alleged. (D&O 1, 3-6.)

## **STATEMENT OF THE FACTS**

### **I. THE BOARD'S FINDINGS OF FACT**

The Board based its findings of fact on the parties' joint stipulation of facts and exhibits, which the parties agreed constituted the entire record in this case.

(D&O 1 n.1.) The Board's findings are summarized below.

#### **A. The Company Signs a "Letter of Assent" Authorizing AECA to Bargain with the Union on the Company's Behalf, and Providing that the Authorization is Effective Until Terminated by the Company with at least 150-days Notice**

The Company is an electrical contractor with a principal place of business in Rome, Georgia. The Company's collective-bargaining relationship with the Union began in December of 1989, when the Company signed a "Letter of Assent-A," authorizing the Atlanta Chapter of the National Electrical Contractors Association ("AECA") to serve as the Company's "collective bargaining representative for all matters contained in or pertaining to the current and any subsequently approved contract between [AECA] and [the Union]." (D&O 1; Stip 2, Ex A.) The Letter of Assent further provided that the Company's authorization:

shall remain in effect until terminated by the [Company] giving written notice to [AECA] and to [the Union] at least one hundred fifty (150) days prior to the then current anniversary date of the applicable approved labor agreement.

(D&O 1; Stip 2, Ex A.) The two most recent “applicable approved labor agreements” were a 3-year collective-bargaining agreement (or “CBA”), effective from September 1, 2000, to August 31, 2003, and a 1-year extension of that agreement through August 31, 2004. (D&O 1; Stip 2, Ex C, F.)

Thus, in order to timely and effectively withdraw AECA’s authority to bargain on the Company’s behalf, the Company had to provide notice to AECA and the Union at least 150 days prior to the anniversary date of the applicable CBA. Absent such notice, the Company remained bound by “any subsequently approved” agreements entered into by AECA and the Union. (D&O 3-6; Stip 2, Ex A.)

**B. The Company Attempts to Withdraw AECA’s Bargaining Authority Without Providing the Required 150-days Notice**

On May 27, 2004—less than 150 days prior to the anniversary date of the applicable CBA—the Company attempted to withdraw AECA’s authorization. Specifically, Company President Ruby Bollen wrote to the Union and AECA, stating that “this my written notification to you that as of August 31, 2004 [the Company] will be terminating [its] affiliation with [the Union] as a Signatory Contractor, and withdrawing from [AECA].” (D&O 2; Stip 3, Ex J.) The May 27 withdrawal did not comply with the Letter of Assent’s 150-day notice provision, and therefore did not effectively

terminate AECA's authority to bargain on the Company's behalf. (D&O 3-6; Stip 2, Ex. A.)

Moreover, in its May 27, 2004 letter, the Company did not refer to the Letter of Assent or its 150-day notice period for withdrawing AECA's authority. Instead, the Company cited Section 1.02(a) of the applicable CBA, which provided a separate 90-day notice period for termination of the CBA. (D&O 2; Stip 3, Ex J.)<sup>2</sup>

On June 1, 2004, AECA replied by letter that the Company's May 27, 2004 notice was untimely under the 1989 Letter of Assent. (D&O 2; Stip 3, Ex L.) In its letter, AECA noted that the Company's "relationship with AECA is governed by the Letter of Assent signed by your Company." AECA reminded the Company that, in order to terminate the Letter of Assent, the Company had to give written notice "at least 150 days prior to the then current anniversary date of the applicable approved labor agreement." (*Id.*) AECA also explained that the 90-day notice provision of Section 1.02(a) of the CBA, to which the Company referred in its May

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<sup>2</sup> Specifically, Section 1.02(a) provided:

Either party or an employer withdrawing representation from the Chapter or not represented by the Chapter, desiring to change or terminate this Agreement must provide written notification at least 90 days prior to the expiration date of the Agreement or any anniversary date occurring thereafter.

(D&O 1; Stip 2, Ex F.)

27 letter, applied to the termination of that CBA, and not to withdrawing AECA's authority to bargain on the Company's behalf. (*Id.*)

**C. The Company Insists on Bargaining Individually with the Union, Fails To Abide by the Terms of the Applicable CBAs, and Unilaterally Changes the Terms and Conditions of Employment**

Even though the Company remained bound by the Letter of Assent, it continued to maintain, by letter dated July 26, 2004, that its May 27, 2004 notice of withdrawal was timely so as to effectively withdraw AECA's authority to bargain on the Company's behalf. (D&O 2; Stip 3, Ex M.) In its July 26, 2004 letter, the Company also attempted, contrary to its obligations under the Letter of Assent, to bargain individually with the Union. (*Id.*) The Company complied with the terms of the 2003 CBA until it expired on August 31, 2004. (D&O 2; Stip 4.)

On September 1, 2004, AECA and the Union agreed to a 3-year CBA that was effective by its terms through August 31, 2007. (D&O 2; Stip 4, Ex S.) The Company was bound by this CBA because it had not timely withdrawn AECA's authorization under the Letter of Assent to bargain on the Company's behalf. (D&O 1, 3-6; Stip 2, Ex A, J, L.) The Company refused, however, to comply with the terms of the 2004-2007 CBA. (D&O 2, 6; Answer ¶ 8.) Instead, on about September 1, 2004, the Company unilaterally altered its employees' terms of employment, including changing

their pay rates and discontinuing the required employer contributions to the Union's benefit funds. (*Id.*)<sup>3</sup>

## II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing stipulated facts, the Board (Chairman Battista and Members Liebman and Kirsanow) found (D&O 1, 6), in agreement with the General Counsel, that the Company had not timely withdrawn AECA's authority to bargain on the Company's behalf and, consequently, the Company violated Section 8(a)(5) and (1) of the Act by:

- withdrawing authorization from AECA at a time when the Company remained obligated to bargain through AECA on a multiemployer basis;
- insisting on bargaining with the Union on an individual basis when the Company was obligated to bargain through AECA; and
- unilaterally changing the terms and conditions of employment and failing to abide by the collective-bargaining agreements that AECA negotiated on the Company's behalf.

The Board's order requires the Company to cease and desist from these violations, and from, in any like or related manner, interfering with, restraining, or

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<sup>3</sup> In its factual statement, the Company (Br 3) notes that in a separate representation proceeding, it petitioned for an election to determine whether a majority of its employees still desired to be represented by the Union. As the Board noted (D&O 2 n. 6), the Regional Director dismissed the petition, and no appeal to that dismissal was made. Accordingly, the separate representation proceeding, which in any event would not be subject to judicial review, is not before the Court.

coercing employees in the exercise of their rights under the Act. Affirmatively, the Board's order requires the Company to:

- notify AECA and the Union that the Company will continue to authorize AECA to represent it in collective bargaining until such time as the Company may withdraw that authorization in accordance with the Letter of Assent;
- make employees whole for losses suffered as a result of the Company's violations and make any required contributions to the employee benefit funds that the Company had failed to make;
- offer immediate employment to union hiring hall applicants who were denied the opportunity to work because of the Company's violations; and
- provide payroll and other relevant records at the request of the Board's Regional Director, and post a remedial notice.

(D&O 6-7.)

### **SUMMARY OF ARGUMENT**

The central issue here is whether the Board reasonably found that the Company untimely withdrew AECA's authority to bargain on the Company's behalf. It is undisputed that after the Company withdrew from AECA, it attempted to bargain individually with the Union, ignored the CBAs that AECA negotiated on its behalf, and unilaterally changed its employees' terms and conditions of employment. The Board found that because the Company's withdrawal was untimely and therefore ineffective, the Company violated Section 8(a)(5) and (1) of the Act by taking those actions at a time when AECA was still its bargaining agent. The Company does not dispute that its actions were unlawful if its

withdrawal was untimely. Thus, the Court should enforce the Board's order in full so long as it agrees that the Board reasonably found that the withdrawal was untimely.

The Board's finding that the Company's withdrawal was untimely is well supported. The Company admits to signing a Letter of Assent authorizing AECA to bargain on its behalf. It concedes that the Letter required at least 150-days notice in order to withdraw that authorization. It further concedes that it tried to withdraw with less than 150-days notice. Thus, consistent with the settled rule that, in order to be effective, the withdrawal must comply with the agreement authorizing multiemployer bargaining (the Letter of Assent here), the Board reasonably found that the Company's withdrawal was untimely and therefore ineffective.

There is no merit to the Company's claim that the Union and AECA are estopped from relying on the Letter of Assent. The Company argues that the 90-day notice period in the 2003 CBA governs its withdrawal from AECA, and that the Union confirmed that interpretation in a letter to the Company. The Company therefore concludes that it timely withdrew with 97-days notice. To the contrary, the Board reasonably found that the CBA's 90-day period governs the separate act of terminating the CBA, and that the Union's letter accurately apprised the Company of that fact. The Board, therefore, reasonably rejected the Company's

estoppel claim, finding that no misrepresentations were made. Accordingly, the Board reasonably concluded that the Company did not timely and effectively withdraw AECA's bargaining authority, and, consequently, the Company violated the Act by insisting on bargaining individually with the Union, ignoring the CBAs that AECA negotiated on the Company's behalf, and making unilateral changes. As all of the Board's findings are reasonable and well supported, the Court should enforce the Board's order in full.

## **ARGUMENT**

### **THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY WITHDRAWING FROM MULTIEMPLOYER BARGAINING WITHOUT PROVIDING TIMELY NOTICE, INSISTING ON BARGAINING DIRECTLY WITH THE UNION, AND MAKING UNILATERAL CHANGES TO THE TERMS AND CONDITIONS OF EMPLOYMENT**

#### **A. Applicable Principles and Standard of Review**

Whether the Company violated its statutory duty to bargain in this case turns on whether it timely withdrew from multiemployer bargaining. Section 8(a)(5) of the Act (29 U.S.C. § 158(a)(5)) makes it an unfair labor practice for an employer to refuse to bargain collectively with the representative of its employees.<sup>4</sup> Section

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<sup>4</sup> Moreover, Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise" of their statutory rights. A violation of Section 8(a)(5) results in a "derivative" violation of Section 8(a)(1). *See Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

8(d) of the Act (29 U.S.C. § 158(d)) defines the duty to bargain as the obligation “to meet ... and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . .”

An employer may choose to authorize an association like AECA to bargain with a union on its behalf, and to execute a CBA if reached. *See NLRB v. Hayden Electric, Inc.*, 693 F.2d 1358, 1359-60, 1363 & n.6 (11th Cir. 1982) (noting that in this situation AECA is “the multiemployer bargaining unit”). The Company chose to do just that here when it signed a Letter of Assent authorizing AECA to bargain on its behalf with the Union, and binding the Company to the current and “any subsequently approved” CBA that AECA and the Union agreed to while the authorization was in effect. The Letter of Assent further provided that the authorization remained in effect until revoked by the Company with at least 150-days notice. Notably, AECA has used this same Letter of Assent for decades with Board and Court approval. *See, e.g., Hayden Electric, Inc.*, 693 F.2d at 1363 & n.6; *NLRB v. Nelson Electric*, 638 F.2d 965, 967 (6th Cir. 1981); *The Leapley Co.*, 278 NLRB 981, 982 (1986).<sup>5</sup>

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<sup>5</sup> As this Court has noted, an employer becomes bound by the terms of a CBA by signing a “Letter of Assent,” whereby the employer authorizes AECA to represent it in negotiations, and agrees to abide by the terms and conditions of any CBA entered into by AECA and the Union. *Hayden Electric*, 693 F.2d at 1363 n.6. In the “Letter of Assent” situation, the employer, even if not itself a member of AECA, or directly a signatory to the CBA, is bound by the CBA’s terms through its Letter of Assent. *See NLRB v. Black*, 709 F.2d 939, 941 & n.1 (5th Cir. 1983)

Moreover, of critical importance here, “multiemployer bargaining units are creatures of mutual consent,” and the employer’s “ability to withdraw from a multiemployer bargaining unit is therefore limited by the agreement of the parties.” *Sheet Metal Workers Int’l Assoc., Local 104 v. Simpson Sheet Metal, Inc.*, 954 F.2d 554, 555 (9th Cir. 1992) (citing *Charles D. Bonnanno Linen Serv. v. NLRB*, 454 U.S. 404 (1982)). Thus, “[i]n order to be effective, the withdrawal must be carried out as specified in the agreement creating the multiemployer unit.” *Id.*; accord *Hayden Electric*, 693 F.2d at 1363 & n.6; *NLRB v. Nelson Electric*, 638 F.2d 965, 967-68 (6th Cir. 1981); *NLRB v. Black*, 709 F.2d 939, 941 & n.3 (5th Cir. 1983). Accordingly, the courts, in addressing the same Letter of Assent that the Company signed here, have universally held that a signatory employer must comply with the Letter of Assent’s 150-day notice provision in order to timely and effectively withdraw AECA’s agency. *Hayden Electric*, 693 F.2d at 1363-65; *Nelson Electric*, 638 F.2d at 967; *Black*, 709 F.2d at 941.

An employer’s failure to timely withdraw AECA’s bargaining authority has consequences. Absent such timely withdrawal, the employer has no right to bargain individually with the union. *Hayden Electric*, 693 F.2d at 1365.

Moreover, it is settled that AECA’s Letter of Assent binds a signatory employer, like the Company, to current and successive CBAs negotiated by AECA until the

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(affirming Board’s finding that identical Letter of Assent bound nonmember employer to CBA that AECA reached with union).

employer revokes AECA's agency with the required 150-days notice. *Nelson Electric*, 638 F.2d at 968; *Black*, 709 F.2d at 941; accord *Cedar Valley Corp. v. NLRB*, 977 F.2d 1211, 1219-20 (8th Cir. 1992) (construing similar Letter of Assent). Accordingly, an employer that remains bound by such a Letter of Assent violates Section 8(a)(5) and (1) of the Act by refusing to abide by CBAs negotiated on its behalf by its agent, the multiemployer association. *See id.* Further, it is axiomatic that an employer is barred from unilaterally changing the terms and conditions of employment set forth in a CBA to which it is bound. *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991).

“Congress has made a conscious decision” in Section 8(d) of the Act (29 U.S.C. § 158(d)) to delegate to the Board “the primary responsibility of marking out the scope . . . of the statutory duty to bargain.” *Ford Motor Co. v. NLRB*, 441 U.S. 488, 496 (1979). Accordingly, “if [the Board’s] construction of the statute is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute.” *Id.* at 497. Rather, [i]f the Board adopts a rule that is rational and consistent with the Act . . . then the rule is entitled to deference from the courts.” *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190, 200 (1991) (citation omitted). The factual findings underlying the Board’s decision are conclusive if supported by “substantial evidence on the record considered as a whole.” *Evans Servs., Inc. v. NLRB*, 810 F.2d 1089, 1092 (11th Cir. 1987)

(quoting 29 U.S.C. § 160(e)). *See also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487-91 (1951).

Although the Board's interpretation of a contract is reviewed *de novo*, *see Litton Financial*, 501 U.S. at 203, the courts are "mindful of the Board's considerable experience in interpreting collective-bargaining agreements," *Bonnell/Tradegar Indus., Inc. v. NLRB*, 46 F.3d 339, 343 (4th Cir. 1995). Even under *de novo* review, moreover, unambiguous contractual terms are strictly enforced, and an employer must comply with the express terms of a Letter of Assent that it has signed to authorize an association to bargain on its behalf. *Sheet Metal Workers Int'l Assoc., Local 104 v. Simpson Sheet Metal, Inc.*, 954 F.2d 554, 556 (9th Cir. 1992); *Cedar Valley Corp. v. NLRB*, 977 F.2d 1211, 1219-23 (8th Cir. 1992); *NLRB v. Hayden Electric, Inc.*, 693 F.2d 1358, 1363-65 (11th Cir. 1982).

**B. The Board Reasonably Found that the Company Failed To Timely Withdraw AECA's Bargaining Authority, and, Consequently, the Company Violated the Act by Insisting on Individual Bargaining with the Union, Ignoring the Applicable CBAs, and Unilaterally Changing the Terms and Conditions of Employment**

Applying the foregoing principles, the Board reasonably found that the Company's May 27, 2004 withdrawal was untimely and therefore ineffective because the Company admittedly failed to give 150-days notice as required by the Letter of Assent that it signed to authorize AECA to serve as its bargaining

representative. (D&O 1, 3-6.) The Board further found that, given the untimely withdrawal, the Company refused to bargain in violation of Section 8(a)(5) and (1) of the Act by insisting on individual bargaining with Union (contrary to the Letter of Assent), repudiating the collective-bargaining agreements negotiated on its behalf by AECA, and making unilateral changes to the employees' terms and conditions of employment. (*Id.*)

The Company does not dispute that it failed give the 150-days notice required by the Letter of Assent (Br 2, 11), that it sought to negotiate individually with the Union (Stip 3, Ex M), and that it did not abide by the terms and conditions of the 2004-2007 CBA negotiated on its behalf by AECA (Answer ¶ 8). It does not dispute that such conduct would be unlawful if the attempted withdrawal was untimely. Thus, so long as the Court agrees that the Board reasonably found that the applicable notice period is the 150 days set forth in the Letter of Assent, the Company's withdrawal was untimely, and the Court should enforce the Board's order in full.

As the stipulated facts show, the Board's finding (D&O 3-6) that the Company's withdrawal was untimely is well supported. The Company agrees that, in 1989, it signed a "Letter of Assent" authorizing AECA to act as the Company's "collective bargaining representative for all matters contained in or pertaining to the current and any subsequently approved contract between [AECA] and [the

Union].” (D&O 1; Stip 2, Ex A.) As the Company further concedes (Stip 2, Ex A), the Letter of Assent provided that it remained in effect until the Company terminated it by giving AECA and the Union written notice at least 150 days prior to the anniversary date of the applicable CBA. Yet, as the Company repeatedly admits (Br 2, 11), its May 27, 2004 letter gave only 97-days notice of its withdrawal from AECA. (D&O 2; Stip 3, Ex J.)

Based on these stipulated facts, the Board reasonably found (D&O 3-6) that the Company’s withdrawal was untimely and therefore ineffective because the Company admittedly failed to provide 150-days notice as required by the Letter of Assent. This conclusion is supported by decades of precedent addressing the same Letter of Assent at issue here. In those cases, the courts have uniformly held that a signatory to that Letter of Assent must comply with its 150-day notice provision in order to effectively withdraw AECA’s agency. *See, e.g., NLRB v. Nelson Electric*, 638 F.2d 965, 967 (6th Cir. 1981) (employer’s withdrawal was ineffective because it “did not withdraw 150 days prior to the current anniversary date of the agreement”); *NLRB v. Black*, 709 F.2d 939, 941 & n.3 (5th Cir. 1983) (same). *Accord NLRB v. Hayden Electric, Inc.*, 693 F.2d 1358, 1363 & n. 6, 1365 (11th

Cir. 1982) (finding that same Letter of Assent requires the employer to give “at least 150 days” notice “of its intent to withdraw AECA’s bargaining authority”).<sup>6</sup>

As noted, the Board further found that, because the Company did not timely and effectively withdraw from AECA, it violated the Act by seeking to negotiate individually with the Union, by failing to abide by the terms and conditions of the CBAs negotiated on its behalf by AECA, and by unilaterally changing the terms and conditions of employment. Neither in its stipulations to the Board (Stip 1-4, 7-8), nor in its brief to this Court, did the Company dispute that it engaged in this conduct, or deny that its actions would be unlawful if its attempted withdrawal from AECA was untimely. The Company is therefore barred from challenging those findings,<sup>7</sup> which are, in any event, amply supported by the stipulated record. *See pp. 7, 13-14, above.*

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<sup>6</sup> Given this precedent, the Company errs in claiming (Br i) that this case presents an issue of first impression. Rather, the issue here—whether an employer must comply with the 150-day notice provision in the Letter of Assent in order to timely withdraw the multiemployer association’s agency—has been addressed numerous times in the cases cited above.

<sup>7</sup> *See Woelke & Romero Framing, Inc. v. NLRB*, 456 U.S. 645, 665-66 (1982) (courts lack jurisdiction to consider claim that party failed to raise before the Board) (citing 29 U.S.C. § 160(e)); *accord NLRB v. Dynatron/Bondo Corp.*, 176 F.3d 1310, 1314-15 (11th Cir. 1999). *See also Dunkin’ Donuts Mid-Atlantic Dist. Ctr., Inc. v. NLRB*, 363 F.3d 437, 441 (D.C. Cir. 2004) (Fed R. App. Proc. 28(a)(9) requires that the argument portion of a party’s opening brief contain the parties’ contentions and the reasons for them, with citations to the authorities and portions of the record on which the party relies); *cf. Sitka Sound Seafoods, Inc. v. NLRB*,

### C. The Company's Defenses Lack Merit

As noted, the Company does not dispute that its attempted withdrawal from AECA was untimely if governed by the 150-day notice period in the Letter of Assent. Instead, the Company claims (Br 2, 7-11) that the Union and AECA are “estopped” from relying on that 150-day notice period.<sup>8</sup> According to the Company (Br 10), Section 1.02(a) of the CBA, which sets a 90-day notice period for terminating the CBA, also establishes the same notice period for withdrawing AECA’s authority. The Company further asserts (Br 7-11) that an October 21, 2003 letter from Union Business Manager Lonnie Plott, which states that the Company must comply with the 90-day period in Section 1.02(a) in order to terminate the CBA, confirmed that the 90-day period also governs withdrawal from AECA.

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206 F.3d 1175, 1180-81 (D.C. Cir. 2000) (declining to consider argument that employer had referred to, but had not “actually argue[d],” in its opening brief).

<sup>8</sup> Before the Board, the Company primarily defended its conduct by relying on the doctrine of “merger” in contract law: the Company claimed that the CBA superseded the Letter of Assent because the two contracts allegedly imposed conflicting terms on the same subject matter. The Board (D&O 2-5) reasonably rejected the merger claim. On review, however, the Company presses only its “estoppel” claim. By failing to specifically argue its merger claim in its opening brief, the Company has waived any right to present such a contention to this Court. *See cases cited above* n.7. Moreover, although the Company (Br i) seeks oral argument on the ground that this case involves an issue of first impression—whether the notice language in the CBA “superseded” the Letter of Assent—as just shown, the Company failed to actually argue that issue in the argument section of its brief.

The Company's claims have no merit. As shown below, the Board reasonably found that the 90-day notice period in Section 1.02(a) governs only the act of terminating the CBA, and that Plott's letter did no more than accurately apprise the Company of that fact. Thus, the Company cannot begin to show that the CBA or Plott's letter made any misrepresentation, much less that the Company reasonably relied on the CBA or the letter as confirmation that the 90-day period governed its withdrawal from AECA. It follows that the Company's estoppel claim fails, because there is no evidence whatsoever that the Union or AECA made a misleading statement upon which the Company reasonably relied to its detriment. *See Oakland Press*, 266 NLRB 107 (1983) (citing *NLRB v. JD Industrial*, 615 F.2d 1289, 1284 (10th Cir. 1980) (party asserting estoppel must show misleading statement by party against whom estoppel is sought, lack of means to obtain the truth, good faith reliance, and detriment)); *accord Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1323-25 (11th Cir. 1989).

The Company's estoppel claim against AECA is equally meritless. The Company neither explains why AECA is responsible for the Union's letter, nor identifies any alleged misrepresentation by AECA. Rather, as the stipulated facts show (*see pp. 6-7*), AECA consistently and accurately explained to the Company that the Letter of Assent's 150-day period governed the act of withdrawing

AECA's bargaining authority, whereas Section 1.02(a) of the CBA, in contrast, applied to terminating the CBA.

**1. Contrary to the Company, the 90-day notice period in Section 1.02(a) of the CBA applies to terminating the CBA, not to withdrawing AECA's agency**

The Company fails to show that the CBA's 90-day notice period governs the act of withdrawing AECA's bargaining authority. Rather, as the Board reasonably found (D&O 4), the 150-day period in the Letter of Assent governs withdrawing AECA's bargaining authority, while the 90-day notice period in CBA Section 1.02(a), in contrast, imposes a notice requirement for the distinct act of terminating the CBA. This finding is well-supported. The Letter of Assent and the CBA are two distinct documents that address different subject matters for different purposes. Thus, it is the Letter of Assent, not the CBA, which the Company signed to authorize AECA to serve as its bargaining representative. Accordingly, the 150-day notice provision in the Letter of Assent explicitly provides the time period in which an employer may withdraw "[t]his authorization." (D&O 4-5; Stip 2; Ex. A.) The CBA, in contrast, establishes the terms and conditions of employment, such as wages and hours. Thus, the 90-day notice period in Section 1.02(a) of the CBA governs the act of "chang[ing] or terminat[ing] the [collective-bargaining] Agreement"—not the distinct act of withdrawing AECA's bargaining authority. Indeed, as the Board also observed (D&O 4-5), CBA Section 1.02(a) does not even

require the party terminating the CBA to provide AECA with any notice at all, as it likely would if it applied to terminating the relationship between AECA and the individual employers it represents.

Accordingly, the Board and the courts have repeatedly recognized the distinction between the Letter of Assent's notice period for withdrawing a multiemployer association's agency, on the one hand, and a CBA's notice period for terminating a CBA, on the other, in cases addressing language that is the same as or similar to that presented here. *See, e.g., IBEW 26 v. Advin Electric Inc.*, 98 F.3d 161, 162-164 (4th Cir. 1996) (applying the Letter of Assent's 150-day period to determine the timeliness of the employer's withdrawal from the multiemployer association, while noting the separate 90-day period for contract termination in Section 1.02 of the contract). *Accord Action Electric v. IBEW 292*, 856 F.2d 1062, 1063-65 (8th Cir. 1988); *IBEW 915 H&W Fund v. Rossi Elec. Co.*, 2006 WL 3827540, \*3-5 (M.D.Fla. 2006); *Kirkpatrick Electric Co.*, 314 NLRB 1047, 1049-52 (1994). In sum, there is no basis for the Company's claim that the 90-day notice period in the CBA governs the timeliness of withdrawing AECA's agency.

The Company also asserts (Br 8) that if the CBA is "inconsistent" with the Letter of Assent, then "the [CBA] prevails, and the Union and AECA are estopped from asserting the Letter of Assent as controlling." Like the claims just discussed,

this claim fails because it proceeds on the false premise that the two documents address the same subject matter: withdrawal of AECA's agency.<sup>9</sup>

Nor is there any merit to the Company's suggestion (Br 10) that Section 1.02(a)'s reference to "an employer withdrawing representation from [AECA]" confirms that Section 1.02(a) governs the act of withdrawing from AECA. Rather, as the Board reasonably explained (D&O 4-5), that reference merely clarifies that "an employer withdrawing representation from [AECA]" is included among those who may provide notice of CBA termination. The Board's view is well supported by the text of Section 1.02(a), which states that its 90-day notice period applies where a designated entity, including an employer withdrawing representation from AECA, "desir[es] to change or terminate this [collective-bargaining] Agreement." (D&O 4-5; Stip 2, Ex. F.) In other words, the Board's conclusion is supported by Section 1.02(a)'s terms, which specify *who* may act ("either a party or an employer withdrawing representation from [AECA]"); *what*

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<sup>9</sup> Moreover, the sole case that the Company cites here (Br 8)—an administrative law judge's decision in *Martin K. Eby Construction*, 1993 WL 1609276 (1993)—does not serve as precedent because no exceptions to the judge's decision in *Eby* were filed and, consequently, that decision was neither presented to nor reviewed by the Board. See *Whirlpool Corp.*, 337 NLRB 726 n. 4 (2002) (noting the settled rule that "a judge's decision to which no exceptions are filed does not serve as precedent for any other case"); accord *ESI, Inc.*, 296 NLRB 1319 n. 3 (1989). In any event, *Eby* is factually distinguishable. As the Board explained (D&O 4 n.10), the employer in *Eby* signed two inconsistent documents to designate an association as its bargaining agent, whereas the Company here signed only one document (the Letter of Assent) to designate AECA as its bargaining agent.

action may be taken (providing written notification “to change or terminate this [collective-bargaining] Agreement”); and *when* that action may be taken (“at least 90-days prior to the expiration date of the Agreement”). The Company’s view, in contrast, effectively rewrites Section 1.02(a) by converting *the actor* specified in that Section (“an employer withdrawing representation from [AECA]”) into *the action* of “withdrawing representation from [AECA].”

Moreover, as the Board further explained (D&O 4), Section 1.02(a)’s reference to “an employer withdrawing representation” is reasonably read as referring to an employer seeking to terminate the CBA who has already taken the required, and separate, step of withdrawing AECA’s representation. The Board’s interpretation is in accord with the settled rule that an employer, like the Company, “may not directly terminate a CBA when it is represented by a multi-employer bargaining association.” *IBEW 915 H&W Fund v. Rossi Elec. Co.*, 2006 WL 3827540, \*3 (M.D.Fla. 2006) (citing *NLRB v. Hayden Electric, Inc.*, 693 F.2d 1358, 1365 (11th Cir. 1982) (absent withdrawal of the association’s bargaining authority, the employer “had no right to bargain individually with the Union”)).

**2. The Union’s October 21, 2003 letter did not confirm that the CBA’s 90-day notice period governs the act of withdrawing AECA’s agency**

The Company also errs (Br 9-10) in claiming that Union Business Manager Plott’s October 21, 2003 letter to the Company confirmed that the CBA’s 90-day

notice period applies to withdrawing AECA's agency. In the Company's own words (Br 9), Plott's letter simply "inform[ed] [the Company] to follow Section 1.02(a)." The Company fails to explain how that simple direction would reasonably lead the Company to its erroneous conclusion that Section 1.02(a) governs withdrawing AECA's agency.

In any event, the stipulated facts support the Board's reasonable conclusion (D&O 5) that the Union's letter accurately referred to the CBA's 90-day period for terminating the CBA, and did not address the subject of withdrawing AECA's agency. On September 28, 2003, the Company wrote the Union to "terminate [its] affiliation with [the Union] as a Signatory Contractor." (D&O 1; Stip 2, Ex G.) The Company sent the letter only to the Union, not to AECA, and the letter did not refer to AECA or its bargaining authority. (*Id.*) On October 21, 2003, Plott responded by a letter, which referred explicitly to the effective dates of the "Collective Bargaining Agreement" and explained that the September 28 notice was untimely because, "[p]ursuant to Section 1.02(a) [of the CBA], your firm should have given at least 90 days notice prior to the expiration date of the [CBA] for termination." (D&O 1-2; Stip 3, Ex H.) Like the Company's letter, Plott's letter did not mention AECA or its bargaining authority. Rather, it simply concluded that "the Collective Bargaining Agreement" remained in effect because it had not been timely terminated. (*Id.*) On November 20, 2003, the Company

rescinded its September 28, 2003 notice and reaffirmed its “intent to remain as a signatory contractor.” (D&O 2; Stip 3, Ex I.)

As these stipulated facts show, Plott’s letter merely referred to terminating the CBA, and not withdrawing AECA’s agency. As the Board noted (D&O 5), Plott’s letter responded to the Company’s September 28 letter, which spoke of terminating the Company’s affiliation with the Union, but nowhere mentioned AECA or its bargaining authority. Moreover, the Company sent that letter only to the Union, and not to AECA. Accordingly, Plott’s October 21 response likewise referred to terminating “the most recent Collective Bargaining Agreement” (Stip 3, Ex H), but it nowhere mentioned AECA or its bargaining authority. Rather, Plott’s letter merely concluded that the CBA remained in effect, but offered no conclusion as to AECA’s status as the Company’s bargaining agent. Indeed, Plott’s letter accurately explained that the 90-day notice period in Section 1.02(a) of the CBA applied to terminating the CBA.

It follows that the Company’s estoppel claim must fail. As noted above (p. 20), the Company, in order to assert estoppel, must show that the Union and AECA made a misleading statement upon which the Company reasonably relied to its detriment. *See cases cited above p. 20.* The Company cannot meet that burden here, because, as just shown, the Union and AECA never misrepresented, nor took any inconsistent positions on, the time-period for withdrawing AECA’s agency.

The estoppel cases cited by Company are therefore distinguishable. Those cases involved parties who were estopped by their own misrepresentations, or by their having taken utterly inconsistent positions. *See* Br 8 (citing *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1323-25 (11th Cir. 1989) (party misrepresented that it had secured a release from liability in a personal injury case); *Johnson v. Georgia Department of Human Resources*, 983 F.Supp 1464 (N.D.Ga. 1996) (party estopped from simultaneously claiming both that it was able to work for purposes of its lawsuit but unable to work when claiming disability benefits.))

The remainder of the Company's brief simply ignores the terms and purpose of the Letter of Assent that it signed. The Company observes (Br 10), for example, that it did not participate directly in negotiating the applicable CBAs. This simply ignores how the Letter of Assent authorized AECA to negotiate those CBAs on the Company's behalf. The Company also errs in suggesting (Br 10) that its status as a "small," "unsophisticated" employer somehow excuses its untimely withdrawal from AECA. After all, as the courts have recognized, one of the benefits of multiemployer bargaining is that it allows small employers like the Company to pool their resources and bargaining strength. *See NLRB v. Truck Drivers Local No. 449*, 353 U.S. 87, 94-96 (1957). In sum, having accepted the benefits of multiemployer bargaining by signing the Letter of Assent, the Company was required to comply with the Letter's 150-day notice period in order to timely and

effectively revoke its commitment to multiemployer bargaining. As shown above, the Board reasonably found that the Company failed to comply with the Letter of Assent when it attempted to withdraw from AECA, and, consequently, the Company's withdrawal was untimely and ineffective.

### CONCLUSION

For the foregoing reasons, the Board respectfully requests that this Court enforce the Board's Order in full.

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December 2007

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UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	:	
	:	
Petitioner	:	No. 07-13132-JJ
	:	
v.	:	Board Case No.
	:	10-CA-35458
ROME ELECTRICAL SYSTEMS, INC.	:	
	:	
Respondent	:	
	:	

**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) the Board certifies that its brief contains 6,695 words of proportionally-spaced, 14-point Times New Roman type, and the word processing system used was Microsoft Word 2000.

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Dated at Washington, DC  
this 2nd day of January, 2008

UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD	:	
	:	
Petitioner	:	No. 07-13132-JJ
	:	
v.	:	
	:	
ROME ELECTRICAL SYSTEMS, INC.	:	
	:	Board Case No.
Respondent	:	10-CA-35485
	:	

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by first-class mail the required number of copies of the Board's brief in the above-captioned case, and has served two copies of that brief by first-class mail upon the following counsel at the addresses listed below:

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