NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Allied Mechanical Services, Inc. *and* Plumbers and Pipefitters Local 357, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO. Cases 7–CA–40907 and 7–CA–41390

May 30, 2008

ORDER DENYING MOTION FOR RECONSIDERATION

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On September 28, 2007, the National Labor Relations Board issued its Supplemental Decision and Order in this case.[1] The Supplemental Decision and Order granted the General Counsel's and the Union's motions for reconsideration of the original Decision and Order[2] and overruled prior dismissals of allegations that the Respondent violated Section 8(a)(5) and (1) of the Act. Specifically, the Board found that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from Local 357 on July 22, 1998, by revising its job application procedure without notice to Local 357 on August 1, 1998, and by failing to provide a response to Local 357's July 29, 1998 information request.

In finding these violations, the Board applied its recent decision in *Raymond F. Kravis Center for the Performing Arts,* 351 NLRB No. 19 (2007) (*Kravis*), which overruled the "due process" standard for union mergers and held that, following a union merger or affiliation, an employer's obligation to recognize and bargain with the union continues regardless of whether the union members were provided an opportunity to vote on the merger or affiliation.[3] The Board also addressed other rationales set forth by the judge for dismissal of the 8(a)(5) allegations. Among other things, the Board found, contrary to the judge, that the parties had a 9(a) bargaining relationship, rather than an 8(f) relationship. Finally, as part of its remedy for the 8(a)(5) violations, the Board ordered the Respondent to recognize and bargain with the Union as the exclusive representative of the bargaining unit employees.

On November 16, 2007, the Respondent filed a motion for reconsideration and a supporting brief, contending that the Board erred in applying *Kravis* retroactively, in finding that the parties had a 9(a) relationship, and in ordering the Respondent to recognize and bargain with the Union. The Respondent also contended that the Board should remand the case to the judge to apply the Board's subsequent decision in *Toering Electric Co*., 351 NLRB No. 18 (2007). The General Counsel and the Union filed answering briefs.[4]

Having duly considered the matter, the Board[5] finds that the Respondent's motion fails to present "extraordinary circumstances" warranting reconsideration under Section 102.48(d)(1) of the Board's Rules and Regulations.[6]

I. RETROACTIVE APPLICATION OF KRAVIS

In its motion, the Respondent contends that the Board's retroactive application of *Kravis* would cause manifest injustice. In determining whether the retroactive application of a Board decision will cause manifest injustice, the Board balances three factors: "[1] the reliance of the parties on preexisting law; [2] the effect of retroactivity on accomplishment of the purposes of the Act; and [3] any particular injustice arising from retroactive application." *SNE Enterprises,* 344 NLRB 673, 673 (2005) (citing cases).

We addressed the first factor in our Supplemental Decision and Order. There, we found that the Respondent could not have justifiably relied on the due process standard as a well-settled requirement when it withdrew recognition from Local 357 in 1998 because the Supreme Court cast grave uncertainty on that standard in *NLRB v. Financial Institution Employees (Seattle-First National Bank)*, 475 U.S. 192 (1986). In that case, the Court held that the Board lacks authority to discontinue an employer's obligation to recognize a union after a merger unless the merger raises a question concerning representation. We further explained that, in cases subsequent to the Supreme Court's *Seattle-First* decision, the Board refrained from relying on a union's failure to meet the

[1] 351 NLRB No. 5.

[2] 341 NLRB 1084 (2004).

[3] Only where the merger or affiliation resulted in changes so significant as to alter the identity of the bargaining representative will the bargaining obligation cease.

[4] The Respondent also filed a statement of additional authority.

[5] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

[6] Insofar as the Respondent's motion seeks reconsideration of the Board's Order requiring the Respondent to recognize and bargain with the Union, the motion is denied for the reasons stated in the Supplemental Decision and Order, which fully sets forth the basis for requiring the Respondent to recognize and bargain with the Union. See 351 NLRB No. 5, slip op. at 7–8.

due process standard as a basis for finding that an employer lawfully withdrew recognition from the union.

As our Supplemental Decision and Order inadvertently failed to address the second and third factors, we shall do so here. Regarding the second factor, we find that retroactive application of *Kravis* would further the purposes of the Act because, as the Supreme Court explained in *Seattle-First,* permitting an employer to withdraw from a bargaining relationship when there is no question concerning representation is contrary to the Act. Moreover, no statutory purpose is served by having a question concerning representation resolved solely by those bargaining unit employees who are union members, as the "due process" standard contemplated.[7]

Turning to the third factor, we find that no particular injustice would arise from retroactive application of *Kravis.* As discussed above, in view of *Seattle-First National Bank's* rationale and the Board's subsequent decisions, the Respondent could not have justifiably relied on the Board's "due process" standard when it decided to withdraw recognition. Notably, the Respondent asserted no other basis for its claim that it would suffer injustice from retroactive application of *Kravis*.

The Respondent further argues that the language of the Act permits the Board to retain the due process requirement, and that the Board's decision to abandon that requirement simply represents a new policy choice. We find no merit in this argument. As stated above and discussed more thoroughly in *Kravis*, *Seattle-First* stressed that the Board lacks authority to allow an employer to withdraw from a bargaining relationship absent a question concerning representation. As the Court stated there, "where affiliation does not raise a question of representation, the statute gives the Board no authority to act." *Seattle-First, 475 U.S.* at 203.

In sum, retroactive application of *Kravis* here would not cause manifest injustice and is required by *Seattle-First*.

II. THE 9(A) BARGAINING RELATIONSHIP

The Respondent also contends that the Board's finding that the parties had a 9(a) bargaining relationship is erroneous. The Board based this finding on two independent grounds. First, the Board found that the parties' 1991 settlement agreement, which resolved a complaint alleging that the Respondent had committed numerous violations of Section 8(a)(1) and (3), demonstrated that the parties had established a 9(a) relationship. Second, the Board found that its prior decision in *Allied Mechanical Services,* 332 NLRB 1600 (2001),[8] precluded the Respondent from making the argument that the parties merely had an 8(f) relationship. The Board concluded that the 2001 decision, which held that the Respondent violated Section 8(a)(5) in 1995–1996 by, among other things, making unilateral changes and engaging in overall bad-faith bargaining, was necessarily premised on the existence of a 9(a) relationship. Accordingly, the Board held that the Respondent was barred, under the principles of collateral estoppel, from relitigating whether the parties had a 9(a) bargaining relationship.

A. The 1991 Settlement Agreement

In the 1991 settlement agreement, the Respondent agreed to "recognize and, upon request, bargain" with Local 337 "as the exclusive collective bargaining representative of the [unit] employees … with respect to rates of pay, wages, hours, and other terms and conditions of employment" and "if an understanding is reached, embody it in a signed collective-bargaining agreement." The Board found that, "given that (a) Local 337 demanded recognition as the employees' majority representative and offered to demonstrate proof of majority status; (b) the settlement agreement resolved a complaint alleging that Local 337 represented a majority of the unit employees and sought a *Gissel* bargaining order because a fair election could not be held; and (c) the settlement agreement imposed obligations on the Respondent to recognize and bargain with Local 337 that went beyond obligations that could be imposed by an 8(f) relationship and are characteristic of 9(a) relationships, it is clear that the parties intended to establish a 9(a) relationship." 351 NLRB No. 5, slip op. at 5.

Nothing in the Respondent's motion warrants reconsideration of our conclusion that the settlement agreement demonstrated that the parties had established a 9(a) relationship. In addition to the reasons set forth in our Supplemental Decision and Order, we find it significant that the language in the settlement agreement requiring the Respondent to recognize and bargain with the Union was identical, in all relevant respects, with the complaint's request for relief. More specifically, the complaint, which sought a *Gissel*[9] bargaining order on the premise that a majority of the employees in an appropri-

[7] The Respondent contends that *Kravis* overturned the due process requirement in order to relieve merging unions from any obligation to show majority support, absent a question concerning representation. The Respondent further contends that, because it already has withdrawn recognition from the Union, retroactive application of *Kravis* here would not further that purpose, for it would not prevent the Union from having to make a majority showing. We fail to see the logic in this argument. Application of *Kravis* here does, in fact, restore the Respondent's obligation to recognize and bargain with the Union without requiring the Union to show majority support.

[8] Referred to herein as the "2001 case."

[9] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

ate unit had designated the Union as their exclusive representative and that there was little possibility of holding a fair election, requested that the Respondent be ordered to:

> Recognize and, upon request, bargain in good faith with the Charging [Party] Union as the exclusive collective bargaining representative of the employees in the Unit respecting rates of pay, wages, hours, and other terms and conditions of employment; and if an understanding is reached, embody it in a signed agreement.

This language clearly contemplated a 9(a) relationship, as it was designed to bestow on the Union the same status it would have enjoyed following an election victory and to require the Respondent to bargain toward a collective-bargaining agreement.

The settlement agreement provided exactly what the complaint requested. As noted above, it obligated the Respondent to "recognize and, upon request, bargain" with Local 337 "as the exclusive collective bargaining representative of the [unit] employees . . . with respect to rates of pay, wages, hours, and other terms and conditions of employment" and "if an understanding is reached, embody it in a signed collective-bargaining agreement." Because the recognition and bargaining language used in the settlement agreement was identical to that sought in the complaint, we find that the agreement demonstrates the parties' intent to establish a 9(a) relationship as contemplated by the complaint. Indeed, had the parties intended to establish a relationship other than one prescribed by Section 9(a), they certainly would have used language different from the very language set forth in the complaint.[10]

In contending that a 9(a) relationship was not proven, the Respondent, among other things, points to the fact that the Union's offer to show evidence of majority support preceded the settlement agreement by 14 months. We find no merit in this contention. As stated above, the complaint sought a *Gissel* bargaining order on the premise that there was little possibility of erasing the effects of the alleged serious unfair labor practices committed by the Respondent and conducting a fair election despite the use of traditional remedies. In these circumstances, it would be illogical to require the Union to demonstrate majority support shortly before the parties entered into the agreement settling the complaint. We note that the Supreme Court in *Gissel* explained that an otherwise warranted bargaining order could be issued where there is also a showing that "*at one point* the union had a majority." *NLRB v. Gissel Packing Co.,* 395 U.S. at 614 [emphasis supplied]. Thus, the circumstances here differ significantly from those cases in which the parties contest whether they have a 9(a) or 8(f) relationship under a collective-bargaining agreement that may be ambiguous regarding the nature of the bargaining relationship. In such cases, the union's failure to offer to show majority support when the agreement was made may be important in determining the parties' relationship. See, e.g., *Donaldson Traditional Interiors*, 345 NLRB 1298 (2005). We find that the Union's offer to demonstrate majority status was made sufficiently close to the time that the Respondent agreed to recognize the Union to demonstrate an intent to create a 9(a) relationship.

B. Collateral Estoppel

Under the doctrine of collateral estoppel, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Big D Service Co., Inc.*, 293 NLRB 322, 323 (1989) (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 fn. 5 (1979); *Marlene Industries Corp. v. NLRB*, 712 F.2d 1011, 1015–1016 (6th Cir. 1983)). An issue is "necessarily determined" if its adjudication was necessary to support the judgment entered in the prior proceeding. *Marlene Industries*, 712 F.2d at 1015.

The Respondent contends that the question of whether the parties' relationship was governed by 8(f) or 9(a) was not actually litigated in the 2001 case. The Respondent therefore asserts that the Board erred in finding that the Respondent was collaterally estopped from contending in the present case that the parties had an 8(f) relationship. As discussed below, we find that the Respondent has failed to demonstrate "material error," as required by Section 102.48(d)(1) of the Board's Rules and Regulations.

The General Counsel's complaint in the 2001 case alleged in paragraph 9 that the Union was the 9(a) representative of the bargaining unit employees. The Respondent's answer denied the allegation. Thus, the question of whether the Union was the 9(a) representative of the employees was squarely placed in issue. The complaint further alleged that the Respondent violated Section 8(a)(5) by making unilateral changes, bypassing Local 337, re-

[10] The Respondent contends that it is of no consequence that the settlement agreement's recognition and bargaining language was virtually identical to the Board's customary remedial language for 9(a) withdrawal of recognition violations, and differed from the remedial orders for 8(f) mid-contract withdrawal of recognition violations. We find no merit in the Respondent's contention; further, we find it particularly significant that the recognition and bargaining provision in the settlement agreement replicated the language of the complaint's request for relief, which, as discussed above, unquestionably sought establishment of a 9(a) relationship.

fusing to furnish information, and engaging in overall bad-faith bargaining. The Board found that the Respondent had committed these alleged unfair labor practices. As explained in our Supplemental Decision and Order,[11] finding these 8(a)(5) violations necessarily was premised on a finding that a 9(a) relationship existed between the Respondent and the Union, because an 8(f) relationship imposes no enforceable bargaining duties in the absence of a collective-bargaining agreement. Thus, in finding the 8(a)(5) violations, "the Board necessarily determined that the bargaining relationship between the Respondent and Local 337 was governed by Section 9(a)."[12]

In support of its argument that the question of whether the parties' relationship was governed by Section 8(f) or Section 9(a) was not actually litigated in the 2001 case, the Respondent points to statements in the parties' briefs in that case. In its brief in support of exceptions (at 2), the Respondent argued that the judge improperly found that the Union was the certified bargaining representative of the Respondent's employees, stating:

> First, the parties did not litigate whether the Union was the certified bargaining representative of AMS' employees. The issue was not necessary for a determination of the unfair labor practice charges. AMS [the Respondent] has agreed that it voluntarily recognized the Union in July of 1991 and that based upon that voluntary recognition, it had a bargaining obligation at all times relevant to these charges.

The Respondent then went on to argue that the General Counsel had failed to prove that it had a 9(a) relationship with the Union, specifically contending that the settlement agreement "fails to provide the basis for finding a 9(a) relationship." (Brief at 4, fn. 3.)

In its answering brief in the 2001 case, the Union conceded that it had not gained representational status through certification by the Board. Instead, the Union asserted that it had achieved 9(a) status through the Respondent's voluntary recognition. Following its principal argument on this point, the Union's brief (at 14) [13] contained an alternative argument that the Respondent's stipulations had resolved the issue:

> The above discussion notwithstanding, in the ultimate analysis, the issue of the Union's status is not ripe for decision at this juncture. For the purposes of the instant cases, Respondent stipulated at trial that it had both an obligation to bargain with the Union, and to provide information requested by the Union that was necessary and relevant to the Union's ability to carry out its duties as the collective bargaining representative of the unit employees. Although the issue of the Union's representational status may become ripe at some point in the future should Respondent refuse to continue in negotiations, or withdraw recognition from the Union, the Board need not address the issue within the scope of these proceedings, especially in light of the fact that the parties did not litigate the issue at trial.

Despite the Union's apparent acknowledgement that the parties had not litigated the issue of whether the Union was a 9(a) representative of the employees, we find that the issue was actually litigated. An issue need not be actively litigated at trial in order to be actually litigated for purposes of collaterally estopping a party from relitigating that issue. Otherwise, admissions in answers, failure to contest material facts in summary judgment dispositions, and stipulations or failures to present evidence at trial would have no issue preclusion consequences. See *Abbott Bank v. Armstrong*, 44 F.3d 665 (8th Cir. 1995) (issue of whether bank was creditor held "actually litigated" in prior case, where creditor status had not been judicially resolved but, rather, was "inherent" and necessary to judgment in case and was admitted in answer). As set forth above, the complaint specifically alleged that the Union was the 9(a) representative of the unit employees, and the Respondent's answer denied the allegation. The Respondent's brief argued that 9(a) status had not been proven, while the Union's brief contended that 9(a) status had been shown. The 1991 settlement agreement, which is evidence of the Union's claim to 9(a) status, apparently was entered in the record, and the parties made reference to it. Although the Respondent asserted in its brief that the parties had not litigated whether the Union was the *certified* bargaining representative of its employees, that question is not the same as the question of whether the Union was a 9(a) representative.

[11] 351 NLRB No. 5 (2007), slip op at 5.

[12] Id. The Respondent disputes this conclusion, contending that the settlement agreement itself was an 8(f) agreement and imposed on the Respondent bargaining duties, the breach of which violated Sec. 8(a)(5). Even if the settlement agreement was the sole basis for finding a Sec. 9(a) relationship in the 2001 case, the Respondent simply tries to relitigate an issue it lost in that case. Moreover, we find no basis for this argument on its own terms. To foster stability in the construction industry, Sec. 8(f) permits construction industry employers and unions to enter into *collective-bargaining agreements* without regard to whether the union has attained majority status. See *John Deklewa & Sons*, 282 NLRB 1375, 1380 (1987) (discussion of legislative history), enfd. 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988). The settlement agreement was not a collective-bargaining agreement. It established no terms and conditions of employment for the bargaining unit employees.

[13] The Respondent's motion to enter into the record its exceptions and supporting brief and the Union's answering brief in Case 7–CA–38022 is granted.

Moreover, to the extent that the parties may have believed that it was unnecessary to litigate the Union's majority status, this belief apparently was based on the Respondent's own admissions. Thus, the Respondent's brief, as quoted above, stated: "AMS has agreed that it voluntarily recognized the Union in July of 1991 and that based upon that voluntary recognition, it had a bargaining obligation at all times relevant to these charges." Given that, as discussed above, any bargaining obligation the Respondent had necessarily was premised on a 9(a) relationship, the Respondent's statement that, based on its voluntary recognition of the Union, it "had a bargaining obligation at all times relevant to these charges," was tantamount to admitting that the Union enjoyed 9(a) status. Consequently, we adhere to both bases for our finding that the parties had a 9(a) bargaining relationship, rather than an 8(f) relationship: that the 1991 settlement agreement demonstrated the existence of a 9(a) relationship, and that the Respondent was collaterally estopped from relitigating whether the parties had a 9(a) bargaining relationship.

III. APPLICATION OF *TOERING ELECTRIC*

Finally, we deny the Respondent's motion to remand the case to the judge to apply *Toering Electric Co*., 351 NLRB No. 18 (2007). In our 2004 decision in this case,[14] we found that the Respondent violated Section 8(a)(3) and (1) of the Act by, among other things, refusing to consider for employment and hire four union members who applied for jobs. Subsequent to issuance of our Supplemental Decision and Order in this case,[15] which addressed only the 8(a)(5) allegations, the Board issued its decision in *Toering,* which modified the elements of proof in refusal-to-hire cases.[16] The Respondent now seeks to apply *Toering* to the violations that the Board found in 2004.

We deny as untimely and lacking in merit the Respondent's motion to remand the case to the judge to apply *Toering*. Section 102.48(d)(1) of the Board's Rules and Regulations requires that motions for reconsideration be filed within 28 days after service of the Board's decision. Neither the Respondent nor any other party sought reconsideration of the Board's 2004 refusal-to-hire findings. Reconsideration was sought regarding only the Board's dismissal of 8(a)(5) allegations, and the Board's 2007 Supplemental Decision and Order concerned only the 8(a)(5) allegations. Thus, the Respondent's motion for reconsideration of the refusal-to-hire violations is untimely.

Moreover, by their terms, the rules announced in *Toering* apply only to "pending cases" at the time of *Toering's* issuance (as well as future cases). See *Toering Electric*, above, slip. op. at 10, fn. 56. As the present case was decided prior to the decision in *Toering,* the Respondent's motion to remand fails because this case does not fall within the ambit of cases to which *Toering* applies.

ORDER

It is ordered that the Respondent's motion for reconsideration is denied.

Dated, Washington, D.C. May 30, 2008

Peter C. Schaumber, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[14] 341 NLRB 1084 (2004).

[15] 351 NLRB No. 5 (2007).

[16] *Toering* held that "proof of an applicant's genuine job interest is an element of the General Counsel's prima facie case under *FES*. [I]f at a hearing on the merits, the employer puts forward evidence reasonably calling into question the applicant's genuine interest in employment, the General Counsel must prove the applicant's genuine interest by a preponderance of the evidence in order to prove that the applicant is an employee within the meaning of Section 2(3)." *Toering Electric*, supra, slip op. at 10.