

*Allied Mechanical Services, Inc.:*  
**If Multiple Unions Merge Without an Employee  
Vote, Should the Successor Union Succeed to the  
Bargaining Rights of Its Predecessors?**

**Presented to:**  
**The 33rd Annual Midwinter Meeting  
of the ABA Section of Labor and Employment Law  
Committee on the Development of the Law Under the NLRA**

**March 1, 2005**

**Gerald L. Pauling, II  
Brian M. Stolzenbach  
Brian J. Hipp  
SEYFARTH SHAW LLP  
55 East Monroe Street, Suite 4200  
Chicago, Illinois 60603-5803  
(312) 346-8000**

The right of employees to choose a collective bargaining agent is among the most fundamental rights protected by Section 7 of the National Labor Relations Act. Accordingly, Sections 8(a)(2) and 9(a) of the Act combine to prohibit an employer from recognizing a union that is not supported by a majority of the bargaining unit.

So what happens when the union chosen by a majority of the bargaining unit disappears through a merger with another union? Must the employer simply recognize and bargain with the new merged entity, without giving it a second thought? Would that respect the fundamental principle of employee choice? The authors of this article think not.

In *Allied Mechanical Services, Inc.*, 341 NLRB No. 141 (2004), the National Labor Relations Board agreed with our assessment, and seemed to give the contrary position little credence at all. Nevertheless, the General Counsel and the union in *Allied Mechanical* have moved for reconsideration, claiming that the Board has no business inquiring into the processes of a union merger. In the wake of calls by union leaders for increasing numbers of union mergers and consolidations, the ultimate decision in *Allied Mechanical* may have much to say about future labor relations.

In the pages that follow, we will discuss the holding of *Allied Mechanical*, the General Counsel and the union's respective positions (and arguments) in the case, and the legal background that gives rise to the dispute at hand. We will explain not only why the union's position is incorrect as a matter of current law, but also why we believe it is important that the Board rebuff the attempt in this case to stifle employee choice.

Finally, we will address the always-pertinent question: what are the practical implications of this case to employers and (as importantly) to the lawyers who advise them?

### **I. A Summary of *Allied Mechanical***

The legal dispute in *Allied Mechanical* began when Plumbers and Pipefitters Local 337 merged with another local union to create a brand new union—Plumbers and Pipefitters Local 357. The employer previously had agreed to recognize Local 337, which represented a majority of the bargaining unit, but the parties had not yet negotiated their first collective bargaining agreement when the union merger took place and Local 337 ceased to exist.

The new union, Local 357, sought to continue negotiations on behalf of the bargaining unit. The employer refused to recognize or bargain with Local 357, claiming that it had never recognized Local 357 as the representative of its employees. Local 357 filed an unfair labor practice charge, alleging that the employer had violated Section 8(a)(5) by refusing to bargain.

Essentially, Local 357 argued that it was a successor to Local 337 and that the employer's duty to bargain with Local 337 transferred with the merger. Ordinarily, of course, an employer has a right to demand proof of majority support through a Board-conducted election before recognizing any union newly claiming to represent its employees. That said, the Board gives great weight to the desire for stability in labor relations and therefore recognizes a successorship principle in the context of union mergers. Local 357 sought to avail itself of this principle.

The Board applied the following two-part test to assess whether Local 357 was the lawful successor to Local 337, such that the employer had a continuing obligation to bargain with the new union:

- (1) was the merger approved by a membership vote conducted with adequate due process safeguards; and
- (2) is there “substantial continuity” between the former union and the new union?

See *Allied Mechanical*, 341 NLRB No. 141, slip op. at 1 (citing *NLRB v. Financial Institution Employees (Seattle-First National Bank)*, 475 U.S. 192, 199 (1986), and *Minn-Dak Farmers Coop.*, 311 NLRB 942, 945 (1993)).

On the facts before it, there was no need for the Board to proceed past the first prong of the test because the union had not conducted *any* vote whatsoever. Union members were not given a say in the merger – with or without due process. Accordingly, the Board concluded that Allied Mechanical acted lawfully when it refused to bargain with Local 357.

On its face, *Allied Mechanical* seems like a perfectly reasonable decision. The three Board Members who ruled on the case (Battista, Schaumber and Meisburg) certainly did not seem to have any qualms about it and rather matter-of-factly cited well-established Supreme Court and Board precedent in support of their decision. Indeed, it is difficult to believe that the decision would have been delegated only to the three Republican Members of the Board if the decision had been expected to be even slightly controversial.

All of these signs notwithstanding, however, the General Counsel and Local 357 have decided that the decision warrants serious reconsideration. So what's the big deal? To that, we now turn.

## **II. The Union and the General Counsel's Position**

Local 357 and the General Counsel have moved for reconsideration of *Allied Mechanical*, and that motion currently is under review by the Board. The union and the General Counsel argue that the Board was incorrect in requiring that the union merger be voted on by the employees represented by the merging unions. Indeed, the General Counsel argues in his brief that the Board has departed from precedent, creating an extraordinary circumstance warranting reconsideration of the decision. G.C. Br. at 1-2.

According to the General Counsel and the Union, there is no existing case law requiring a vote from the membership of a merged union. Instead, they argue that the only relevant issue is whether the merger has raised a question concerning representation (QCR). In the words of the General Counsel, a merged union should be considered a successor to its predecessors' bargaining rights unless a merger must create a "sufficiently dramatic" change in a union's identity. G.C. Br. at 8. In effect, the General Counsel and Local 357 appear to argue that the second half of the *Allied Mechanical* test (i.e., whether substantial continuity has been retained) is the only relevant question.

## **III. The General Counsel's and the Union's Misperception of the Law**

In their briefs in the *Allied Mechanical* case, the General Counsel and Local 357 focus heavily upon *Seattle-First*, a Supreme Court case involving a "union affiliation." Union

affiliations typically are subject to the same tests as a merger of unions; however, the holding of *Seattle-First* is much narrower than the union and General Counsel suggest. *Seattle-First* does not control the decision in *Allied Mechanical*. Indeed, as described below, longstanding Board law requires that when multiple unions merge, the unions' members have a right to vote on the merger. *Seattle-First* did nothing to disturb that principle.

**A. An Analysis of Board Law Before *Seattle-First***

Given that *Seattle-First* was an affiliation case – not a merger case – an understanding of *Seattle-First* must begin with an analysis of prior Board law on affiliations.

Before *Seattle-First*, the Board required a local union that affiliated with a national or international union to prove that its members had an adequate opportunity to vote on the affiliation before it would amend a previous certification to reflect the new affiliation. See *North Electric Co.*, 165 NLRB 942, 943 (1967). The Board additionally required that the election be conducted with sufficient “due process” safeguards, such as notice to members, an opportunity for debate, and ballot secrecy safeguards. See *Newspapers Inc.*, 210 NLRB 8, 9 (1974), *enfd* 515 F.2d 334 (5th Cir. 1975).

The Board also required substantial continuity between the pre-affiliation union and its would-be successor. The central question of this inquiry was whether the affiliation “substantially changed” the union. Relevant factors included: the degree of local autonomy; the identity of local officers; and the presence and/or continuation of established procedures. See *Universal Tool & Stamping Co.*, 182 NLRB 254, 259 (1970).

Where the changes produced by the affiliation were sufficiently substantial, that gave rise to a QCR, requiring resolution by the Board's election procedure. *Id.*

As long as due process and continuity were present, the Board historically has considered affiliation to be an internal union matter that did not affect the union's status as bargaining representative and did not permit an employer to withdraw recognition from the union. *See Seattle-First, supra*, at 199-200 (overview of pre-decision Board law).

### **B. An Analysis of *Seattle-First***

Contrary to the General Counsel's and Local 357's position in *Allied Mechanical*, the Court in *Seattle-First* did not eliminate the necessity of considering due process safeguards when deciding whether a newly-affiliated union succeeds to the bargaining rights of the pre-affiliation union. Rather, the Court considered a more narrow question, arising from a new rule adopted by the Board — that a post-affiliation union would not succeed to the bargaining rights of its successor unless all bargaining unit members (not just union members) had been allowed to vote on an affiliation. The question on appeal was whether or not this new rule could be deemed consistent with the Act. At the time, the circuit courts were split on the issue. *Compare Seattle-First National Bank v. NLRB*, 752 F.2d 356 (9<sup>th</sup> Cir. 1984) with *Local Union No. 4-14 v. NLRB*, 721 F.2d 150 (5<sup>th</sup> Cir. 1983) and *United Retail Workers Union, Local 881 v. NLRB*, 774 F.2d 752 (7<sup>th</sup> Cir. 1985).

The Court observed that the Board's earlier precedent required: (1) a vote by union members on the affiliation question (safeguarded by due process); and (2) substantial continuity between the pre-affiliation and post-affiliation unions. In the absence of these

two factors, employers could challenge the union's majority status, refuse to bargain with the affiliated union, and require a new Board election.

After a review of past Board precedent, the Court stated: "The Board's new rule dramatically changes this scheme. The Board now takes the position that all employees in the bargaining unit – not merely union members – must have the opportunity to participate in the affiliation decision." 475 U.S. at 200-01. The Court held that this rule improperly interfered with internal union processes and struck it down.

Notably, in addressing directly the same argument now propounded by the General Counsel and the union in *Allied Mechanical*, the Court said: "The union suggests that it may even be inappropriate for the Board to impose due process safeguards with respect to union members. While we note that the NLRA does not require unions to follow specified procedures in deciding matters such as affiliations, *we need not assess the propriety of the Board's past procedures.*" *Id.* at 200 n. 6 (emphasis added). In other words, the Court refused to disrupt settled Board law requiring an election by union members. Some twenty years later, that very same law now is under attack in *Allied Mechanical*.

### C. An Analysis of Board Law After *Seattle-First*

Board case law since *Seattle-First* consistently has given consideration to the due process prong of the test. The Board has stated, for instance, that "only where an affiliation vote is conducted with less than adequate due process safeguards *or* where the organizational changes are so dramatic that the postaffiliation union lacks substantial continuity with the preaffiliation union will the Board find the employer's duty to bargain does not continue." *Sullivan Bros. Printers*, 317 NLRB 561, 562 (1995)

(emphasis added), *enfd* 99 F.3d 1217 (1st Cir. 1996). Thus, the Board places due process considerations on par with continuity concerns.

Further, in *Minn-Dak Farmers Cooperative*, 311 NLRB 942 (1993), *enfd* 32 F.3d 390 (8<sup>th</sup> Cir. 1994), the case cited by the Board in *Allied Mechanical*, the Board analyzed the due process requirement with care. The Board analyzed whether the union's alleged failure to follow its bylaws' affiliation procedures constituted a due process violation. In finding that the employer had a duty to bargain with the union, the Board stated that it "has long held on affiliation issues that strict adherence to the union's constitution is not a controlling factor; *what is important is whether the members had a proper opportunity to express their desires.*" *Id.* at 945 (emphasis added). Because the members had proper notice of the affiliation election and had an opportunity to discuss the election, and because there were proper precautions used to protect ballot secrecy, minimum due process standards were upheld.

In *Allied Mechanical*, the General Counsel and Local 357 both argue that the *Minn-Dak* opinion did not analyze due process as an independent criterion. Instead, they argue that everything eventually comes back to the question of whether a QCR has been raised. In particular, the General Counsel argues that the Board in *Minn-Dak* "evaluated the voting procedures not because due process required a membership vote, *per se*, under Board precedent but to determine whether the union's failure to follow its internal procedures somehow tainted the vote and thus raised a QCR. Thus the Board linked its due process requirement to the question of whether a QCR was raised and found that the employer had failed to establish that [questions about the vote]

subverted due process sufficiently to raise a QCR. Because no QCR was raised, the Board held that the union's failure to follow its bylaw did not cause the affiliation vote to lack due process." G.C. Br. at 7.

The General Counsel misses the point while perhaps inadvertently conceding what he supposedly is contesting: that a sufficiently tainted vote (i.e., one which does not accord due process) effectively raises a QCR under Board precedent, allowing the employer to refuse to bargain with the new union. There is simply no avoiding the Board's statement in *Minn-Dak* that "what is important is whether the members had a proper opportunity to express their desires." *Id.* at 945.

In *Allied Mechanical*, the General Counsel has cited a series of cases which he claims excuses the union's failure to hold *any* election on the merger. These cases, however, do not involve local unions merging or affiliating with a national or international union.<sup>1</sup> Rather, they involve the merger or affiliation of a district, regional, or parent union with another body. The Board repeatedly has distinguished these situations and the need for due process from that which is required in the context of local union mergers and affiliations. See *City Wide Insulation Inc.*, 307 NLRB 1, 3-4 (1992) (merger of district councils does not require vote on local level because it is union procedure) (citing cases). This distinction makes sense in that when a change occurs "up the ladder," the day-to-day representative duties of the local union are less likely to change than in the case of an actual change to the local union.

---

<sup>1</sup> The General Counsel cited *City Wide Insulation*, 307 NLRB 1 (1992); *Knapp-Sherrill Co.*, 263 NLRB 396 (1982); *Texas Plastics*, 263 NLRB 394 (1982); *House of the Good Samaritan*, 248 NLRB 539 (1980); *Aurelia Osborn Fox Memorial Hospital*, 247 NLRB 356 (1980). G.C. Br. at 7 n. 5.

Additionally, the General Counsel and Local 357 insist that *May Department Stores Co.*, 289 NLRB 661 (1988), *enfd* 897 F.2d 221 (7th Cir. 1990), lends credence to the argument that “a QCR exists after a merger *only* where there has been a change in representation ‘sufficiently dramatic to alter the union’s identity.’” See General Counsel Brief at 8 (emphasis added). This, however, is not the holding of *May Department Stores*. Indeed, the Board specifically analyzed whether the affiliation election met minimum due process standards in *May Department Stores* – and concluded that it did. The Board then stated in a footnote: “In light of our finding below that the Board’s traditional due process requirements have been met in this case, we find it unnecessary to consider whether, in view of the Supreme Court’s opinion in [*Seattle-First*], such requirements need be fulfilled in all instances where affiliations occur.” In effect then, the Board, like the Court in *Seattle-First*, put off any decision on the very argument made by the General Counsel and Local 357. Instead, it applied and analyzed the due process requirement that has long been used.

It is true that the Board rarely excused the duty to bargain based upon a lack of due process in a merger or affiliation vote prior to *Allied Mechanical*. Nonetheless, there is additional recent Board precedent that confirms the need for an affiliation vote. See *Cold Heading Co.*, 332 NLRB 956 (2000).

In *Cold Heading*, the Board excused the employer from bargaining with a newly affiliated union on the basis of an affiliation election. The employer in *Cold Heading* had long considered employees in “leader” positions to be covered by the parties’ collective bargaining agreement. However, it later reversed this position, stating that the leaders

were statutory supervisors, should not be union members and should not be covered by the labor agreement. The union tentatively agreed to this change, but shortly thereafter stated that it intended to affiliate with the UAW. In the subsequent affiliation election, the leaders were allowed to vote separately in an “advisory vote.” It turned out that these advisory votes were determinative and, if counted, would have resulted in no affiliation. Upon hearing the results, the employer reversed its position yet again and stated that the leaders’ votes should count, relying upon the vote to refuse to bargain with the newly affiliated union. *Cold Heading Co.*, 332 NLRB at 957-58.

The Board ruled for the employer, holding that the leaders should have been allowed to vote and holding that the employer had no obligation to bargain, given that the affiliation was not approved by the membership. Obviously, if there had been no need for an affiliation vote at all – as the Union and the General Counsel argue in *Allied Mechanical* – then the Board’s decision in *Cold Heading* would make no sense.

#### **D. A Summary of the Law as It Stands**

It seems safe to say that current Board law includes both a due process requirement and a substantial continuity requirement, though it should be noted that the due process requirement is not terribly exacting. The Board considers the totality of circumstances regarding the vote and requires only that voters be made aware of the election, that they have the opportunity to discuss the election, and that there be some semblance of secrecy to the vote. *See Sullivan Bros., supra.* Moreover, to avoid an obligation to bargain, an employer has the burden to show that the election violated these minimal due process requirements. Since *Seattle-First*, only where there has been no vote at all, or

where the vote has gone against affiliation, has the Board excused the employer's duty to bargain.

#### **IV. The Twin Requirements of Due Process and Substantial Continuity Are Consistent with the Act and Constitute Sound Labor Policy.**

Despite the clarity of the law, there is some logic to the General Counsel's and Local 357's argument. After all, the due process requirement, as it stands now, does not manifestly safeguard employee choice. The Supreme Court stripped the due process requirement of that ability when it held that bargaining unit members who are not union members have no right to a vote on an affiliation. Further, although the Court refused to address the precise argument that Local 357 and the General Counsel are making in *Allied Mechanical*, the Court did use broad language that can be viewed as favorable to the union's and the General Counsel's arguments. *See, e.g., Seattle-First*, 475 U.S. at 207-208 ("[The Board] may not condone an employer's refusal to bargain in the absence of a question of representation, and has no authority to prescribe internal procedures for the union to follow in order to invoke the Act's protections"). Nonetheless, there is good reason for the Board to maintain the due process prong of the test for union mergers.

Lest anyone forget, the NLRA is supposed to protect employee choice. Accordingly, one of the most fundamental principles in labor law is the rule that an employer typically may not recognize a union seeking to represent its employees without first obtaining some credible evidence that a majority of those employees *want* the union to represent them. It simply is not the case that a union merger situation is necessarily a

special situation in this regard. The merger creates a brand new union that seeks to represent employees, and it is difficult to see why it should necessarily be determinative that the employees had previously wanted another, now non-existent union to represent them.

In this regard, even if *Seattle-First* means that there need be no election in the affiliation context, a different rule may be warranted for mergers. Indeed, the Court in *Seattle-First* relied upon prior Board cases which had held that “an affiliation does not create a new organization, nor does it result in the dissolution of an already existing organization.” 475 U.S. at 206 (quoting *Amoco Production Co.* 239 NLRB 1195 (1979)). The Court noted that generally, the most dramatic change after an affiliation is merely a “formal name change.” *Id.* at 207. A merger, by contrast, necessarily involves the creation of a new legal entity and the dissolution of the old one. In *Allied Mechanical*, Local 357 did not exist prior to the merger, and Local 337 – the union initially recognized by the employer – no longer exists.

In fact, to take it a step further, the Board should consider whether to revert to the standard of requiring a vote by all bargaining unit members in the case of mergers. Given the Court’s reliance upon the typically minor changes associated with an affiliation, and the Court’s own observation concerning a situation in which one union ceases to exist and another purports to take its place, such a rule would not only not run

afoul of the holding in *Seattle-First*, but also might actually be more consistent with *Seattle-First* than the current rule of requiring only a vote of the union membership.<sup>2</sup>

Reducing the test to consider only “substantial continuity” between the pre-merger and post-merger unions would make the test nearly impossible to predict, and would undoubtedly be ineffective in offering employees even the most minimal protection from having a new union substitute itself for the employees’ chosen representative. The two tests – due process election and substantial continuity – are complementary and can reasonably ensure that employee choice is respected.

Consider, for example, the Board’s finding of substantial continuity where a small independent union affiliated with a large international, based in large part upon the fact that the employees had voted for the affiliation. *See Mike Basil Chevrolet*, 331 NLRB 1044 (2000). There, the Board overruled the Regional Director’s finding that the independent union’s character was fundamentally changed when it affiliated with the UAW. In finding continuity, the Board considered the “totality of the circumstances” and found that the fact that a UAW business representative would be primarily responsible for the handling of grievances was insufficient to create a QCR. Further, the Board stated that while it was not entirely clear whether the prior leadership of the independent union would continue in their positions, the membership would have three delegates on the executive board. That the executive board was comprised of eighty to one hundred

---

<sup>2</sup> Indeed, the ALJ in *Allied Mechanical* seemed to recognize that *Seattle-First* leaves the question open in the context of mergers. *See* 341 NLRB No. 141, slip op. at 16; *but see Retail Workers Local 881 v. NLRB*, 797 F.2d 421, 423 (7th Cir. 1986) (stating that the relevant considerations in both “merger” and “affiliation” cases are the same).

members was not sufficient to find discontinuity. Finally, despite the fact that dues more than doubled, the Board found it reasonable to assume that employees who vote for an affiliation “and thereby attain stronger representation and better services expect that it will be more expensive.” *Id.* at 1045.

The Board’s holding in *Mike Basil Chevrolet* illustrates that continuity and due process are complementary requirements. The Board noted that in any affiliation, “there will be changes in the structure of the representing union.” But it was reasonable for the independent to choose to sacrifice some sovereignty for the greater bargaining power that comes along with affiliation with a larger, more powerful union. And that choice was reflected in an employee vote.

Consider, however, a similar situation in the merger context – and without an employee vote. Assume that members have their dues doubled, their leadership replaced, and their grievances processed primarily by a business agent from an umbrella organization that never previously had any connection to the local union. Members of the union may decide that such costs are worth the benefits of the merger into a presumably stronger union, but that is a question they should be allowed to decide. Without the due process election requirement, what assurances exists to ensure that the substantial continuity requirement will provide sufficient protection for employee choice?

The ALJ in *Allied Mechanical* provided an excellent summary of the argument in favor of requiring an employee vote. The ALJ stated that “[the General Counsel’s argument], of course, ignores the real possibility that the affected employees may not

like, or even trust, the potential personnel or the structure of a proposed consolidated union. In such circumstances, the employees should be afforded a choice, even if substantial continuity between preaffiliation and postaffiliation unions would be maintained after the affiliation is accomplished.” 341 NLRB No. 141 at p. 16 n.18.

Many large international unions have made consolidation, affiliation and mergers of smaller units a primary objective. The most activist unions have declared their intent to increase these trends, centralizing power in the hands of fewer and larger unions. Rank and file members of local unions may want nothing to do with such activities, and their opinions should be respected. Admittedly, unions should have a great deal of independence in making internal structural decisions, but the Board is correct to require minimum checks on the ability of unions to circumvent the need to gain the support of the employees they seek to represent.

Again, the Board’s requirements are not onerous. All that is required is a vote with basic due process protections. Indeed, one might reasonably ask: what are the unions so afraid of?

## **V. Practical Advice for Employers**

As the decision stands today, employers should not read too much into the *Allied Mechanical* opinion. As explained above, only in the complete absence of an employee vote or a failed vote is the Board likely to find that an employer is excused from bargaining with a successor union on due process grounds. That said, the issue should be something of which employers are aware. Never should an employer blindly assume that it must – or that it should – recognize a merged union simply because one of its

predecessors represented the employer's employees. A basic inquiry into the circumstances of the merger may well be warranted.

Employers have a duty not to bargain with a union that lacks the support of a majority of a bargaining unit. While not a perfect vehicle for ensuring this majority support, the due process requirement in mergers and affiliations provides a necessary check against unions steamrolling employee sentiment.

CH1 10839530.2