United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: September 5, 2017

TO: Ronald K. Hooks, Regional Director
Region 19

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: Securitas Security Services USA, Inc., and Bechtel National, Inc., joint employers
Case 19-CA-191814

177-1650-0100-0000
530-4825-5000-0000
530-8054-0100-0000
530-8054-6500-0000

The Region submitted this case for advice as to whether the Union waived its right to bargain with Bechtel, a joint employer, when the Union's August 2016 representation petition only named Bechtel's subcontractor, Securitas, as the employer. We conclude that the Union did not waive its right to bargain with Bechtel as a joint employer during the representation proceedings because the Union was not fully aware of the relationship between Bechtel and Securitas and the Union's conduct does not evidence a conscious and deliberate pursuit of a bargaining relationship limited solely to Securitas. We further conclude that the failure to name Bechtel as a joint employer will not deprive Bechtel of due process within the meaning of *Alaska Roughnecks and Drillers Association v. NLRB*,[1] because Bechtel has received timely notice of its alleged joint employer status and will continue to have an opportunity to challenge that allegation during the instant unfair labor practice proceedings. Finally, we conclude that the Region should solicit an Amendment of Certification (AC) petition from the Union, and process that in conjunction with the unfair labor practice charge.

FACTS

Pursuant to a contract with the United States Department of Energy ("DOE"), Bechtel National, Inc. ("Bechtel") is contracted to design, build, and commission an immense treatment plant, the Waste Treatment Plant, to process and sterilize radioactive waste at the Hanford Site[2] in south central Washington State. The Waste

[1] 555 F.2d 732 (9th Cir. 1977), *cert. denied*, 434 U.S. 1069 (1978).

[2] Commissioned in 1943, the Hanford Site was home to both weapons-grade plutonium production reactors and, eventually, power reactors for the civilian

Treatment Plant ("WTP") has been under construction since 2002 and comprises numerous buildings over the sixty-five acre Hanford Site. The WTP is scheduled to become operational at some point between 2022 and 2039. Under Bechtel's contract with the DOE, Bechtel is required to provide certain specified levels of security at the WTP.

In 2008, Bechtel subcontracted its security work for both the WTP and its off-site office buildings in Richland, Washington to Securitas Security Services USA, Inc. ("Securitas"). The current contract is set to expire in 2018, but has several options for extensions. The contract also contains a range of provisions relevant to Bechtel's control over Securitas' employees' terms and conditions of employment on a daily basis. Securitas employs approximately twenty-four security officers who provide security services to Bechtel's Richland offices and the WTP site.

A. The Securitas Security Officers Obtain Union Representation

In April 2016,[3] several security officers employed by Securitas began to discuss obtaining union representation. Shortly thereafter, the Securitas security officers contacted International Guards Union of America, Local 21 ("Local 21"), an independent local organized under IGUA, Region 1 ("the Union"). Local 21 represents a unit of guards employed by a company directly contracted by the DOE to provide site-wide and perimeter security for the Hanover Site. Local 21 has no paid staff or representatives; rank-and-file members employed at the Hanover Site handle matters of both contract administration and enforcement. Likewise, the Union is a member-run organization and appears to have no professional staff. On August 22, Local 21's president, acting in his capacity as Region 1's vice president, filed a representation petition[4] on behalf of the security guards employed by Securitas. The Union's petition named "Securitas Security Services USA/ Waste Treatment Plant" as the employer. On August 29, Securitas and the Union entered into a stipulated election agreement providing for a mail ballot election for a unit of twenty-four Securitas security officers. Between September 15 and October 6, the Region conducted a mail ballot election with eighteen security officers voting in favor of representation and none voting

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electrical grid until the final reactor was decommissioned in 1987. As of 2007, the Hanford Site was home to roughly two-thirds of the nation's high-level radioactive waste by volume. The Site also currently hosts a commercial nuclear power plant and various scientific laboratories.

[3] All dates hereinafter are in 2016, unless otherwise noted.

[4] Case 19-RC-182558.

against representation. On October 14, the Region issued the certification of representation naming Securitas as the employer and the Union as the collective-bargaining representative.[5] At no point during the processing of the representation case did the Union or Securitas raise the relationship between Bechtel and Securitas. There is no evidence that any of Securitas' employees informed the Union that Bechtel exerts either direct or indirect control over Securitas' employees' terms and conditions of employment.[6] There is also no evidence that Local 21's president, who had never filed a representation petition before, had any knowledge of Bechtel's daily control over the Securitas security officers' terms and conditions of employment.

B. After the Union's Certification, its Newly-Appointed Officers Learn of Bechtel's Control Over Their Terms and Conditions of Employment

On November 4, the Union apprised Securitas that it had elected seven bargaining-unit security officers to serve as its officers and representatives. Throughout November, the Union learned that Bechtel was demanding certain changes to its staffing practices at Bechtel's Richland offices. Also, on approximately November 7, one of the unit security guards received several verbal warnings at the direction of one of Bechtel's WTP security supervisors. On November 9, the Union's newly-elected Local 161 president and another Union officer went to discuss the November 7 verbal warnings with Bechtel's Security and Safety Manager. At that meeting, Bechtel's Security and Safety Manager repeatedly asked the Union officers why they had unionized and told them that Bechtel had known that the security officers were planning to unionize since the beginning of the security officers' organizing activity. The Union officers ended the meeting because the Bechtel manager's questions were making them uncomfortable.

On November 21, Local 161 filed Case 19-CA-188637 alleging that both Securitas and Bechtel, as joint employers, violated Sections 8(a)(1), 8(a)(3) and (5) for, *inter alia*, refusing to bargain with the Union.[7] On November 30, the Union requested that

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[5] Subsequent to the election, the Union created a new local, Local 161, for the purpose of representing the unit of Securitas security officers.

[6] Some of the more senior Securitas security officers were aware that Bechtel had, on occasion, both directly disciplined Securitas security officers in the past and required Securitas to make changes to security procedures. There is no evidence that the Union or its agents were aware of these instances of Bechtel control prior to or during the processing of the representation proceedings.

[7] The Union later withdrew this charge, on December 20, because it had not yet requested to bargain with Bechtel.

Securitas provide a copy of its contract with Bechtel as well as some other information in order to aid it in developing contract proposals. On December 12, Securitas provided most of the information that Union requested but refused to provide a copy of its contract with Bechtel because it did not see the relevance of that information. On December 19, the Union responded to Securitas and explained that the contract between Securitas and Bechtel was relevant because it likely had information that affects security officers' job duties, wages, and benefits. On December 22, Securitas responded to the Union and stated it was the sole employer of the security officers and that it was fully prepared to bargain with the Union.

On December 22, the Union's president sent Bechtel a letter stating that:

> "[The Union] is the sole and exclusive collective bargaining [agent] of the security guards and lead security guards at the [WTP]. This notice is to inform you [the Union] believes based on recent acts and unilateral changes that Bechtel is a Joint Employer with Securitas and as such is ready to bargain the terms and conditions of employment resulting in a fair Collective Bargaining Agreement."

C. In January 2017, Securitas Informs the Union that Bechtel has Ordered a Reduction in Force

On January 5, 2017, the Union and Securitas held their first bargaining session. At the beginning of the bargaining session, the Union presented a number of proposals to Securitas dealing with uniforms, hours of work, and work during severe weather events. Securitas replied that those topics were economic issues and it did not wish to bargain over those issues at that time. The Union's bargaining team, comprised solely of Securitas security officers, allowed Securitas to move on to non-economic subjects. Towards the end of the bargaining session, Securitas told the Union that, effective mid-January 2017, there would be a reduction in force pursuant to Bechtel's determination that it did not require as much security on evenings and weekends. As a result, two full-time security officers would be displaced and used to fill in for security officers who were on leave. Although the Union's president objected to the displacement of the two employees, Securitas responded that the only other option would be to reduce all employees' hours and Securitas had no interest in doing that. The Union believed that Securitas had no genuine intention to bargain over announced reduction in force in any way and the bargaining session ended.

Also on January 5, 2017, Bechtel responded that it had received the Union's December 22 letter and forwarded it to Securitas. Bechtel went on to state that "Bechtel National, Inc. is not a joint employer with Securitas." That same day, the Union repeated its request that Securitas provide a copy of its contract with Bechtel in order to fully determine the scope of Bechtel's and Securitas' relationship. On

January 7, 2017, the Union again requested the contract between Bechtel and Securitas and strongly objected to the proposed reduction in force. The Union also objected to using the displaced employees as fill-in security officers and made a number of proposals in the event Securitas followed through with the reduction in force. On January 10, Securitas rejected all of the Union's proposals and interpreted its objection to using the displaced guards as fill-ins as a request to simply lay the employees off. Securitas also again refused to provide a copy of its contract with Bechtel to the Union, stating:

> Securitas employs the Security Officers at this site and as such hires, disciplines, assigns tasks/duties, sets the wages and benefits, etc. We are more than happy to answer any questions you have as to what these employees do, and what their terms and conditions of employment are. Also, we are fully prepared to bargain with you over their terms and conditions of employment. For these reasons, the Company's contract with the client, a third party who is not the employer, is irrelevant to negotiations on our CBA.

Later that day, the Union responded that it preferred the displaced employees to be used as fill-ins rather than laid-off. Securitas agreed to honor that request. On January 16, 2017, Securitas eliminated the two full-time positions and began offering the displaced employees fill-in shifts, as available.

The Union and Securitas subsequently met for bargaining on March 15, March 16, and April 18, 2017. Securitas, though willing to discuss some of the Union's economic proposals, has not offered any counterproposals. Nevertheless, the Union and Securitas have reached tentative agreements on a range of other matters. Bechtel has not participated in any of these bargaining sessions.

D. The Instant Unfair Labor Practice Charge

On January 25, 2017,[8] the Union filed the instant unfair labor practice charge alleging that Securitas and Bechtel, as joint employers, violated Section 8(a)(1) and (5). Specifically, the charge alleges that: 1) Bechtel unlawfully refused to bargain with the Union; 2) Bechtel and Securitas unlawfully refused to provide the contract between them; 3) Bechtel and Securitas unlawfully reduced and changed available shifts through the January 16, 2017 reduction in force without bargaining; and 4) Bechtel's Security and Safety Manager interrogated employees as to their union

[8] The initial charge was amended February 7, 2017.

activity and gave the impression that their union activity was under surveillance on November 6, 2016.[9]

On February 6, 2017, the Region sent Bechtel a letter appraising it of the allegations against it, including its joint employer relationship with Securitas. The Region requested that Bechtel provide witnesses for interview and documentary evidence related to the Region's investigation into the Union's allegations, including a copy of Bechtel's contract with Securitas. The Region also requested that Bechtel provide a position statement responding to the Union's allegations, including Bechtel's joint employer status. On March 13, 2017, Bechtel, through legal counsel, responded to the Region's February 6 requests by denying that Bechtel was a joint employer with Securitas and refusing to provide any documentary evidence in relation to the Region's investigation of Bechtel's joint employer status prior to the Region's determination that an unfair labor practice had occurred.

On March 20, 2017, in light of Bechtel's refusal to cooperate with the Region's investigation, the Region requested that the Board issue an investigatory subpoena duces tecum. On March 24, 2017, the Board approved the Region's request for an investigatory subpoena to obtain additional documents from Bechtel in order to determine Bechtel's status as a joint employer, including a copy of Bechtel's contract with Securitas. On April 24, Bechtel complied with the Board's subpoena and provided the requested information, including the contract between Bechtel and Securitas. Based on this newly-acquired evidence, the Region has determined that Bechtel is a joint employer with Securitas for the Securitas security officers represented by the Union.

ACTION

We conclude that the Union did not waive its right to bargain with Bechtel as a joint employer during the representation proceedings because the Union was not fully aware of the relationship between Bechtel and Securitas and the Union's conduct does not evidence a conscious and deliberate pursuit of a bargaining relationship limited solely to Securitas. We further conclude that the failure to name Bechtel as a joint employer will not deprive Bechtel of due process within the meaning of *Alaska Roughnecks and Drillers Association v. NLRB*,[10] because Bechtel has received timely notice of its alleged joint employer status and will continue to have an opportunity to challenge that allegation during the instant unfair labor practice proceedings.

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[9] The Union alleged several other violations of Sections 8(a)(1), (3), and (5). The Region has determined that there is no merit to these allegations.

[10] 555 F.2d 732 (9th Cir. 1977), *cert. denied*, 434 U.S. 1069 (1978).

Finally, we conclude that the Region should solicit an Amendment of Certification (AC) petition from the Union because the Board might determine, consistent with *Alaska Roughnecks,* that an AC petition is the appropriate vehicle for imposing a bargaining obligation in cases where a joint employer could have been, but was not, named during the initial representation proceedings.

A. The Union Did Not Waive its Right to Bargain with Bechtel by Failing to Name it as a Joint Employer During the Representation Proceedings

The Board will find that two employers are joint employers of the same statutory employees if they "share or codetermine those matters governing the essential terms and conditions of employment."[11] The appropriate timeframe for determining "whether employers are to be considered joint . . . is that period surrounding the unfair labor practices."[12] Generally, all of the companies that share a joint employer relationship have a duty to bargain with their shared employees' bargaining representative.[13] The Board has regularly found a bargaining obligation even as to a joint employer that is not signatory to a collective-bargaining agreement between a union and the other joint employer.[14] Moreover, the Board has held that certification of one employer does not prohibit it from imposing a bargaining obligation on another joint employer of the employees in the bargaining unit.[15] Changes in control and/or

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[11] *BFI Newby Island Recyclery*, 362 NLRB No. 186, slip op. at 2 (Aug. 27, 2015) (citing *NLRB v. Browning-Ferris Indus. of Pennsylvania, Inc.*, 691 F.2d 1117, 1123 (3d Cir. 1982)).

[12] *CNN America, Inc.*, 361 NLRB No. 47, slip op. at 8 (Sept. 15, 2014) (citing *Goodyear Tire & Rubber Co.*, 312 NLRB 674, 676 (1993)).

[13] *See, e.g., W. W. Grainger, Inc.*, 286 NLRB 94, 96 (1987), *enforcement denied on other grounds*, 860 F.2d 244 (7th Cir. 1988); *Whitewood Maintenance*, 292 NLRB 1159, 1159, 1168 (1989), *enforced*, 928 F.2d 1426 (5th Cir. 1991); *Sun-Maid Growers of California*, 239 NLRB 346, 353–54 (1978), *enforced*, 618 F.2d 56 (9th Cir. 1980).

[14] *D & S Leasing*, 299 NLRB 658, 660 & n.9, 672–73 (1990), *enforced*, 954 F.2d 366 (6th Cir. 1992); *W. W. Grainger, Inc.*, 286 NLRB at 97; *American Air Filter Co.*, 258 NLRB 49, 53–54 (1981); *Ref-Chem Co.*, 169 NLRB 376, 379–82 (1968), *enforcement denied*, 418 F.2d 127 (5th Cir. 1969).

[15] *See CNN America, Inc.*, 361 NLRB No. 47, slip. op at 8 (rejecting argument that Board's certification and successive collective-bargaining agreements omitting alleged joint and/or successor employer barred subsequent joint employer finding), *enforcement denied on other grounds*, No. 15-1209, 2017 WL 3318834 (D.C. Cir. Aug.

ownership of employers of a particular bargaining unit can create bargaining obligations for additional entities despite what is stated in an original certification.[16]

The Board has determined that, in certain situations, a union may waive its right to bargain with a joint employer by failing to assert the joint employer relationship during the representation proceedings. However, employees' right to bargain with a joint employer through their bargaining representative is not easily waived. In determining whether a union has waived its right to bargain with an employer, such a waiver must be "clear and unmistakable."[17] In both *Goodyear Tire & Rubber Co.* and *Aldworth, Co.*, the union had full knowledge of the joint employer relationship at the time that it filed the representation petition but failed to name the alleged joint employer.[18] Then, subsequent to the certification, and without a change in the control exerted by the alleged joint employer, the union attempted to have the Board

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4, 2017). *See also Central Transport*, 306 NLRB 166, 166 (1992) (finding alleged joint employer had a bargaining duty notwithstanding that it was not a participant in the representation proceeding because it stipulated to joint employer status), *enforcement denied*, 997 F.2d 1180 (7th Cir. 1993); *American Air Filter Co.*, 258 NLRB at 52 (rejecting argument that certification naming only one employer bars litigation of alleged joint employer status in unfair labor practice proceeding); *U.S. Pipe & Foundry Co.*, 247 NLRB 139, 139–43 (1980) (employers were joint employers even though this was not stated on the certification).

[16] *See NLRB v. Burns Int'l Sec. Servs.*, 406 U.S. 272, 279–80 (1972) (employer has an obligation to bargain as a successor even it was not named on the certification or part of the original representation proceeding); *Corbel Installations, Inc.*, 360 NLRB No. 3, slip op. at 1 (Sept. 19, 2013) (employer that acquired company two months after certification of a union to represent the company's employees had an obligation to recognize and bargain with that union).

[17] *Provena St. Joseph Medical Center*, 350 NLRB 808, 810–11 (2007); *see generally Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

[18] *See Aldworth*, 338 NLRB at 141 (when the union filed its petition, it was "fully aware" of the employee-leasing arrangement between the labor supplier and its alleged joint employer customer); *Goodyear*, 312 NLRB at 688 (union representative testified that when the union filed the petition, he was aware of the relationship between the driver-leasing company and its alleged joint employer customer, a chemical plant operator).

impose a bargaining obligation on the alleged joint employer.[19] In both of those cases, the Board determined that a union's conduct at the time that it initially sought recognition through a representation petition was "comparable to a waiver"[20] or "essentially"[21] a waiver of bargaining rights that the union otherwise would have had with respect to the joint employer. Thus, when a union fails to assert a joint employer relationship during representation proceedings, the Board will find that the union has waived the right to bargain with that joint employer where the union had full knowledge of the joint employer relationship during the representation proceeding and, through its conduct in those proceedings, consciously and deliberately pursued a bargaining relationship limited to the employer named in the certification of representation.[22]

The D.C. Circuit has generally endorsed the Board's waiver approach.[23] In *Computer Associates*, the D.C. Circuit rejected the Board's joint employer finding

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[19] *See Aldworth*, 338 NLRB at 141 (union filed a charge seeking a *Gissel* bargaining order against an alleged joint employer that it had not named in its stalled representation petition); *Goodyear*, 312 NLRB at 688 (union filed a charge alleging that chemical plant operator was a joint employer approximately seven months after the union was certified and after the chemical plant operator had terminated its contract with the employer named in the certification).

[20] *Goodyear*, 312 NLRB at 689.

[21] *Aldworth Co.*, 338 NLRB at 140–41.

[22] *See Aldworth Co.*, 338 NLRB at 140–41 (union "essentially waived" bargaining rights with joint employer where union was "fully aware of lease agreement between" employers; union's failure to name joint employer during representation proceedings demonstrates "a conscious and deliberate pursuit of a bargaining relationship limited" solely to one employer); *Goodyear*, 312 NLRB at 688–89 (where union agent testified that he was "aware" of relationship between putative joint employers in some detail during the representation proceedings, union made a "deliberate decision, comparable to waiver" to only name the primary employer during representation proceedings).

[23] *See Dunkin' Donuts*, 363 F.3d at 440 ("when a union, knowing the relationship between two companies, deliberately names only one of the companies in its representation petition and its stipulation for an election, and requests bargaining only with that company, it may not later substitute another company"); *Computer Assocs. Int'l, Inc. v. NLRB*, 282 F.3d 849, 851–52 (D.C. Cir. 2002) (union's act of stipulating to a single employer during representation proceeding when the union's initial petition had claimed joint employers binding on the parties absent "changed

because, in the earlier representation proceeding, the parties' stipulation had named only one employer.[24] But the *Computer Associates* court found that the parties' stipulation and the subsequent certification of representative remained "presumptive[ly]" binding on the parties where the union had initially named the joint employer in its election petition, and then *abandoned* that assertion by agreeing to a stipulation of election that named only one employer as the "sole employer."[25] Subsequently, in enforcing the Board's decision in *Aldworth*, the D.C. Circuit articulated its approval of the Board's approach in *Goodyear* and explained that "when a union, knowing the relationship between two companies, *deliberately names only one of the companies in its representation petition and its stipulation for an election*, and requests bargaining only with that company, it may not later substitute another company."[26]

In the instant case, the Union did not consciously waive its right to bargain collectively with Bechtel because it did not possess sufficient knowledge of Bechtel's status as a joint employer prior to the October 14 certification.[27] Initially, unlike *Goodyear*, there is no evidence that any Securitas security officer ever communicated any details of their limited knowledge of Bechtel's daily control over Securitas employees (through the issuance of discipline and setting of work rules) to the Union

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circumstances"). Other courts of appeals have concluded that a post-representation proceeding finding of joint employer is prohibited where the putative joint employer did not "intervene[ene] in a labor dispute" after the certification. *See Alaska Roughnecks & Drillers Ass'n v. NLRB*, 555 F.2d 732, 36 (9th Cir. 1977); *Cent. Transp., Inc.*, 997 F.2d at 1186. *See generally infra* discussion and cases cited in Section B.

[24] *Computer Assocs. Int'l*, 282 F.3d at 851–52.

[25] *Id.* at 850–51.

[26] *Dunkin' Donuts*, 363 F.3 at 440 (emphasis added).

[27] We note that Bechtel is liable as a joint employer for violations of Sections 8(a)(1) and 8(a)(3), such as the alleged unlawful statements made by Bechtel's manager on November 9, regardless of its bargaining obligation. *See Dunkin' Donuts*, 363 F.3d at 440 (enforcing Board finding that union waived its right to bargain with joint employer but did not waive its right to hold joint employer liable for violations of Sections 8(a)(1) and (3) (citing *Goodyear Tire & Rubber*, 312 NLRB at 688–89)).

prior to or during the representation proceedings.[28] Moreover, even if the Union had some knowledge of Bechtel's control over Securitas' employees' terms and conditions of employment, the Union did not have the whole picture until it began representing employees after the October 14 certification.[29] After the Union had elected its initial local officers, all relatively less-senior Securitas security officers, the Union's officers began to realize the role that Bechtel had over their terms and conditions of employment based on the early November security procedure changes required by Bechtel and Bechtel's manager's statements on November 9 after a Bechtel manager disciplined a security guard. After these two events, the Union almost immediately took action to assert a bargaining obligation on Bechtel as a joint employer.[30] Since November 30, the Union has attempted to learn more about the nature of Bechtel's and Securitas' relationship from both entities by requesting relevant information, such as the contract between the two companies. Both Securitas and Bechtel have refused to provide the Union with any information and, instead, continue to assert that Securitas is the sole employer of security officers. To this day, unlike the union in *Aldworth* that had a "full knowledge" of the lease agreement between the two employers, the Union still does not have a complete understanding of the companies' relationship because both Bechtel and Securitas continue to refuse to provide the Union with necessary information, such as the contract between the companies.[31] Finally, unlike *Goodyear*, at all material times prior to the certification, security

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[28] *Cf. Goodyear,* 312 NLRB at 688 (union agent testified that employees had discussed their confusion as to their employers' relationships during representation proceedings).

[29] *Cf. Aldworth Co.*, 338 NLRB at 141 (union was "fully aware" of employers' relationship when it had full knowledge of the employers' lease agreement during representation proceedings).

[30] Although the Union did not request bargaining until December 22, the Union's November 22 unfair labor practice charge in Case 19-CA-188637 demonstrates its first attempt to assert Bechtel as a joint employer. The Union withdrew that charge on December 20 after it realized that its failure to request bargaining with Bechtel precluded a Section 8(a)(5) failure to bargain violation. *See, e.g.*, *NLRB v. Alva Allen Indus.*, 369 F.2d 310, 321 (8th Cir. 1966) ("A union cannot charge an employer with refusal to negotiate when it has made no attempts to bring the employer to the bargaining table." (citing *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939))).

[31] *See Aldworth Co.*, 338 NLRB at 141 (union had full knowledge of joint employer relationship where it was "fully aware" of lease between primary and joint employer).

officers believed they were employed solely by Securitas.[32] Thus, at all points prior to the Union's certification on October 14, the Union did not possess the clear understanding of the relationship between Bechtel and Securitas that Board law requires in order for the Union to waive its right to bargain with Bechtel as a joint employer.

Furthermore, the Union's course of conduct during the representation proceeding does not demonstrate that it consciously and deliberately pursued a bargaining relationship limited solely to Securitas. First, unlike *Computer Associates*, where the union asserted a joint employer relationship in the initial petition but later, in a stipulated election agreement, agreed to an election only with the "sole employer," the Union here never asserted at any point during the representation proceeding that Bechtel was a joint employer.[33] The August 22 petition, the August 29 stipulation to election, the October 14 certification, and all other documents pertaining to identity of interested parties in the representation case all identify Securitas alone as the employer of the employees. Additionally, there is no evidence that Bechtel committed any unfair labor practices or overtly interfered with terms or conditions of employment in such a way as to alert the Union to its role during the pendency of the representation proceedings. In *Aldworth*, a *Gissel* case, the alleged joint employer committed numerous discreet violations of Sections 8(a)(1) and 8(a)(3) while the representation case was pending.[34] The Board concluded that the union consciously and deliberately did not pursue a bargaining relationship with the joint employer where the union never attempted to amend its election petition to name the joint employer despite the joint employer's overt interference.[35] Here, in contrast, Bechtel did not interfere with the employees' unionization efforts or their terms and conditions of employment during the brief pendency of the representation proceedings. Moreover, neither Local 21's president nor the Securitas security officers had ever handled representation proceedings before the Board and there is no indication they understood the significance of Bechtel's control until after the election. Accordingly, in light of the Union's ignorance of Bechtel's joint employer relationship with Securitas, the Union's course of conduct during the representation proceeding

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[32] *See Goodyear,* 312 NLRB at 689 (in assessing merits of joint employer allegation, ALJ noted that employees discussed their "supposed confusion" as to who their employer was with the union's agent during the representation proceedings).

[33] *Computer Assocs. Int'l*, 282 F.3d at 851–52.

[34] *Aldworth Co.*, 338 NLRB at 140–41.

[35] *Id.* at 141.

cannot be interpreted as a conscious and deliberate abandonment of a bargaining relationship with Bechtel.

B. Bechtel Will Not Be Deprived of Due Process by the Union's Failure to Assert its Status as a Joint Employer in the Representation Proceedings

Two courts of appeals have held that a union is absolutely prohibited from asserting a joint employer bargaining obligation after the certification of representation has issued where the employers' relationship existed during the representation case, except in extenuating circumstances. Both the Seventh[36] and Ninth Circuits[37] have held that, generally, the failure to name a joint employer on the certification of representation precludes the imposition of a bargaining obligation except through the Board's Amendment of Certification (AC) proceedings.[38]

In *Alaska Roughnecks*, the Ninth Circuit rejected the Board's joint employer finding on due-process grounds where the union had failed to amend its representation petition or file an AC petition asserting the joint employer's bargaining obligation.[39] There, the union did not request to bargain with the primary employer's customer (the joint employer) until six months after the customer had ended its relationship with the primary employer.[40] The union filed an unfair labor practice charge against the customer when it refused to bargain with the union as a successor employer.[41] The customer was not aware that the Board was considering that the customer was actually a joint employer rather than a successor until the investigation was complete and complaint issued.[42] The court concluded that, under the specific facts of that case, the notice the customer received from the Board that it

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[36] *See Cent. Transp., Inc.*, 997 F.2d at 1186 (AC petition required under Board's rules and regulations)

[37] *See Alaska Roughnecks,* 555 F.2d at 736 (AC petition required on constitutional due process grounds).

[38] *2*9 C.F.R. § 102.61(e).

[39] *Alaska Roughnecks*, 555 F.2d at 735–36.

[40] *Id*. at 734.

[41] *Id.* at 734.

[42] *Id.* at 734.

was a joint employer was "wholly inadequate" and the Board was precluded from finding that the customer was a joint employer where that had not been litigated in the representation proceeding.[43] The court acknowledged, however, that the outcome might have been different if the customer had "either intervened in [the employer's] labor dispute with the union . . . or been approached by the union earlier . . . ."[44]

We disagree with the Ninth Circuit's suggestion in *Alaska Roughnecks* that the due process rights afforded to joint employers during unfair labor practice proceedings are less than those afforded during representation proceedings.[45] Representation proceedings are intended principally to determine "the interests of *employees* in being represented by the designated union, the scope of the appropriate unit, and the employees to be included therein."[46] The Board's role in such proceedings is that of a "neutral investigator."[47] Although employers have some interest in representation proceedings, those proceedings are merely administrative and are not final dispositions of the substantive rights of the parties, which can be determined only when the Board acts as a prosecutor whose duty it is to protect against violations of the Act.[48] In addition, the failure of a union to utilize AC proceedings to assert a

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[43] *See id.* at 735 (concluding that the customer had a due-process right to timely "notice and an opportunity to be heard" and "an effective opportunity to defend" itself regarding its status as a joint employer.).

[44] *Id.* at 737; *see also Cent. Transp., Inc. v. NLRB*, 997 F.2d at 1187 (rejecting Board's joint employer finding where union "did not inform [trucking company] that it deemed [trucking company] a joint employer until after" trucking company's contract with driver-leasing company, the employer named in the Board certification, had been canceled; finding that Board's regulations require it be bound by certification determination, at least where purported joint employer had not intervened in the labor dispute).

[45] *See American Air Filter Co.*, 258 NLRB at 52 (certification of one employer does not bar litigation of the status of alleged joint employer in a subsequent unfair labor practice proceeding; to conclude otherwise, "misperceives the nature of representation hearings and the certification process" because representation proceedings are not final dispositions of substantive rights of parties).

[46] *American Air Filter Co.*, 258 NLRB at 52.

[47] *Id.* at 52–53.

[48] *Cf. Associated General Contractors of California v. NLRB*, 564 F.2d 271, 276–78 & n. 7 (9th Cir. 1977) (holding that courts of appeals are only permitted to review the

bargaining obligation on a joint employer does not deprive a putative joint employer of due process because due process safeguards are present in both the investigatory and prosecutorial stages of the Board's unfair labor practice cases. A putative joint employer will be given notice of its alleged joint employer status and a timely opportunity to challenge that claim. In order to file a meritorious refusal-to-bargain charge against a joint employer, the union normally must first notify the joint employer of its asserted relationship to the primary employer and request bargaining.[49] Once the unfair labor practice charge has been filed, the joint employer will receive notice of that allegation and an opportunity to present evidence, witness testimony, and its legal arguments to the Regional Director if it wishes to challenge its alleged status as a joint employer during the investigatory phase of the case.[50] Thus, under normal circumstances, joint employers are given abundant notice and opportunity to challenge their status as joint employers during the investigation and consideration of unfair labor practice charges.[51] Because an employer is given ample opportunity to fully litigate the question of its joint employer status in the unfair labor practice proceeding, it would "elevate form over substance" to find that the employer was prejudiced by the union's failure to name it as a joint employer in the representation proceedings.[52]

Board's certifications of representation indirectly through review under Section 10(f) of subsequent Board unfair labor practice decisions regardless of whether the representation proceedings precede or occur concurrently with the unfair labor practice proceedings); 5 U.S.C. § 554(a)(6) (excluding "certification[s] of worker representatives from the class of cases requiring adjudication on the record and opportunity for an agency-held hearing).

[49] *Alva Allen Indus.*, 369 F.2d at 321.

[50] *See NLRB v. Bancroft Mfg. Co.*, 516 F.2d 436, 445–46 (5th Cir. 1975) (Regional Director's decision to decide objectionable election conduct in unfair labor practice proceeding rather than representation proceeding did not violate company's due process rights because unfair labor practice proceedings "boast[] all of those procedural safeguards ordinarily associated with the concept of due process").

[51] *Cf. Chamber of Commerce v. NLRB*, 2015 WL 4572948, at *28 (D.D.C. July 29, 2015) ("[t]he demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective") (internal quotation marks and citations omitted).

[52] *American Air Filter Co.*, 258 NLRB at 52–53. *Cf. NLRB v. Aaron Bros. Corp.*, 563 F.2d 409, 413 (9th Cir. 1977) (Regional Director's power to both investigate and

Here, Bechtel has been provided ample due process within the meaning of *Alaska Roughnecks* even though the Union did not assert that Bechtel was a joint employer until after the certification of representation. First, Bechtel has been provided notice of its potential bargaining obligation as a joint employer with Securitas.[53] On December 22, the Union contacted Bechtel and asserted that it was a joint employer with Securitas and requested bargaining. Thus, unlike the union in *Alaska Roughnecks* that only contacted the joint employer after it terminated its contract with the primary employer, the Union here approached Bechtel early in its collective-bargaining relationship with Securitas.[54] Bechtel also received timely notice of the Region's investigation into the joint employer allegation. After the Union filed the instant unfair labor practice charge, the Region served a copy of that charge on Bechtel and informed Bechtel of the Region's investigation into the Union's allegations—including Bechtel's joint employer status. Thus, Bechtel, unlike the customer in *Alaska Roughnecks*, has been notified by both the Union and the Board of its alleged joint employer status long-prior to the issuance of an unfair labor practice complaint.

Second, unlike the customer in *Alaska Roughnecks*, Bechtel has already been afforded ample opportunity to be heard and to challenge its status as a joint employer throughout the Region's investigation. On February 9, the Region apprised Bechtel of its right to present documentary evidence, witness testimony, and position statements during the Region's investigation of the Union's joint employer allegation. On March 13, 2017, in response to the Region's February 9, 2017 notice, Bechtel provided its legal position to the Region denying its joint employer status. At that time, Bechtel refused to provide documentary evidence necessary for the Region to determine if Bechtel is a joint employer until the Region had determined that an unfair labor

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adjudicate election objections in unfair labor practice proceedings does not raise due process concerns).

[53] *Cf. Alaska Roughnecks*, 555 F.2d at 734–35 (union's unfair labor practice charge against primary employer's customer alleged that it was a successor employer; General Counsel's decision to issue complaint was first notice that the customer had from either the Board or the union that the customer was considered a joint employer).

[54] *See id.* at 737 (observing that the court's result may have been had different had the joint employer "been approached by the union earlier").

practice had even occurred.[55] Thus, Bechtel has not only had an opportunity to challenge the Union's allegations during the Region's investigation, but it has affirmatively refused to fully comply with the Region's investigation. Nevertheless, after the Region issues complaint in this case, Bechtel will *still* be provided with the opportunity to present its evidence, witnesses, and legal arguments before the ALJ, confront the evidence and witnesses relied upon by the General Counsel, and, should Bechtel so choose, seek review of the ALJ's factual and legal determinations before the Board and, ultimately, a United States court of appeal with jurisdiction over the parties.[56] In sum, the fact that Bechtel's joint employer status was not alleged nor litigated in the representation case has not and will not deprive it of its due process rights.

Nevertheless, the Region should solicit an AC petition from the Union seeking to add Bechtel, as a joint employer with Securitas, to the certification of

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[55] In order for the Region to appropriately investigate the allegations in this case, including Bechtel's joint employer status, the Board approved the Region's use of an investigatory subpoena to obtain the needed information from Bechtel.

[56] We note that a joint employer that was not involved in or named in a representation petition may actually be in a more advantageous position to litigate its status in a case such as this as opposed to a technical Section 8(a)(5) proceeding. In technical Section 8(a)(5) cases, a Regional Director's factual conclusions in an underlying representation proceeding, such as to joint employer status, are afforded some deference and the joint employer is usually barred from raising new arguments that it failed to raise in the representation case. *See NLRB v. Sav-on Drugs*, 704 F.2d 1147, 1149 (9th Cir. 1983) (observing that, under Section 3(b) and the Board's regulations, unreviewed representation decisions of Regional Directors are afforded the same weight and deference as Board decisions); *see also Seattle Opera v. NLRB*, 292 F.3d 757, 766 (D.C. Cir. 2002) (noting that a party is foreclosed from raising issues in technical Section 8(a)(5) cases that could have been litigated before the Regional Director—but weren't—in representation cases); *NLRB v. Red-More Corp.*, 418 F.2d 890, 893–94 (9th Cir. 1969) (deferring to Regional Director's prior finding and conclusion of joint employer because "fully litigated representation proceedings, such as the joint employer relation here involved, are entitled to some degree of finality in a subsequent unfair labor practice case"). Conversely, where a joint employer's status was not litigated in a representation case, a Regional Director's allegation of joint employer status in an unfair labor practice proceeding will be afforded no deference whatsoever and must be proven by a preponderance of the evidence before the ALJ.

representation.[57] Initially, we note that neither the Board's rules and regulations nor the Act itself requires a union to utilize AC proceedings in order to assert a joint employer bargaining relationship after the issuance of certification.[58] However, since *Alaska Roughnecks*, the Board has never addressed whether AC petitions are the appropriate vehicle to address the circumstance, such as the instant case, where an existing joint employer relationship was unknown to a union during a representation case and the union later tries to assert such a relationship.[59] As a precautionary measure in case the Board should decide that AC proceedings are the proper vehicle to assert a joint employer obligation where the putative joint employer was not included on the certification, the Region should solicit an AC petition from the Union prior to issuing complaint in the instant case and process that in conjunction with the unfair labor practice case.[60]

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[57] In *Microsoft Corporation*, Case 19-CA-162985, Advice Memorandum dated March 1, 2016, we did not instruct the Region to solicit an AC petition in similar circumstances because we concluded that, *inter alia*, the joint employer had intervened in the union's labor dispute within the meaning of *Alaska Roughnecks*.

[58] *Compare U.S. Security Associates*, Case 1-AC-98, Decision and Order (Sept. 6, 2007) (dismissing AC petition on grounds that it is not the appropriate vehicle to add another employer to the certification), *with W. L. Golightly, Inc.*, 172 NLRB 2155, 2155–56 (1968) (rejecting on the merits a union's request to amend a certification to include a joint employer).

[59] In its 1993 decision in *Central Transportation*, the Seventh Circuit adopted the Ninth Circuit's interpretation of the Board's AC petition regulations (29 C.F.R. § 102.61(e)), as the appropriate vehicle to impose a bargaining obligation on a joint employer. 997 F.2d at 1186. Since that decision, we are unaware of any guidance from the Board either in its case law or its rulemaking that clarifies whether AC Petitions may/should be utilized to add a joint employer to a certification of representation.

[60] After complaint has issued and if appropriate, the Region should consolidate the AC petition and unfair labor practice case in a combined proceeding. *See National Labor Relations Board Casehandling Manual Part Two: Representation Proceedings* § 11490.3 (January 2017).

Accordingly, after the Region has received the Union's AC petition seeking to add Bechtel as a joint employer with Securitas to the certification of representative, the Region should issue complaint, absent settlement, alleging that Bechtel, as a joint employer with Securitas, has violated Section 8(a)(5) by refusing to bargain with the Union.

/s/
J.L.S.

ADV.19-CA-191814.Response.SecuritasSecurity[redacted]