Antioch Building Materials Co. *and* Operating Engineers Local Union No. 3, International Brotherhood of Operating Engineers, AFL–CIO. Cases 32–CA–13804

March 9, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS AND BROWNING

On December 23, 1994, Administrative Law Judge George Christensen issued the attached decision. The Respondent and the General Counsel filed exceptions and supporting briefs.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth below.[2]

ORDER

The National Labor Relations Board orders that the Respondent, Antioch Building Materials Co., Pittsburg, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Repudiating its agreement to be bound by the arbitration provisions of the 1989–1993 master agreement between Operating Engineers Local Union No. 3 and Associated General Contractors of California, Inc. and its December 1993 agreement with Local Union No. 3 to arbitrate the outstanding and unresolved grievances initiated by Local Union No. 3 against the Respondent during the term of the aforesaid master agreement.

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

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

(a) Comply with a renewed request by Local Union No. 3 to arbitrate the outstanding and unresolved grievances initiated by Local Union No. 3 against the Respondent during the term of the aforesaid master agreement.

(b) Post at its Pittsburg, California facility copies of the attached notice marked ''Appendix.''[3] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[1] We agree with the judge, for the reasons set forth in his decision, that the Respondent, following the decertification of the Union and the expiration of the parties' collective-bargaining agreement, unlawfully repudiated its obligation to arbitrate grievances initiated by the Union during the term of the collective-bargaining agreement and prior to decertification. See, e.g., *Arizona Portland Cement Co.*, 302 NLRB 36 (1991); *Missouri Portland Cement Co.*, 291 NLRB 1043, 1044 (1988). We find it unnecessary to rely, however, on the judge's citation to *Government Employees Local 888 (Bayley-Seton)*, 308 NLRB 646 (1992).

[2] The judge failed to include a narrow cease-and-desist provision in his recommended Order, and failed to attach to his decision a notice to employees. We shall accordingly modify the judge's recommended Order to include a narrow cease-and-desist provision, and to direct the Respondent to post the attached notice to employees.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT repudiate our agreement to be bound by the arbitration provisions of the 1989–1993 master agreement between Operating Engineers Local Union No. 3 and Associated General Contractors of California, Inc. and our December 1993 agreement with Local Union No. 3 to arbitrate the outstanding and unresolved grievances initiated by Local Union No. 3 against us during the term of the 1989–1993 master agreement.

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

WE WILL comply with a renewed request by Local Union No. 3 to arbitrate the outstanding and unresolved grievances initiated by Local Union No. 3 against us during the term of the 1989–1993 master agreement.

ANTIOCH BUILDING MATERIALS CO.

Jo Ellen Marcotte, Esq., for the General Counsel.
Mark D. Jordan, Esq., of Santa Rosa, California, for Respondent Antioch.
Lawrence B. Miller, Esq., of Alameda, California, for Charging Party Local 3.

DECISION

STATEMENT OF THE CASE

GEORGE CHRISTENSEN, Administrative Law Judge. On March 17, 1994, Operating Engineers Local 3 (Union) filed a charge and on April 29, 1994, Region 32 of the National Labor Relations Board (Board) issued a complaint alleging Antioch Building Materials Co. (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act) by repudiating its obligations under agreements with the Union to arbitrate grievances initiated by the Union against the Respondent on behalf of employees within an appropriate unit of the Respondent's employees.

I conducted a hearing on the issues raised by the complaint and the Respondent's answer thereto at Oakland, California, on August 25, 1994.

The complaint alleged and the Respondent in its answer admitted:

1. At all pertinent times the Respondent was an employer engaged in commerce in a business affecting commerce and the Union was a labor organization within the meaning of the Act.

2. At all pertinent times Susan Larsen was the Respondent's President and a supervisor and agent of the Respondent acting on its behalf within the meaning of the Act.

3. At all pertinent times the following described employees of the Respondent constituted a unit appropriate for collective-bargaining purposes within the meaning of the Act:

> All operating engineers and plant operators, including employees engaged in the operation and repair of batching and Readymix machinery, employed by Respondent at its Pittsburg, California facility, but excluding all office clerical employees, drivers, mechanics, guards, and supervisors as defined in the Act.

4. Between May l962 and continuing through its June 1993 decertification, the Union was the exclusive collective-bargaining representative of the Respondent's employees within the unit, during that period the Respondent recognized the Union as the exclusive collective-bargaining representative of the unit employees and such recognition was embodied in successive collective-bargaining agreements, the most recent of which was effective by its terms for a period extending from June 16, 1989, through June 15, 1993.

5. The aforesaid 1989–1993 agreement contained a grievance-arbitration procedure which provided for final and binding arbitration of disputes between the Union and the Respondent concerning the terms and application of the agreement.

6. In March 1994 Susan Larsen, on behalf of the Respondent, refused to proceed with the arbitration of grievances allegedly initiated by the Union against the Respondent during the term of the 1989–1993 agreement and since that date has continued to refuse to arbitrate the alleged grievances.

The complaint alleged and the Respondent's answer denied:

1. During the term of the 1989–1993 agreement the Union initiated grievances against the Respondent which are still outstanding and have not been resolved.

2. In December 1993 the Respondent and the Union, through their respective representatives, agreed to arbitrate the alleged grievances, selected an arbitrator to decide the alleged grievances, and set a date to commence the arbitration.

3. The Respondent, by Larsen's March 1994 and continued refusal to proceed with arbitration of the outstanding and unresolved grievances, repudiated the 1989–1993 agreement and the alleged December 1993 agreement.

4. By such repudiation, the Respondent violated Section 8(a)(1) and (5) of the Act.

The issues created by the foregoing are whether:

1. The Union initiated grievances against the Respondent during the term of the 1989–1993 agreement which are still outstanding and have not been resolved.

2. In December 1993 the Respondent and the Union, through their respective representatives, agreed to arbitrate the alleged grievances, selected an arbitrator to decide the alleged grievances and set a date to commence the arbitration.

3. Larsen, by her March 1994 and continued refusal to proceed with arbitration of the alleged outstanding and unresolved grievances, repudiated the 1989–1993 agreement and the alleged December 1993 agreement.

4. By the alleged repudiation, the Respondent violated Section 8(a)(1) and (5) of the Act.

The General Counsel, the Union, and the Respondent appeared by counsel and were afforded full opportunity to adduce evidence, examine and cross-examine witnesses, argue, and file briefs. Briefs were filed by all three.

Based on my review of the entire record, observation of the witnesses, perusal of the briefs and research, I enter the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

The complaint alleged, the answer admitted, and I find at all pertinent times the Respondent was an employer engaged in commerce in a business affecting commerce and the Union was a labor organization within the meaning of Section 2 of the Act.

II. THE UNIT

The complaint alleged, the answer thereto admitted, and I find at all pertinent times the following constituted a unit appropriate for collective-bargaining purposes within the meaning of Section 9 of the Act:

> All operating engineers and plant operators, including employees engaged in the operation and repair of batching and Readymix machinery, employed by Respondent at its Pittsburg, California facility, but excluding all office clerical employees, drivers, mechanics, guards and supervisors as defined in the Act.

III. THE UNION'S REPRESENTATIVE STATUS

The complaint alleged, the answer thereto admitted, and I find between May 1982 and June 15, 1993, the Union was the exclusive collective-bargaining representative of the Respondent's employees within the aforesaid unit.

IV. RESPONDENT'S RECOGNITION OF THE UNION'S STATUS

The complaint alleged, the answer thereto admitted, and I find between May 1982 and June 15, 1993, the Respondent recognized the Union as the exclusive collective-bargaining representative of the Respondent's employees within the aforesaid unit and that such recognition was embodied in successive collective-bargaining agreements, the most recent of which was effective by its terms between June 16, 1989, and June 15, 1993.

V. THE 1989–1993 AGREEMENT'S ARBITRATION PROVISIONS

The complaint alleged, the answer thereto admitted, and I find the 1989–1993 agreement contained a provision for final and binding arbitration of disputes between the Union and the Respondent concerning the terms and application of that agreement.

VI. THE ALLEGED GRIEVANCE FILINGS

On December 6 , 1989, the Union initiated a written grievance against the Respondent alleging the Respondent violated existing job placement regulations[1] when it employed four heavy-duty repair welders November 17 through 20, 1989 (G.C. Exh. 4(a)).

On November 13, 1990, the Union initiated a written grievance against the Respondent alleging the Respondent violated the overtime provisions of the 1989–1993 master agreement by since May 1, 1990, working unit employees either two or three 10-hour shifts at straight time (G.C. Exh. 4(b)).

On November 13, 1990, the Union initiated a written grievance against the Respondent alleging the Respondent violated existing job placement regulations incorporated in the 1989–1993 master agreement by using unit employees to operate loaders (G.C. Exh. 4(c)).

On May 1, 1991, the Union initiated a written grievance against the Respondent alleging the Respondent violated existing job placement regulations incorporated in the 1989–1993 master agreement when it employed a heavy-duty repairman and a Bobcat operator on April 11–12, 15, 16–19, and 22–24, 1991 (G.C. Exh. 4(d)).

On June 28, 1991, the Union initiated a written grievance against the Respondent alleging the Respondent violated the subcontracting provisions of the 1989–1993 master agreement and existing job placement regulations incorporated in the 1989–1993 master agreement by since June 6, 1991, employing subcontractor Frank Alegre Trucking (G.C. Exh. 4(e)).

On September 23, 1991, the Union initiated a written grievance against the Respondent alleging the Respondent violated the overtime provisions of the 1989–1993 master agreement by since June 1989 failing to pay overtime to employees who worked in excess of 8 hours per day (G.C. Exh. 4(f)).

On September 23, 1991, the Union initiated a written grievance against the Respondent alleging the Respondent violated existing job placement regulations incorporated in the 1989–1993 master agreement by not employing an asphalt plant operator, a concrete batch operator, and a loader operator on various dates within the prior 6 months (G.C. Exh. 4(g)).

In addition to the foregoing, in 1991 and 1992 the Union initiated oral grievances against the Respondent alleging the Respondent violated the 1989–1993 master agreement by harassing union business representatives trying to police the 1989–1993 master agreement and by failing and refusing to pay unit employees the 199l and 1992 step wage increases mandated by that agreement.[2]

The latter grievance was also noted in a June 10, 1992 letter addressed to the Respondent by the Union (see VIII below for further details of the June 10 letter).

I also credit the uncontradicted testimony of Union Counsel Miller, he and other representatives of the Union met with Respondent Counsel Mark Thierman, Respondent President Susan Larsen and other representatives of the Respondent in 1992 and discussed the outstanding grievances but were unable to reach any agreement for their resolution.

On the basis of the foregoing, I find during the term of the 1989–1993 master agreement the Union initiated grievances against the Respondent alleging the Respondent violated various provisions of the master agreement and the job placement regulations incorporated therein.

VII. THE RESPONDENT'S 1992 ATTEMPT TO REPUDIATE THE AGREEMENT AND THE UNION'S 1992 ATTEMPT TO ENFORCE THE AGREEMENT

On July 6, 1992, Region 32 refused to issue a complaint based on the Respondent's charge the Union was violating the Act by refusing to negotiate an individual or independent collective-bargaining agreement with the Respondent covering the wages, hours, and employment conditions of the unit employees (Case 32–CB–3906) and insisting the Respondent was bound by the wage, hour, and terms of employment provisions of the 1989–1993 master agreement. In the same ruling, Region 32 refused to issue a complaint based on the Union's charge the Respondent was violating the Act by refusing to comply with the provisions of the 1989–1993 master agreement pursuant to its agreement to be bound thereby (Case 32–CA–12586).

Region 32 based its ruling on the ground a determination of the merits of the respective charges turned on the question of whether, by agreeing in October 1988 to be bound by the terms of the 1986–1989 master agreement between the Union and AGC, the Respondent was bound by the automatic renewal provisions thereof to the terms of the 1989–1993 master agreement. Noting the parties advanced the bases set out

[1] These regulations were incorporated into and made part of a 1989–1993 agreement between the Union and the Associated General Contractors of California, Inc. (the master agreement) for a term extending from June 16, 1989, through June 15, 1993.

[2] The findings in this paragraph are based upon the credited and uncontradicted testimony of Union Counsel Miller and supporting exhibits.

in their charges ''through grievances and other legal action,'' more than 6 months prior to the dates they filed their respective charges, the Region ruled their charges were barred from determination on their merits under Section 10(b) of the Act.

VIII. THE PURPORTED SETTLEMENT

On June 10, 1991, the Union formally advised the Respondent it had completed an audit of the Respondent's records (sec. 03.02.00 of the 1989–1993 master agreement authorized union audit of such records whenever there was a dispute regarding time, wages, and fringe benefit payments of union represented and agreement covered employees) and determined the Respondent was delinquent both in its payments on behalf of unit employees to the funds administering the fringe benefit payments established under the 1989–1993 master agreement, wages payable to unit employees under the terms of that agreement, and liquidated damages for a manning violation under the job placement regulations incorporated in that agreement.

Not having received any fringe benefit payments from the Respondent on behalf the unit employees following the expiration of the 1986–1989 master agreement, in 1992 the Operating Engineers Health & Trust Fund sued the Respondent in the United States District Court for the Northern District of California for moneys allegedly due the fund under terms of the 1989–1993 master agreement.[3]

The suit was settled on December 2, 1992, by Fund agreement to accept the Respondent's tender of $23,700 in installments, as payment for moneys due the Fund on behalf of unit employees for their coverage under the fringe benefit terms of the master agreement through December 31, 1992.

IX. THE ALLEGED DECEMBER 1993 AGREEMENT AND THE UNION DECERTIFICATION

Unsuccessful in its efforts to secure compliance by the Respondent with terms of the 1989–1993 master agreement through processing grievances against the Respondent over its failure to comply with terms of that agreement by October 1992, on October 1, 1992, Union Counsel Miller wrote Respondent Counsel Thierman requesting the parties arbitrate the still outstanding and unresolved grievances initiated by the Union, enclosed a form addressed to the Federal Mediation and Conciliation Service (FMCS) requesting the submission of a panel of arbitrators for the parties' selection of an arbitrator to decide the disputes and asked Thierman to sign the request for forwarding to FMCS (G.C. Exh. 5). Thierman failed to respond.

Miller's additional efforts to contact Thierman and secure his agreement to start the process for selecting an arbitrator and a date to arbitrate the grievances were unsuccessful until early 1993, when Thierman requested and Miller sent to Thierman a letter detailing some of the outstanding grievances the Union sought to arbitrate. (G.C. Exh. 6).

Within 60 to 90 days prior to the June 15, 1993 expiration of the 1989–1993 master agreement, a petition to decertify the Union as the exclusive collective-bargaining representative of the unit employees was filed, an election was held and lost by the Union, and the election results were certified by Region 32 on June 11, 1993.

Following the decertification, Thierman finally addressed Miller's arbitration request. He agreed to join with Miller in requesting that FMCS forward a panel of arbitrators from which he and Miller could select an arbitrator to decide the grievance disputes.

In accordance with that agreement, on August 25, 1993, Miller forwarded to Thierman another form signed by Miller addressed to FMCS requesting the submission of a panel of arbitrators to decide the outstanding grievance disputes for Thierman's signature and forwarding to FMCS (G.C. Exh. 7).

Dissatisfied with the initial panel received from FMCS, Miller secured Thierman's acquiescence to a request for a second panel.

On October 26, 1993, FMCS responded with a second panel of arbitrators (G.C. Exh. 8).

Miller and Thierman conferred following the second submission and selected panelist Thomas Angelo as the arbitrator to hear and decide the grievance disputes. Miller contacted Angelo and secured Angelo's available dates for commencement of the hearing (either April 11 or 18, 1994).

In December 1993 Miller and Thierman conferred and agreed to begin the arbitration hearing before Angelo on the latter date.

On February 8, 1994, Miller wrote to Angelo confirming his selection by the Union and the Respondent to hear and decide the grievance disputes and the selection of April 18, 1994, at 10 a.m. at the Union's office facilities as the time and place for commencement of the hearing, addressing a copy of the confirming letter to Thierman.[4]

On the basis of the foregoing, I find by December 1993 the Union and the Respondent, by their respective representatives, had agreed to arbitrate the outstanding and unresolved grievance disputes initiated by the Union against the Respondent alleging Respondent violation of terms of the 1989–1993 master agreement, selected an arbitrator and set a date for the commencement of a hearing before that arbitrator to hear and finally decide or resolve those grievance disputes.

X. THE REFUSAL TO ARBITRATE

On March 3, 1994, Thierman advised Miller by letter he no longer represented the Respondent and requested the Union ''deal with Susan Larsen directly on all matters currently pending.'' (G.C. Exh. 11.)

On March 7, 1994, Miller contacted Larsen,[5] confirmed Thierman no longer represented the Respondent and recited the agreement he and Thierman reached concerning the arbitration of the outstanding and unresolved grievances the Union initiated against the Respondent during the term of the 1989–1993 master agreement alleging Respondent violation of provisions of that agreement, their selection of an arbitrator, and the date, time, and place they set for commencing

[3] The 1989–1993 master agreement excluded disputes over employer payments due the Fund under the terms of the agreement from resolution pursuant to the grievance/arbitration provisions of the agreement.

[4] The findings in this section are based on Miller's uncontradicted testimony, which I credit, and supporting exhibits.

[5] The complaint alleged, the answer thereto admitted, and I find at all pertinent times Larsen was an officer, supervisor, and agent of the Respondent acting on its behalf within the meaning of Sec. 2 of the Act.

the hearing to finally decide those grievance disputes. Larsen stated she was not going to arbitrate any grievances, they were all settled. Miller asked for a copy of the settlement agreement. Larsen advised him to secure it from his people.

On March 9, 1994, Miller again contacted Larsen. He informed Larsen he secured a copy of the December 2, 1992 settlement, stated it was limited to the settlement of a lawsuit brought by counsel retained by the Operating Engineers Health & Trust Fund against the Respondent because of the Respondent's failure to pay moneys due to the Fund under the terms of the 1989–1993 master agreement and had no bearing on the grievance disputes to be resolved by the agreed-upon arbitration.[6]

Miller proposed a meeting with Larsen to attempt an amicable resolution of the outstanding grievance disputes. Larsen agreed to meet and requested copies of any written outstanding and unresolved grievance disputes.

Miller sent Larsen copies of the written grievances he sent to Thierman, contacted Larsen on March 15, 1994, and confirmed Larsen's receipt of the documents. After confirming her receipt of the documents, Miller stated if they were unable to resolve any of the outstanding grievances at the meeting, the Union expected her to proceed with the arbitration of any of the grievances they were unable to settle. Larsen replied she was willing to discuss the grievances but she was not going to arbitrate anything. Miller stated if she was not prepared to arbitrate grievances they were unable to resolve, there wasn't much point to meeting. Larsen agreed. Miller stated in view of her position, that would necessitate the Union's filing of an unfair labor practice charge over her repudiation of any obligation to arbitrate any of the outstanding grievances which were still unresolved. Larsen told him to do whatever he wanted.[7]

On the basis of the foregoing, as well as the Respondent's admission in its answer to the complaint, I find in March 1994 and at all times since, the Respondent by Larsen has refused to arbitrate the outstanding and unresolved grievances initiated by the Union against the Respondent during the term of the 1989–1993 master agreement alleging the Respondent violated terms of that agreement and job placement regulations incorporated therein.

XI. THE ALLEGED REPUDIATIONS

The Respondent admitted in its answer to the complaint and I have entered findings on March 15, 1994, and since the Respondent, by Larsen, has refused to arbitrate unresolved grievances initiated by the Union against the Respondent during the term of the 1989–1994 master agreement alleging Respondent violations of various provisions of that agreement and job placement regulations incorporated therein.

By so refusing, the Respondent has continued to repudiate any obligation or duty to comply with the terms and conditions of the 1989–1993 master agreement, including any obligation or duty to comply with the Union's request to arbitrate unresolved grievances initiated by the Union against the Respondent during the term of that agreement alleging Respondent violation thereof during its term and also repudiated its agreement to commence an arbitration of those grievances before arbitrator Angelo on April 18, 1994.

XII. THE ALLEGED VIOLATION

An employer's repudiation of a collective-bargaining agreement the employer entered into with a union recognized by the employer as an exclusive bargaining representative of its employees is a violation of Section 8(a)(5) of the Act by virtue of the fact such repudiation constitutes a unilateral change by the employer, without the consent of the union, of the rates of pay, wages, hours, and other conditions of employment of the represented employees the two had previously established, including the arbitration provisions thereof. As the Supreme Court noted in the *Wiley* case,[8] ''The Union . . . claimed rights . . . after the agreement expired . . . Claimed rights during the term of the agreement . . . are unquestionably within the arbitration clause.'' 376 U.S. at 554. The Board has ruled in similar fashion.[9]

The Respondent conceded there was a collective-bargaining agreement in effect between the Respondent and the Union for a term extending from June 16, 1989, through June 15, 1993; during that term the Union was the exclusive collective-bargaining representative of an appropriate unit of the Respondent's employees and was so recognized by the Respondent; and that the agreement included a provision for the final resolution of grievance disputes which arose during its term by arbitration.

The content of the grievances and the grounds recited by Region 32 as the basis for the Respondent's 1992 charge evidence a continuous repudiation by the Respondent of any obligation to comply with any of the provisions of the 1989–1993 master agreement until and unless faced with a potential order by a tribunal possessing the power to compel compliance with its edicts, as in the case of the Fund's lawsuit against the Respondent. Consistently, the Respondent has repudiated any obligation to finally resolve the Union's grievances over its violations of that agreement to date, continuing to frustrate the Union's efforts to secure the unit employees' enjoyment of the wages, hours, and other benefits contained in that agreement.

Counsel for the Respondent states:

> [A]lthough it concedes the existence of a Collective Bargaining Agreement, the Counsel for the General Counsel has failed to prove such a written document with a binding arbitration provision . . . To prevail, counsel for the General Counsel must demonstrate that there is a valid written agreement to arbitrate, that the matter requested to be arbitrated have not been settled and more importantly, this is all timely before the Board because of the strict limitations of Section 10(b), in light of the decertification dated June 11, 1994 . . . Respondent has been unable to uncover precisely what constitutes this agreement to arbitrate . . . As to any

[6] As noted above, disputes over payments to the Fund were excluded or barred from resolution pursuant to the grievance/arbitration provisions of the 1989–1993 master agreement.

[7] The foregoing findings are based upon Miller's uncontradicted testimony, which I credit, and supporting exhibits.

[8] *Wiley & Sons v. Livingston*, 376 U.S. 543 (1964); also see *Nolde Brothers v. Bakery Workers Local 358*, 430 U.S. 243 (1977).

[9] *Government Employees Local 888 (Bayley Seton)*, 308 NLRB 646 (1992); *Arizona Portland Cement Co.*, 302 NLRB 36 (1991); *Missouri Portland Cement Co.*, 291 NLRB 1043 (1988); *Steiner Aircraft*, 237 NLRB 1079 (1978).

> written agreement as to specifics of this ''arbitration agreement'' the record is void . . . the Master Agreement cannot be utilized as an agreement to arbitrate since there remains substantial questions as to what Collective Bargaining Agreement, if any, the Respondent is bound. Respondent has admitted to the existence of a Collective Bargaining Agreement but not to any specific agreement . . . on June 11, 1993 the union was decertified . . . the duty to bargain in good faith ceases on the issuance of decertification . . . the underlying charge in this matter was filed well beyond six months from June 11, 1993 . . . absent a duty to bargain in good faith, there can be no violation of Section 8(a)(5) . . . it is consistently the Board's policy not to require arbitration in the absence of a specific written agreement to so arbitrate . . . . In reviewing the validity of underlying agreements to arbitrate, the Board looks to specific written binding agreements, which if they do not exist will not be recognized by the Board; *Wheeler Construction*, 219 NLRB 541; *Tulsa-Whisenhunt Funeral Homes*, 195 NLRB 106 . . . there are no unresolved grievances since December 2, 1992 . . . a settlement agreement entered into on December 2, 1992 states ''the settlement is effective through today's date and covers any and all claims that the Trust Fund has against the employer through December 2, 1992.''

These contentions shall be addressed below.

Although admitting a collective-bargaining agreement between the Union and the Respondent for a period extending from June 16, 1989, through June 15, 1993, existed and contained an agreement to arbitrate grievances arising during its term, the Respondent professes an inability to uncover what agreement bound the Respondent during the 1989–1993 period, particularly any agreement to arbitrate grievance disputes arising during its term.

The latter admission contradicts the Respondent's assertion of an alleged doubt concerning what agreement the Respondent bound itself to, inasmuch as the only 1989–1993 agreement containing an arbitration provision was the master agreement. In addition, the Respondent not only admitted it was party to a collective-bargaining agreement with the Union covering the wages, hours, and conditions of employment of the unit employees for the 1989–1993 period, the Respondent also admitted it was party to such agreements with the Union over the preceding 28 years. Over the entire 32-year period there was only one agreement in existence at any particular time specifying the wages, hours, and conditions of employment of the unit employees, namely, one of the successive master agreements.

Over the entire 32-year period of the bargaining relationship between the Respondent and the Union, the Union obviously employed the practice, common in the industry, of negotiating a succession of master agreements with AGC covering the rates of pay, etc., of employer-members of AGC within geographical areas of the Union's jurisdiction and short-form (usually one-page, see G.C. Exh. 3) agreements with employers within the same area who were not members of AGC, wherein those employer agreed to be bound by the provisions of the master agreements, including the automatic extension provisions therein, unless one of the parties terminated their agreement by notice of such termination served by the terminating party on the other within 60 to 90 days prior to the expiration of a master agreement.

The last short-form agreement executed by the Respondent and the Union (in late 1988) bound the Respondent to comply with the wages, hours, and all other terms and conditions of the existing (1986–1989) master agreement and automatically bound the Respondent to comply with the wages, hours, and all other terms and conditions of the successive master agreement unless one of the parties served a notice terminating their agreement within 60 to 90 days prior to the expiration date of the 1986–1989 master agreement.

There is no evidence either the Union or the Respondent terminated their agreement within 60 to 90 days prior to the expiration of the 1986–1989 master agreement,[10] thus the wages, hours, and other terms and conditions of the 1989–1993 master agreement were automatically extended to cover the unit employees for the term of that agreement, including the arbitration provisions thereof.

The Board has long held an independent employer who agrees to the terms of a short-form agreement which in turn adopts the terms of a multiemployer association agreement becomes subject to the terms of those agreements, including the termination and automatic renewal provisions thereof. Thus, in the absence of timely notice either by the union on the independent employer or by the independent employer on the union of termination of their agreement providing for automatic extension in the absence of such notice, the independent employer is bound by the terms of the adopted multiemployer agreement for the automatic renewal period thereof.[11]

The Respondent admitted the 1989–1993 agreement governing the wages, hours, and conditions of employment of the unit employees contained a procedure which provided for final and binding arbitration of disputes between the Union and the Respondent concerning the terms and application of the agreement. That agreement was and is the master agreement.

On the basis of the foregoing, I find and conclude the Respondent was bound to the provisions of the 1989–1993 master agreement providing for final and binding arbitration of grievance disputes between the Union and the Respondent concerning the terms and application of that agreement.

The Respondent contends the Board will not require arbitration of grievance disputes in the absence of a written agreement to arbitrate, citing *Wheeler Construction Co.*, 219 NLRB 541 (1975), and *Tulsa-Whisenhunt Funeral Homes*, 195 NLRB 106 (1972).

The two cases are inapplicable. Wheeler involved a short-form agreement wherein the employer agreed to adopt the terms of a multiemployer agreement then in negotiations following the execution of that agreement, but specifically reserved the right to cancel the agreement either before or after the negotiations resulted in a multiemployer agreement. The employer exercised that right and canceled the agreement following the execution of the multiemployer agreement. The

[10] The fact the Union served a notice of termination of the 1986–1989 master agreement on AGC is irrelevant. *Fortney & Weygand, Inc.*, 298 NLRB 863, 864 (1990); *CEK Industrial Mechanical Contractors*, 295 NLRB 635, 635–636 (1989), and cases cited therein.

[11] *Fortney & Weygand, Inc.*, supra; *C & K Industrial Mechanical Contractors*, id.

Board rejected the contentions of the Union and the General Counsel the employer nevertheless was bound to the terms of the multiemployer agreement.

No such cancellation provision was contained in the short-form agreement between the Union and the Respondent; to the contrary, their agreement provided it could only be terminated within 60 to 90 days prior to the expiration of a master agreement and was automatically extended for the term of each successive master agreement if not so terminated.

As to *Tulsa-Whisenhunt*, supra, that case involved allegations the employer violated Section 8(a)(3) of the Act by discharging two employees because of their engagement in protected, concerted activities, and has no relevance whatsoever to any of the issues in this proceeding.

I have entered a finding and conclusion the Respondent was bound by the terms of the arbitration provisions of the written 1989–1993 master agreement. Even in the absence of that finding and conclusion, I find the December 1993 oral agreement between counsel for the Union and for the Respondent to arbitrate the outstanding grievances establishes a Respondent duty or obligation to arbitrate the unresolved, outstanding grievances.

The Respondent contends there are no unresolved disputes over union claims of Respondent violation of terms of the 1989–1993 master agreement, that the December 2, 1992 settlement of the Fund's lawsuit against the Respondent to collect moneys pursuant to terms of the 1989–1993 master agreement resolved all outstanding disputes.

The contention is patently erroneous. The settlement agreement specified it covered ''any and all claims that the trust fund has against the employer.'' Both the short-form agreement adopting the terms of the current and future master agreements, including the 1989–1993 master agreement under which the suit was brought, excluded disputes over employer refusals or failures to pay moneys due the Fund under the terms of the master agreement and required the Fund to resort to the courts rather than arbitration for final resolution. The suit initiated by the Fund against the Respondent was limited to a claim for moneys allegedly due and payable to the Fund to maintain unit employee coverage under the benefit plans specified in the 1989–1993 master agreement and neither sought nor secured any settlement of the grievance disputes initiated by the Union against the Respondent over alleged Respondent violations of various provisions other than the fringe benefit provisions of the 1989–1993 master agreement.

I therefore find and conclude the grievances initiated by the Union against the Respondent during the term of the 1989–1993 master agreement alleging violations during the term of that agreement of various of its provisions are still outstanding and unresolved.

The Respondent argues following the June 11, 1993 decertification of the Union, it no longer had any duty to bargain with the Union in good faith and therefore cannot be held to have violated Section 8(a)(5) of the Act by refusing to arbitrate the unresolved grievances.

The Board has held to the contrary, stating the decertification of a union does not erase rights arising prior to the decertification under a collective-bargaining agreement between the decertified union and the employer party to that agreement.[12]

Last, the Respondent contends since more than 6 months elapsed between the date the Union was decertified (June 11, 1993) and the date the Union filed its charge of unfair labor practices (March 17, 1994), the case should be dismissed as untimely, pursuant to Section 10(b) of the Act.

This contention has no merit. The Union's request for arbitration of the grievances was not refused until March 15, 1994, 2 days before the date the charge was filed, after union efforts to resolve the grievances by negotiations were unsuccessful and after Respondent avoided and procrastinated responding to union requests for Respondent's cooperation in taking the necessary steps to bring the grievances before an arbitrator for final resolution.

On the basis of the foregoing, I find and conclude the Respondent violated Section 8(a)(1) and (5) of the Act by repudiating its obligation and duty under the Act and its agreements to comply with union requests for arbitration of unresolved grievances initiated by the Union against the Respondent during the term of the 1989–1993 master agreement over the Respondent's alleged failures to comply with the provisions of that agreement.[13]

CONCLUSIONS OF LAW

1. At all pertinent times the Respondent was an employer engaged in commerce in a business affecting commerce and the Union was a labor organization within the meaning of Section 2 of the Act.

2. At all pertinent times Susan Larsen was an officer, agent, and supervisor of the Respondent acting on its behalf within the meaning of Section 2 of the Act.

3. At all pertinent times the following employees of the Respondent constituted an appropriate unit for collective-bargaining purposes within the meaning of Section 9 of the Act:

> All operating engineers and plant operators, including employees engaged in the operation and repair of batching and Readymix machinery, employed by the Respondent at its Pittsburgh, California facility, but excluding all office clerical employees, drivers, mechanics, guards and supervisors as defined in the Act.

4. At all pertinent times the Union was the duly designated exclusive collective-bargaining representative of the Respondent's employees within the aforesaid unit.

5. By agreement with the Union, the Respondent bound itself to observe the wages, hours, and terms and conditions of employment provisions of the 1989–1993 agreement between the Union and the Associated General Contractors of California, Inc., including its automatic extension and arbitration provisions, and in December 1993 agreed at the Union's request to arbitrate outstanding and unresolved grievances initiated by the Union against the Respondent alleging Respondent violation of numerous provisions of that agreement during the term of the agreement.

6. By its repudiation of any obligation to comply with the terms and conditions of the 1989–1993 master agreement, in-

[12] *Government Employees Local 888 (Bayley Seton)*, supra.

[13] *Independent Stave Co.*, 248 NLRB 219 (1980); *Airport Limousine Service*, 231 NLRB 932 (1977); *Paramount Potato Chip Co.*, 252 NLRB 794 (1980); *Chevron Oil Co.*, 168 NLRB 574 (1967).

cluding but not limited to its arbitration provisions, and by its repudiation of its December 1993 agreement to comply with the Union's request for final resolution of outstanding and unresolved grievances initiated by the Union against the Respondent under the terms of that master agreement by arbitrating those grievances to final resolution or award, the Respondent violated Section 8(a)(1) and (5) of the Act.

7. The aforesaid unfair labor practices affected and affects interstate commerce as defined in the Act.

THE REMEDY

Having found the Respondent engaged in unfair labor practices, I recommend the Respondent be directed to cease and desist therefrom and to take affirmative action designed to effectuate the purposes of the Act.

Inasmuch as findings have been entered the Respondent has repudiated its obligations under the 1989–1993 master agreement, including the arbitration provisions of that agreement as well as its December 1993 agreement to comply with a union request to resolve outstanding and unresolved grievances initiated by the Union against the Respondent during the term of the 1989–1993 collective-bargaining agreement between them by final and binding arbitration and award, it is appropriate to recommend the Respondent be directed to comply with a renewed union request therefore.[14]

[Recommended Order omitted from publication.]

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[14] See *Paramount Potato Chip Co.*, 252 NLRB 794, 797 (1980); and *Airport Limousine Service*, 231 NLRB 932, 935 (1977).