

**Wilson & Sons Heating & Plumbing, Inc. and United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, Local 109.** Case 3-CA-12195

April 30, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT AND DEVANEY

On December 19, 1985, Administrative Law Judge Russell M. King Jr. issued the attached decision. The General Counsel and the Charging Party each filed exceptions and supporting briefs, and the Respondent filed cross-exceptions, a brief in support of its cross-exceptions, and a brief in reply to the General Counsel's and the Charging Party's exceptions.

On January 23, 1989, the National Labor Relations Board remanded the proceeding to the judge for further consideration consistent with its Decision and Order in *John Deklewa & Sons*, 282 NLRB 1375 (1987), affd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988).

The judge issued the attached supplemental decision on September 29, 1989. Subsequently, the Respondent and the Charging Party filed exceptions to the supplemental decision and supporting briefs. The General Counsel filed cross-exceptions, a supporting brief, and an answering brief to the Respondent's exceptions.

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

The Board has considered the decisions and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

*A. The Alleged Repudiation and Discontinuation of the Bargaining*

*Agreement and Withdrawal of Recognition from the Union*

The central issue in this case is whether, as found by the judge, the Respondent violated Section 8(a)(5) and (1) of the Act by, on or about May 31, 1984, repudiating its 8(f) collective-bargaining agreement with the Union, unilaterally discontinuing application of the terms of the bargaining agreement, and withdrawing recognition from the Union. From 1969 until the spring of 1984 the Respondent recognized the Union as the 8(f) bargaining representative of a unit of its employees who performed plumbing work. The parties signed successive letters of assent manifesting their commitment to be bound by the terms of successive area master agreements between the Union and the

Mechanical Contractors of South Central New York (the Association).<sup>1</sup> The last letter of assent, which the Respondent signed on October 28, 1983, was one binding it to the 1983-1984 area agreement. That agreement, by its terms, was effective June 1, 1983, to May 31, 1984,<sup>2</sup> but renewed automatically in the absence of 3 months' advance notice by either party of a request to change the agreement. It is undisputed that neither the Respondent nor the Union gave the contractually required advance notice of intent to change the 1983-1984 agreement. Therefore, we agree with the judge's finding that the collective-bargaining agreement between the Respondent and the Union renewed automatically for an additional 1-year term on May 31, 1984. *Fortney & Weygandt, Inc.*, 298 NLRB 863 (1990).<sup>3</sup>

By letter of June 4, 1984, the Respondent advised the Union that it had no contractual or other relationship with the Union, thereby giving notice that it had repudiated the agreement and had withdrawn recognition from the Union. As the judge concluded, under the principles enunciated in *Deklewa*, in view of the Union's status as an 8(f) bargaining representative, and the fact that the contract had been automatically renewed, these actions of the Respondent were clear violations of its duty to bargain with the Union unless, as the Respondent contends, there was no bargaining duty by reason of a one-man unit. The judge rejected this contention and we agree.

It is undisputed that, for a number of years prior to February 1984, the Respondent continuously employed two or more plumbers in bargaining unit positions. During the period of late September 1983 through early February 1984, the Respondent's unit employees were John Gould, Duane Ray, and Frank Horvath Jr. In February 1984, Horvath quit his employment with the Respondent, and Ray was laid off for lack of work. Gould remained the only unit employee on the Respondent's payroll from February 1984 until November of the same year, when the Respondent hired another plumber, Rose.<sup>4</sup> The Respondent continued to employ Gould after hiring Rose.

When Ray was laid off he received no formal or written layoff notice. There is no evidence that the Respondent told him anything about his chances of recall. In prior years, Ray had been laid off for lack of work

<sup>1</sup> The Respondent was not a member of the Association.

<sup>2</sup> In sec. II.B.1, of his original decision, the judge inadvertently erred in specifying the expiration date of such agreement as May 31, 1983.

<sup>3</sup> We also agree with the judge that Union Business Agent Haller's erroneous statement to the Respondent on or about June 4, 1984, that there was no longer a contract did not constitute a waiver of the automatic renewal clause, particularly in view of the fact that on June 12 Haller made it clear to the Respondent that, pursuant to the automatic renewal clause, the contract was still in effect.

We further agree with the judge that, pursuant to timely notice by the Respondent on February 2, 1985, the contract did not automatically renew for an additional 1-year term beginning June 1, 1985.

<sup>4</sup> Rose was not hired through the union hiring hall.

for short periods, at the end of which he was recalled. Hoping to be recalled again, Ray called the Respondent a number of times in early 1984 following his lay-off, and spoke to a secretary who told him that there was no work for him yet.

On June 6, 1984, the Respondent's principals, Steve and Charles Wilson, had a meeting with employee Gould in which they told Gould, among other things, that in the future they would expect him to assume a more responsible position with the Company if it made a successful economic recovery and hired more employees.<sup>5</sup> According to the uncontroverted testimony of Charles Wilson, the Wilsons told Gould that, in the event of such an upturn, they would give him managerial or supervisory responsibilities with respect to the new employees. As Charles Wilson further testified, "We decided at the end that we could make it go" based on the organizational changes that the Wilsons and Gould agreed to implement and the fact that the Respondent had a substantial and supportive customer base in the community.

As the judge noted, the Board has held that where a unit consists of no more than a single permanent employee at all material times, the employer has no statutory duty to bargain and, further, will not be found in violation of the Act for disavowing a bargaining agreement and refusing to bargain with the bargaining representative of a one-man unit.<sup>6</sup> The critical inquiry thus is whether the one-man unit is a stable, one-man unit. We find that the bargaining unit in the present case consisted of more than one permanent employee at critical times, including the time when the Respondent signed the memorandum agreement binding it to the 1983-1984 master agreement as well as at the time of the unfair labor practice hearing, when uncontroverted evidence showed that the Respondent employed both Gould and Rose to do bargaining unit work. Moreover, the evidence here indicates that the Respondent's reduction of the size of the bargaining unit to one employee was not permanent. The temporary nature of the reduction is indicated not only by the November 1984 hiring of a second employee, Rose, to do unit work, but also by Charles Wilson's own testimony that when he discussed the Company's future with unit employee Gould in early June 1984, by which time the Respondent had repudiated the bargaining agreement and withdrawn recognition from the Union, the Respondent hoped to increase its complement of plumbers in the future. The hiring of Rose made this a reality. Further, the fact that employee Ray, after his February 1984 layoff, reasonably expected to be recalled as in previous years also supports

our finding that the reduction in unit size to one employee was only temporary. Based on all the above, we find that the Respondent's reduction in the size of the bargaining unit to a single employee was a temporary measure and that there was no stable one-man unit. Therefore, the Respondent was not free on May 31, 1984, to repudiate or discontinue applying the bargaining agreement or to withdraw recognition from the Union. Accordingly, we conclude, in agreement with the judge, that by repudiating the bargaining agreement, unilaterally discontinuing the application of its terms, and withdrawing recognition the Respondent violated Section 8(a)(5) and (1) of the Act.

#### B. *Alleged Direct Dealing with Employee Gould*

On the final day of the hearing, the General Counsel moved to amend the complaint to allege that the Respondent violated Section 8(a)(5) and (1) of the Act by dealing directly with employee Gould on June 7, 1984, over the terms and conditions of Gould's continued employment. The judge granted the motion and found, on the merits, that the Respondent violated the Act, as alleged. The Respondent excepts to the judge's granting of the motion to amend the complaint and to his finding that it unlawfully engaged in direct dealing with Gould. For the reasons set forth below, we find that the motion to amend the complaint was timely and proper under the circumstances. Further, we agree with the judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act by dealing directly with Gould for the reasons stated by the judge in his supplemental decision.

On the final 2 days of the 7-day hearing, on direct examination by the Respondent's counsel, both Gould and the Respondent's vice president, Charles Wilson, testified concerning their June 7, 1984 meeting, which was also attended by the Respondent's president, Steve Wilson.<sup>7</sup> Gould and Charles Wilson gave mutually corroborative and uncontroverted testimony to the effect that Gould initiated the meeting with the Wilsons to discuss the terms under which Gould could continue his employment with the Respondent. Prior to the meeting, Gould wrote a list of items to be discussed at the meeting, including a proposed pay rate, vacation benefits, a proposed percentage of profits, expected backup in performing certain types of tasks, and a proposed contract term. During the meeting, Gould and the Wilsons discussed the listed items and other related matters, including how much money the Respondent would save as a result of paying Gould at the proposed lower rate and not paying any more fringe benefit contributions. After some modification of Gould's initial proposal, the three reached an agreement, which

<sup>5</sup> The June 7 conversation between Gould and the Wilsons is the subject of a separate unfair labor practice allegation, discussed below.

<sup>6</sup> *Stack Electric*, 290 NLRB 575 (1988), citing *D & B Masonry*, 275 NLRB 1403 (1985); and *Garman Construction Co.*, 287 NLRB 88 (1987).

<sup>7</sup> There is no evidence, and the Respondent does not contend, that the General Counsel had knowledge of this meeting at any time prior to the final days of the hearing.

they signified by initialing the paper on which Gould had written his proposal. The Respondent did not notify the Union of the meeting with Gould.

As to the procedural question whether the General Counsel's motion to amend the complaint was timely,<sup>8</sup> Section 102.17 of the Board's Rules and Regulations permits the amendment of a complaint before, during, or after a hearing "upon such terms as may be deemed just." Whether it is just to grant a motion to amend a complaint when the motion is made during or after a hearing depends on factors such as surprise or lack of notice (*Nestle Co.*, 248 NLRB 732 fn. 3 (1980); *Douglas & Lomason Co.*, 253 NLRB 277, 279 fn. 6 (1980)); whether the General Counsel offered a valid excuse for failing to make the motion earlier (*Douglas & Lomason Co.*, above; *Trans-States Lines*, 256 NLRB 648, 648 fn. 3 (1981)); and whether the matter was fully litigated (*La Famosa Foods*, 282 NLRB 316, 330 (1986), *Douglas & Lomason Co.*, above; *Nestle Co.*, above; *Ace Drop Cloth Co.*, 178 NLRB 664 fn. 1 (1969)).

In the present case, the General Counsel's motion to amend the complaint to add the direct dealing allegation was based on evidence which the Respondent itself adduced from its own witnesses on the final 2 days of the hearing. In these circumstances, there is no basis for a finding of surprise, lack of notice, or prejudice to the Respondent. Additionally, the General Counsel first learned of the conduct from the testimony of the Respondent's witnesses and thus had a good excuse in these circumstances for not moving to amend the complaint at a time prior to the last day of the hearing. Further, we note that the Respondent did not request an extension of time because of the proposed amendment. Finally, we cannot say that the matter was not fully litigated where both sides had the opportunity at the hearing to present any available evidence relative to the alleged violation; the Respondent presented detailed facts concerning the conversation during which the alleged violation occurred; and the General Counsel and Charging Party had ample opportunity, which they used, to cross-examine the Respondent's witnesses concerning the conversation. See *Ace Drop Cloth*, above. Accordingly, we find it just, under the circumstances presented, to grant the General Counsel's motion to amend the complaint, and therefore we affirm the judge's granting of the motion.

### C. Alleged Refusal to Provide Requested Information

The judge found that the Respondent did not unlawfully refuse to provide the Union with requested information by refusing Business Agent Haller his April 23, 1984 request to audit the Respondent's books. He

<sup>8</sup> Although the timeliness issue was raised before the judge, he did not resolve it.

based this finding on the failure of the Union's audit request to conform to the contractually established audit procedure. For the reasons set forth below, we find, contrary to the judge, that the Respondent violated Section 8(a)(5) and (1) of the Act by denying the Union's information request.

Business Agent Haller wrote the Respondent letters dated January 24 and February 3, 1984, stating that the Union had information indicating that the Respondent had been paying employee Horvath substandard wages, and asking the Respondent to provide contrary proof if any existed. The Union received no reply. In April 1984, Haller had telephone conversations with the Respondent's principals, Steve and Charles Wilson, in which Haller requested an appointment to have an accountant audit the Respondent's books. Haller asserted that the collective-bargaining agreement gave the Union the right to audit the books. Steve Wilson, in his testimony, admitted telling Haller in one of those conversations that no one had the right to audit the Company's books. Steve Wilson also admitted that at the time of the Union's audit requests he knew that the Respondent was paying Horvath, a journeyman plumber, at a rate below the contractual journeyman rate, and that an audit would reveal this fact.

On April 23, 1984, Haller wrote a letter to the Respondent, on union letterhead, which he signed as "Business Manager," repeating his request for an audit and asserting "our right to audit" signatory contractors pursuant to a provision of the bargaining agreement. That provision, article III, section 4(b), states in pertinent part:

The books and records of each employer pertinent to the employment of employees covered by this Agreement shall be made available at all reasonable times for inspection and audit by the accountants of the [fringe benefit] Funds. . . . Inspection shall be restricted to verification of payments made and/or due to the Funds.

The Respondent never responded to Haller's letter.

Although Haller's letter did not expressly state the purpose of the requested audit, the judge found, and we agree, that the dispute over Horvath's pay was the primary reason for the audit request. The judge further found, however, that because the purpose of the Union's request related to employee pay while the contractual provision cited by the Union related only to funds contributions, the Respondent "perhaps unknowingly" legitimately refused the audit request. We find, in the circumstances of this case, that the judge applied an overly narrow interpretation of an employer's duty to provide information to the statutory representative of its employees.

It is well established that the Act requires an employer to supply a union, on request, with information

relevant to collective bargaining or the performance of the union's representational duties. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). Here, the Union's request was directly related to its statutory function of representing a unit employee with respect to a key condition of employment, i.e., his pay. This fact should have been obvious to the Respondent based on the parties' prior conversations and correspondence regarding Horvath's pay. The Respondent did not, however, ask the Union to clarify its request, nor did it offer to provide the Union more limited access to the Respondent's books and records. Instead, the Respondent ignored the Union's letter, previously having stated flatly that no one had the right to audit its books. Such complete nonresponsiveness to the Union's request is plainly inconsistent with the Respondent's duty to provide relevant information. See *NLRB v. Rockwell-Standard Corp.*, 410 F.2d 953, 958 (6th Cir. 1969). Further a blanket refusal to comply is unlawful even assuming the Union's request was ambiguous or overbroad. See *Keauhou Beach Hotel*, 298 NLRB 702 (1990); and *A-Plus Roofing*, 295 NLRB 967 JD fn. 7 (1989). Thus, in these circumstances, the fact that the Union may have inartfully rested its request for pay-related information on a provision of the bargaining agreement dealing with fund contributions is not determinative. Finally, we find that although the contract provided for a specific type of information request, that provision did not constitute a waiver of the Union's more general right under the Act to receive relevant information. See *Bozzuto's, Inc.*, 275 NLRB 353 (1958). We conclude, accordingly, that the Respondent violated Section 8(a)(5) and (1) of the Act by failing and refusing to comply with the Union's request for pay-related information.

#### D. The Alleged November 1983 Unilateral Change

The judge found that Section 10(b) of the Act barred consideration of the complaint allegation that, since November 17, 1983, the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing wage rates. We disagree with the judge's 10(b) finding and, after considering the evidence related to this allegation, we find that the Respondent violated the Act by unilaterally implementing and maintaining a wage rate for employee Horvath different from that called for in its bargaining agreement with the Union.

The original charge in this case was filed May 16, 1984.<sup>9</sup> It alleged that since about April 1, 1984, the Respondent refused to bargain in good faith "by, *inter alia*, refusing to provide requested information relating to the [Respondent's] compliance with its collective bargaining agreement." The Union filed amended

charges on July 5 and October 24, 1984. The first amended charge alleged that, since April 1, the Respondent refused to bargain in good faith by refusing to provide requested information and "unilaterally changing terms and conditions of employment . . . ." The second amended charge alleged that, since about November 14, 1983, the Respondent violated Section 8(a)(5) and (1) of the Act by, among other things, refusing to provide requested information and "unilaterally changing wage rates and other terms and conditions of employment." Thus, the specific allegation of a unilateral change in November 1983 was made for the first time in the second amended charge.

The judge concluded that the November 17 unilateral change allegation of the complaint was time-barred under Section 10(b) based on his finding that the original charge dealt with an "entirely different subject matter." Contrary to the judge's view, however, the record shows that the alleged November 1983 unilateral change related directly to the refusal to provide information allegation, which was part of the original charge. As found above, the refusal to provide information allegation was based on the Respondent's refusal to honor the Union's April 1984 requests to audit the Respondent's books. As the judge found, the purpose of the Union's request was to determine whether the Respondent had been paying employee Horvath at a lower rate than that called for in the collective-bargaining agreement. Horvath's pay was, in turn, the subject of the November 1983 unilateral change allegation. It is clear, therefore, that the conduct that triggered the Union's information requests was the same conduct that constituted the alleged unilateral change. Further, the Respondent's failure to comply with the Union's requests for pay-related information prevented the Union from confirming that its information regarding Horvath's pay was correct. See *Barnard Engineering*, 295 NLRB 226 (1989). We find, in these circumstances, that the two allegations are sufficiently interrelated that the 6-month limitations period for both allegations should be measured from May 16, 1984, the date of the original charge.<sup>10</sup> Thus, because the original charge was filed within 6 months of the November 1983 conduct alleged in the complaint, Section 10(b) of the Act does not bar our consideration of the allegation.<sup>11</sup>

<sup>10</sup> See *Advertiser's Mfg. Co.*, 294 NLRB 740 (1989); *Roslyn Gardens Tenants Corp.*, 294 NLRB 506 (1989); *Redd-I, Inc.*, 290 NLRB 1115 (1988); and *Ryder Systems*, 280 NLRB 1024 (1986).

<sup>11</sup> Although the second amended charge alleged that the conduct occurred on or about November 14, 1983, the complaint alleged that the unilateral change occurred since about November 17, 1983, a date within the 10(b) period measured from the filing of the original charge. Moreover, the record indicates that the Union did not discover that the Respondent was paying Horvath below the contractual journeyman rate until January 1984 when Business Agent Haller was reviewing dues-checkoff reports submitted by the Respondent. It appears, therefore, that the original charge was filed well within 6 months of the Union's obtaining knowledge of the Company's failure to pay

<sup>9</sup> The judge erroneously found that the original charge was filed May 14, 1984.

Turning to the merits of the unilateral change allegation, the record discloses that the Respondent first hired Horvath as a trainee in early 1982 pursuant to an informal agreement with the Union providing that, until Horvath passed a journeyman examination, he would not be required to become a member of the Union and the Respondent would not be required to pay the contractual wage rate. Horvath was temporarily laid off in January 1983 and passed his journeyman's examination in March. In September 1983, the Respondent recalled Horvath but initially did not require him to join the Union or pay him the contractual wage rate for journeymen. Also in September, Union Business Agent Haller discovered that Horvath was again working for the Respondent. Haller immediately telephoned the Respondent's president, Steve Wilson, and asked why Horvath had not yet joined the Union. Wilson volunteered to take Horvath to the union hall the following day so that Horvath could join. Horvath in fact joined the Union the day after the telephone conversation between Haller and Wilson. Thereafter, and until Horvath quit his job with the Respondent in February 1984, the Respondent made the contractually required fund contributions for Horvath.

In January 1984, the Respondent's vice president, Charles Wilson, told Business Agent Haller that one of the dues-checkoff reports submitted to the Union might be in error with respect to Horvath. Haller then reviewed the dues-checkoff reports which showed Horvath's pay as \$10.75 per hour, which was substantially lower than the contractual journeyman rate.<sup>12</sup> Later in January and again in February 1984, Haller wrote the Respondent concerning Horvath's apparently substandard pay, but received no reply.

It is uncontroverted that from November 17, 1983, the date the complaint alleges the violation commenced, until February 1984, when Horvath's employment with the Respondent ceased, he was paid at a rate substantially below that established in the bargaining agreement. An employer's unilateral failure to abide by the wage provisions of a collective-bargaining agreement plainly violates Section 8(a)(5) and (1) of the Act. See *Manley Truck Line*, 271 NLRB 679 (1984), enf. 779 F.2d 1327 (7th Cir. 1985). Accordingly, we find that by unilaterally departing from the contractually established pay rate with respect to employee Horvath, the Respondent violated Section 8(a)(5) and (1) of the Act.

journeyman Horvath the contractually established rate. Thus, the limitations period arguably did not even begin to run until January 1984. *Truck & Dock Services*, 272 NLRB 592 (1984). Thus, we conclude that the Respondent has failed to carry its burden of proving its affirmative defense that the allegation of a unilateral change in wages is time-barred under Sec. 10(b).

<sup>12</sup>The record does not reflect when the Union received the dues-checkoff reports in question. The reports showed that, beginning in September 1983, the Respondent paid Horvath at a rate lower than that called for in the contract.

#### AMENDED CONCLUSIONS OF LAW

Substitute the following for paragraph 8 and add the following new paragraph 9.

"8. That by refusing, on request, to provide the Union with access to its books and records for the purpose of obtaining information relevant to the performance of the Union's statutory duties concerning compliance with contractual pay rates, the Respondent violated Section 8(a)(5) and (1) of the Act.

"9. That by unilaterally departing from contractual rates of pay for unit employees, the Respondent violated Section 8(a)(5) and (1) of the Act."

#### ORDER<sup>13</sup>

The National Labor Relations Board orders that the Respondent, Wilson & Sons Heating & Plumbing, Inc., Ithaca, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition during the term of a collective-bargaining agreement of United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, Local 109, as the collective-bargaining representative of the Respondent's employees covered by the agreement, or repudiating such collective-bargaining agreement.

(b) Dealing directly with unit member and employee John G. Gould, or any other employees covered by the collective-bargaining agreement, regarding changes in terms and conditions of their employment, during the term of a collective-bargaining agreement.

(c) Refusing, on request, to provide the Union with access to its books and records for the purpose of obtaining information relevant to the performance of the Union's statutory duties concerning compliance with contractual pay rates.

(d) Unilaterally departing from rates of pay for unit employees set forth in its 1983-1984 collective-bargaining agreement with the Union.

(e) 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.

<sup>13</sup>Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of the proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. Therefore, any additional amount owed with respect to the employee benefit funds will be determined in accordance with the procedure set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

Additionally, we shall include in our Order a provision to cover any employee applicants who were denied an opportunity to work for the Respondent because of the Respondent's unlawful refusal to continue using the hiring hall. A determination of whether or not such individuals exist is best left to the compliance stage of this proceeding. See *Viola Industries*, 286 NLRB 306, 308 fn. 10 (1987), and *Rappazzo Electric Co.*, 281 NLRB 471, 483 (1986). See also *W. E. Colglazier, Inc.*, 289 NLRB 1219 (1988).

(a) Make whole employee John G. Gould and any other employees covered by the collective-bargaining agreement, as well as hiring hall applicants who should have been employed, in the manner set forth in the remedy section of the judge's supplemental decision, for any losses they may have suffered as a result of the Respondent's failure to adhere to the agreement until it expired on May 31, 1985.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, time-cards, personnel records and reports, and all other records necessary to analyze the amount of backpay and other sums, amounts, or benefits which may be due under the terms of this Order.

(c) Provide the Union access to the Respondent's books and records for the purpose of obtaining information relevant to the Union's performance of its statutory duties concerning compliance with contractual pay rates.

(d) Make whole employee Frank Horvath Jr. whole for his reduced pay resulting from the Respondent's unilateral departure, from November 1983 to February 1984, from the pay rates established in that collective-bargaining agreement.

(e) Pay to the appropriate funds the health and welfare, pension, insurance, education, and other contributions required to be paid by the 1984-1985 collective-bargaining agreement to which the Respondent was bound.

(f) Post at its Ithaca, New York office or facility copies of the attached notice marked "Appendix."<sup>14</sup> Copies of the notice, on forms, provided by the Regional Director for Region 3, 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.

(g) Sign and return to the Regional Director sufficient copies of the attached notice marked "Appendix" for posting by United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 109, if willing, in conspicuous places where notices to employees and members are customarily posted.

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

<sup>14</sup>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."

CHAIRMAN STEPHENS, dissenting in part.

I acknowledge that my colleagues' finding that the 1983-1984 collective-bargaining agreement was automatically renewed as to the Respondent is in accord with *Fortney & Weygandt, Inc.*, 298 NLRB 863 (1990). I dissented in that case because I agreed with the judge that an employer who does nothing more than sign a letter of assent to be bound by a master agreement negotiated by an employer association should not be found to have agreed to automatic renewal of the original agreement when (1) the *signatory* parties to the master agreement have themselves forestalled renewal by giving notice to terminate and negotiating new terms for a successor agreement, and (2) the letter of assent itself contains no terms concerning duration of the agreement. I adhere to my position in *Fortney & Weygandt* and thus would not find that the Respondent is bound by a renewal of the agreement for a 1-year term beginning on June 1, 1984.<sup>1</sup> Furthermore, because the relationship between the Respondent and the Union was an 8(f) relationship, I would find, in the absence of a valid renewal of the collective-bargaining agreement, that the Respondent lawfully withdrew recognition from the Union through its letter of June 4, 1984. Accordingly, I would dismiss both the allegations of failure to adhere to the terms of a renewed agreement for the 1984-1985 term and the allegation of unlawful direct dealing with employee Gould. (The acts alleged as to Gould occurred after the Respondent's June 4 repudiation of the 8(f) bargaining relationship, when the Respondent, in my view, no longer had an obligation to deal with its employees through the Union.)

I join my colleagues as to their resolution of all other complaint allegations.

<sup>1</sup> I note that both *Fortney & Weygandt* and the instant case are distinguishable from *C.E.K. Industrial Mechanical Contractors*, 295 NLRB 635 (1989), enf'd. 921 F.2d 350 (1st Cir. 1990), in that the employer in *C.E.K.* had actually signed the master agreement (albeit as an individual employer rather than as a member of the multiemployer association), whereas the Respondent here and the employer in *Fortney & Weygandt* signed only letters of assent. I did not participate in *C.E.K.* and find it unnecessary to decide here whether I would embrace its holding in an appropriate case.

## 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 June 1, 1984, to May 31, 1985 collective-bargaining agreement between our Company and United Association of Journeymen and

Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO, Local 109.

WE WILL NOT deal directly with unit member and employee John G. Gould, or any other employee covered by the collective-bargaining agreement, regarding changes in terms and conditions of their employment, during the term of the collective-bargaining agreement.

WE WILL NOT refuse, on request, to provide the Union with access to its books and records for the purpose of obtaining information relevant to the performance of the Union's statutory duties concerning compliance with contractual pay rates.

WE WILL NOT unilaterally depart from rates of pay for unit employees set forth in our 1983-1984 collective-bargaining agreement with the Union.

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 make whole, with interest, John G. Gould and other unit employees covered by the collective-bargaining agreement, as well as hiring hall applicants who should have been employed, who may have incurred losses of wages and benefits because of our failure to abide by the terms and conditions of the collective-bargaining agreement until the agreement's expiration on May 31, 1985.

WE WILL provide the Union access to the Respondent's books and records for the purpose of obtaining information relevant to the Union's performance of its statutory duties concerning compliance with contractual pay rates.

WE WILL make employee Frank Horvath Jr. whole for his reduced pay resulting from the Respondent's unilateral departure, from November 1983 to February 1984, from the pay rates established in that collective-bargaining agreement.

WE WILL pay to the appropriate funds the health and welfare, pension, insurance, education, and other contributions required to be paid by the collective-bargaining agreement to which we have been bound.

WILSON & SONS HEATING & PLUMBING, INC.

*Carl B. Newsome, Esq.*, for the General Counsel.  
*Anna Holmberg, Esq. (Wiggins, Holmberg, Galbraith and Holmberg)*, of Ithaca, New York, for the Respondent.  
*James R. LaVaute, Esq. (Blitman and King)*, of Syracuse, New York, for the Charging Union.

#### DECISION

##### STATEMENT OF THE CASE

Russell M. King, Jr., Administrative Law Judge. This case was heard by me in Ithaca, New York, on 5 through 8 March and 15 through 17 April 1985. The underlying charges were filed on 16 May 1984 by United Association of Journeymen

and Apprentices of the Plumbing and Pipefitting Industry, Local 109 (the Union), and the original complaint was issued on 18 July 1984 by the Regional Director for Region 3 of the National Labor Relations Board (the Board) on behalf of the Board's General Counsel.<sup>1</sup> The complaint was also amended on 5 July 1984 and 24 October 1984, and the General Counsel filed two motions to amend the complaint during the hearing.

An amended complaint was issued 13 November 1984, and alleges that Wilson & Sons Heating & Plumbing Co., Inc. (Wilson Heating or the Company) violated Sections 8(a)(1) and (5) and 8(d) of the Act as follows:<sup>2</sup> (1) by unilaterally changing wages rates on 17 November 1983; (2) by unilaterally refusing to adhere to terms of the collective-bargaining agreement (contract) on 31 May 1984; (3) by refusing to follow referral procedures contained in the contract on 31 May 1984; (4) by repudiating the contract on 31 May 1984 and 2 February 1985;<sup>3</sup> (5) by withdrawing recognition of the Union on 31 May 1984; (6) and by refusing to allow the Union to inspect and audit the Company's books and records pursuant to the contract on 23 April 1984.<sup>4</sup> On 11 April 1985, while the hearing was in adjournment, the General Counsel filed a motion to amend the complaint alleging that Wilson Heating and Charles R. Wilson Engineering (Wilson Engineering), a sole proprietorship, are affiliated businesses and are thus "a single employer, *alter ego* employers or joint employers" engaged in commerce within the meaning of the Act. The motion was opposed by the Company and I reserved ruling on the motion. The matter will be treated later in this decision. During the hearing and on 15 April 1985 the General Counsel filed an additional motion to amend the complaint, alleging that on 7 June 1984 the Company bypassed the Union and dealt directly with its employees regarding the terms and conditions of their employment. I reserved a ruling on this motion which will also be treated below.

<sup>1</sup>The term "General Counsel," when used herein, will normally refer to the attorney in the case acting on behalf of the General Counsel of the Board, through the Regional Director.

<sup>2</sup>The pertinent parts of the Act (29 U.S.C. § 151, et seq.) provide as follows:

Sec. 8. (a) It shall be an unfair labor practice for an employer— (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 . . . (5) to refuse to bargain collectively with the representative of his employees . . . .

Sec. 7 . . . Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities of the purpose of collective bargaining or other mutual aid or protection . . . .

Sec. 8. (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if required by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

<sup>3</sup>The 2 February 1985 allegation was added to the complaint by amendment during the hearing.

<sup>4</sup>This allegation appeared in the original complaint, but was further amended on 29 January 1985.

The Company, in its answer and amended answer, denied that it violated the Act in any manner and defends on the following grounds. The company alleges that the 6-month limitation period of Section 10(b) of the Act had expired regarding the allegation of unilateral changes in wage rates on 17 November 1983. The Company also alleges that the contractual relationship between the parties terminated on 31 May 1984 at the expiration of the contract, and that the Union is not the exclusive bargaining representative of Wilson Heating's employees. The Company also maintains that the Board lacks jurisdiction over it because the use of the calendar year of 1983 as a representative period is not appropriate.

Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the briefs filed herein by the General Counsel, counsel for the Company, and counsel for the Union, I make the following

#### FINDINGS OF FACT<sup>5</sup>

##### I. JURISDICTION

The pleadings, admissions and evidence in the case establish the following jurisdictional facts. Wilson & Sons Heating & Plumbing, Inc. is a New York corporation with an office and facility in Ithaca, New York. During all times material herein the Company engaged in the construction industry as a heating, plumbing and electrical installation and repair contractor. During the calendar year 1983 the Company, in the course and conduct of its business operations, performed repair and installation services valued in excess of \$50,000 for certain entities or customers within the State of New York which themselves, and individually in 1983, received income in excess of \$50,000 and purchased goods and services in excess of \$50,000 from outside the State of New York. As indicated earlier, the Company contests jurisdiction in this case, and argues that the 1983 calendar year is not an appropriate representative period.

In asserting jurisdiction, the Board has relied "on the experience of an employer during the most recent calendar or fiscal year, or the 12-month period immediately preceding the hearing before the Board, where such experience was available." *Arrostock Federation of Farmers*, 114 NLRB 538 (1955). The use of the word "or" indicates that the Board may rely on any one of the three time periods specified for jurisdictional purposes. *Blake's Restaurant*, 230 NLRB 27 (1977); *Reliable Roofing Co.* 246 NLRB 716, 103 (1979). The possible reduction in an employer's volume of business in the present year does not preclude assertion of jurisdiction where commerce data for a recent annual period is available and meets the Board jurisdictional standards. *Burton Beverage Co.*, 116 NLRB 634 (1956). In the present case, the calendar year is also the Company's fiscal year, and the Board has approved the use of the last full calendar year

<sup>5</sup>The facts found herein are based on the record as a whole and on my observation of the witnesses. The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits with due regard for the logic of probability, the demeanor of the witnesses, and the teaching of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those testifying in contradiction of the findings herein, their testimony has been discredited either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredible and unworthy of belief. All testimony and evidence, regardless of whether or not mentioned or alluded to herein, has been reviewed and weighed in light of the entire record.

preceding the year in which the alleged unfair labor practices occurred. *Acme Equipment Co.*, 102 NLRB 153 (1953). I find and conclude that the Board has properly asserted jurisdiction in this case and thus, that the Company is now, and has been at all times material, an employer in commerce within the meaning of Section 2(2), (6), and (7) of the Act.<sup>6</sup>

Also as alleged and admitted, I find that the Union is now, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

#### II. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. Summary of Testimony and Evidence<sup>7</sup>

The Company is engaged in mechanical heating and plumbing contracting, and was founded by Charles R. Wilson, Sr., now deceased. The officers of the corporation are the two sons and the widow of the founder as follows: Stephen P. Wilson, president, Charles R. Wilson, vice President, and Dorothy Wilson, secretary. The Company has recognized and bargained collectively with the Union as the representative of its employees since 1976, signing successive letters of assent to be bound by all the terms of an area master contract between the Union and the Mechanical Contractors of South Central New York (Master Plumbers Association). The Company was not a member of the Association. The unit consisted mainly of steam and pipefitters, plumbers, and welders. The contract required member contractors to file reports and make benefit contributions on behalf of employees to the insurance and educational funds. Article IV of the contract provides that it "shall automatically be renewed from year to year after its expiration date, unless either of the parties" make written request for changes to the other party three months prior to the termination date of the contract. The latest letter of assent was signed by Charles Wilson on 28 October 1983, the terms of which were effective from 1 June 1983 until 31 May 1984.<sup>8</sup> Charles Wilson testified that on 28 October 1983, Union Business Manager Louis Haller threatened to "pull our men and he would put us out of business" unless Wilson signed the latest letter of assent. How-

<sup>6</sup>Uncertain at the time as to whether or not the calendar year 1983 would be an acceptable period for jurisdictional purposes, and apparently without sufficient evidence pertaining to any other appropriate period, as indicated earlier on 11 April 1985, while the hearing was in adjournment, the General Counsel moved to amend the complaint to add as a respondent in the case Wilson Engineering, alleging that Wilson Heating and Wilson Engineering "are a single employer, alter ego employers or joint employers within the meaning of the Act." The motion also alleged that Wilson Engineering, during the 1984 calendar year, performed services in excess of \$50,000 for customers which were directly engaged in commerce within the meaning of the Act. I allowed such evidence to be admitted but reserved ruling on the motion. Although my above jurisdictional findings regarding Wilson Heating in effect render the matter moot, I deny the motion. Additionally, the two businesses eventually became completely separate enterprises with entirely different purposes and work product. In my opinion the evidence reflects that they were far from being sufficiently closely related with a common business purpose so as to constitute a single employer, alter ego employers or joint employers under current applicable and legal standards. See *O. Voorhees Painting Co.*, 275 NLRB 779 (1985); *Fugazy Continental Corp.*, 265 NLRB 1301 (1982).

<sup>7</sup>The following includes a summary of parts of the testimony of the witnesses appearing in the case. The testimony will appear normally in narrative form, although on occasions some testimony will appear as actual quotes from the transcript. The narrative only and merely represents a summary of what the witnesses themselves stated or related without credibility determinations unless indicated, and does not reflect my ultimate findings and conclusions in this case.

<sup>8</sup>All dates hereinafter are in 1984 unless otherwise indicated.

ever, Haller only remembered telling Wilson that he would take the employees off the job unless Wilson signed a contract. Wilson signed the letter of assent the next day.

At the end of 1983 Charles and Stephen Wilson began discussing their belief that the Company could not compete because of the state of the construction market, loss of major customers, and high labor costs. The Wilsons had discussions with the Company's three employees about operating the Company nonunion. According to Charles Wilson, the employees were told that "if we had no change we would go out of business." Employee Duane Ray testified that he favored the Company remaining a union shop. One solution discussed was to create a "double-breasted" operation that was both union and nonunion, one plumbing company for commercial operations and another for residential operations. Charles Wilson was issued an engineering license in August 1983, although he testified that he did not know when he actually received the license. He testified that in January he began the process of forming an engineering consulting business. According to Wilson "the engineering work we were doing was different in character than what we had done for the previous twenty years." Although he testified that Wilson Engineering "began doing substantial business in January," Wilson denied that the engineering company came into being in January. According to Wilson the engineering company was technically established in March when the Company received its business certificate. Wilson explained this apparent contradiction with the notion that engineering design was done within Wilson Heating while he developed the capabilities necessary to set up a separate company. According to Wilson, "during the time from January on we were accumulating more and more capabilities, and the character of what we were doing was constantly evolving and changing." The work now performed by Wilson Engineering was performed within Wilson Heating commencing in late 1983 or early 1984, and prior to the formation of the engineering company. The same secretary and bookkeeper maintained records for both companies, and all of Wilson Engineering employees worked for Wilson Heating before Wilson Engineering was formed. Further, from January until June the salaries of the management personnel and employees on the Wilson Engineering payroll were paid by Wilson Heating. Until 14 June the engineering company employees received unemployment insurance and worker's compensation from Wilson Heating. A separate checking account was opened in March after the engineering company established a separate office. Apparently after June 1984 the two companies were completely separated. At the time of the hearing Wilson Engineering owed Wilson Heating \$9000 of an original \$18,000 which had been advanced by Wilson Heating to form Wilson Engineering.

During January and early February, Wilson Heating employed three persons engaged in bargaining unit work, John G. Gould, Frank Horvath, and Duane C. Ray. In February Horvath quit and Ray was laid off. Thereafter, from 24 February through 31 May, Wilson Heating employed only John Gould for bargaining unit work. Wilson Heating had hired Frank Horvath in 1982, as a trainee under an informal arrangement with Union Business Agent Louis Haller. It was agreed that the Company would train Horvath as a union mechanic until he passed the Union's journeyman exam and joined the Union. Horvath was to be paid a wage rate lower

than the union scale while in training. Horvath performed nonunit work about one-half the time, was laid off in January 1983, but later passed the Union's journeyman exam in March 1983, and subsequently rehired. Horvath, not having joined the Union, was discovered on a company job in September 1983. Haller contacted Stephen Wilson, by telephone, asking why Horvath was on the job. Wilson then voluntarily took Horvath to the Union to pay Horvath's initiation fees the next day. The Company also made union fringe benefit contributions for Horvath, but continued to pay him \$10.75 per hour, less than the rate required by the contract. Haller testified that in January he contacted Charles Wilson, asking him to remind Horvath to pay his monthly dues. When Haller reviewed the union dues-checkoff reports submitted to the Union by the Company, he found that Horvath was not being paid at union scale. Haller requested Horvath's paystubs on 24 January and 3 February. In March Haller received the paystubs, which confirmed that there was an error in pay.<sup>9</sup> Haller then requested an audit of the Company's books, which was denied. Steven Wilson told Haller on 23 April in a telephone conversation that he did not believe that anyone had the right to audit the company books. Article III, section 4(b) of the contract states, in part, as follows:

The books and records of each employer pertinent to the employment of employees covered by the Agreement shall be made available at all reasonable times for inspection and audit by the accountants of the Funds, including without limitation, all payroll sheets, W-2 Forms, New York State Employment Reports, social security Reports, Insurance Company Reports and Supporting Checks, ledgers, vouchers and any other items concerning payroll. Inspection shall be restricted to verification of payment made and/or due to the Funds.

The Company maintains that Union Business Agent Haller, even in his capacity as a trustee of the insurance and educational funds, did not properly request the audit pursuant to article III of the contract. According to the Company, Haller's telephone request and his request by letter made no reference to the Funds. This in fact was true. The Company also asserts that the request was not made by the fund manager, or anyone who purported to act on behalf of the funds. Finally, the company also contends that no vote had been held at a meeting by the trustees of the funds at which a quorum was present, as required by the trust agreement, to authorize an audit of the Company's books.

Charles and Stephen Wilson indicated that on 1 June they determined that the Company was not obligated to comply with the terms of the contract after its expiration date on 31 May, also deciding not to negotiate a new contract. On 1 and 4 June Union Business Manager Haller mistakenly told Charles Wilson that the contract had expired.<sup>10</sup> The Com-

<sup>9</sup> Frank Horvath's \$10.75 per hour wage, which he received from November 1983 until he quit in February 1984 is the basis for sec. 10(a) of the amended complaint, alleging that since on or about 17 November 1983 (exactly 6 months prior to the date the original charge in this case was filed), the Company unilaterally and unlawfully changed wage rates of the employees. Employee Horvath is the only employee concerned regarding the allegation.

<sup>10</sup> Wilson testified that Haller asked whether the Company would sign a new contract, saying that if a new contract was not signed Haller would "pull the men [one employee] because [w]e don't have a contract with you." Contrary to Charles Wilson's contention, according to Haller he never stated on 1 or 4 June that he would refuse to negotiate with the Company.

pany notified the Union by letter on 4 June that no contract existed between the parties. After discovering that the contract had an automatic renewal clause, Haller told Charles Wilson in a telephone conversation on 12 June that he had been mistaken and the Company was "still under contracts." In the same conversation Wilson told Haller that the Company would not make benefit fund contributions for remaining employee John Gould. By letter dated 2 February 1985, the Company again notified the Union that it "would not renew any contractual agreement which may be found to exist with the union." The letter also recited that the Company did not waive its position that the contract terminated on 31 May 1984.

On 7 June 1984, the Company made an individual employment contract with bargaining unit employee Gould. According to Charles Wilson's testimony, the Company told Gould that no contract had been signed with the Union, but Wilson indicated that Gould wanted to work anyway. The contract provided for a wage rate of \$1 less than the union commercial rate and no fringe benefits, and Gould was to work on a nonunion basis.

### B. Analysis of Law and Evidence and Initial Conclusions

#### 1. The status of the contract

The contract involved herein was the contract between the Union and an employers association, the Mechanic Contractors of South Central New York, Incorporated. The Company was not a member of the association, and to that extent, was independent,<sup>11</sup> but had bound itself to the association's contract for a number of years by signing a letter of assent, the latest of which was signed 28 October 1983 by Charles R. Wilson and Union Business Agent Haller. The effective and expiration dates were 1 June 1983 to 31 May 1983,<sup>12</sup> and the letter of assent recited that the signatory for the Company "has read and is fully familiar with all the terms" of the contract, and that the Company agreed to adhere to and be bound by all the terms thereof, as well as revisions and amendments adopted pursuant thereto. Article IV, sections 2 and 3 provided for automatic renewal from year to year unless the parties requested a change in writing 3 months prior to the expiration date. In early June Haller mistakenly assumed that the contract had expired and on June 4 the Company wrote to the Union stating that no contract existed, and thereafter failed to abide by its terms. This was the first notice from the Company to the Union, written or otherwise, pertaining to the contract. Subsequently Haller learned of his error and on 12 June telephoned Charles Wilson, indicating that the Company was still under contract. However, after 31 May the Company has maintained that no contractual relationship existed.

From the clear language of the contract and lack of action on the part of the Company, I find that the contract was renewed and in effect for the contract year of 1 June 1984 to

31 May 1985.<sup>13</sup> The renewal was automatic upon expiration and in my opinion the renewal was not waived by Haller's initial mistake in failing to know or remember that there was an automatic clause. I further do not feel, under the facts and circumstances of this case, that the Company's status as a nonmember of the association should, in any way, affect the above outcome and findings. However, these findings shall prove to without benefit to the Union in the case because of Board law regarding one-man units, which will be discussed later.

#### 2. Alleged violation in November 1983

Paragraph 10(a) of the complaint alleges that on or about 17 November 1983, the Company unilaterally changed wage rates and other terms and conditions of employees in the unit, in violation of Section 8(a)(5) of the Act. The Company argues that the allegation is untimely under Section 10(b) of the Act which provides that no complaint shall issue based on any unfair labor practice occurring more than 6 months prior to the filing of the charge. I agree. The original charge was filed by the Union on 14 May 1984 and alleged only a failure to furnish information on or about 1 April, in violation of Section 8(a)(5) and (1) of the Act. On 5 July an amended charge was filed again alleging a refusal to furnish information on 1 April and additionally alleging that the Company unilaterally changed the terms and conditions of employment of unit employees on 1 April, in violation of Section 8(a)(5) and (1) of the Act. The initial and first complaint was issued on 18 July alleging that on or about 23 April the Company unlawfully failed and refused to recognize and bargain with the Union by refusing the request of the Union's benefit funds to audit the Company's books and records. A second amended charge was filed 24 October, and for the first time the November 1983 allegation was raised, 11 months after its alleged occurrence. An amended complaint was filed 13 November finally containing the November 1983 allegation.

The General Counsel must and does argue that the 1983 allegation falls under the umbrella of the first and initial charge filed on 14 May, 6 months to the date of the 1983 allegation.<sup>14</sup> However, the initial charge dealt with a single and entirely different subject matter, i.e., the refusal to furnish information, as opposed to unilateral changes in working conditions. I find that the subject of the November 1983 allegation entered the picture only after the passage of 11 months after its alleged occurrence, and 5 months too late, and is thus barred by Section 10(b) of the Act Accordingly, I shall recommend its dismissal.

#### 3. The contract repudiation and withdrawal of recognition

Charles Wilson and Union Business Agent Haller initially thought the contract expired 31 May. Haller soon thereafter found out differently and so informed Wilson, but Wilson maintained his position that the contract had expired and was nonexistent. I have previously found herein that the contract

<sup>11</sup> During his testimony Charles Wilson, for reasons not explained in the record, continually referred to the contract as an "independent contract."

<sup>12</sup> The Company had been complying with the new contract from its effective date.

<sup>13</sup> Such is not the case for the ensuing year (1985-1986) as the Company gave definite and timely notice of its intentions not to renew the contract in its letter to the Union dated 2 February 1985.

<sup>14</sup> The second amended charge, filed 24 October and raising the 1983 allegation for the first time, is rather curious to me. It is barred by Sec. 10(b) of the Act on its face, and it is thus of no value in the case.

was renewed and in effect for the period 1 June 1984 to 31 May 1985, but no longer.<sup>15</sup> Accordingly, I find that the Company, through the actions of Charles Wilson, did repudiate the contract and withdrew recognition of the Union. Paragraph 10(c) of the amended complaint alleges that the Company wrongfully and unilaterally discontinued contacting the Union for job applicants pursuant to the contract's referral procedures. Having found that the Company unilaterally discontinued applying the terms of the contract by repudiating the contract, and by withdrawing its recognition of the Union, in my opinion paragraph 10(c) is duplicitous and also merges into the above findings.

By late February employee Gould was the only unit employee. The evidence is un rebutted that the Company had lost, and was losing money and customers. There was no prospect for a unit buildup in the foreseeable future, and several days after the expiration date of the contract, Gould resigned his union membership and went back to work for the Company on his own terms, thus indicating his lack of desire to bargain.

The Board has held that it will not certify a one-man unit because the principle of collective-bargaining presupposes that there is more than one eligible person who desires to bargain. *Luckenbach Steamship Co.*, 2 NLRB 1450 (1937). *Foreign Car Center*, 129 NLRB 319 (1966). The Board has also held that the existence of a one-man unit does not, of itself, make the unit inappropriate, and the Act does not preclude bargaining with a union on behalf of a single employee, if an employer is willing. *Louis Rosenberg, Inc.*, 122 NLRB 1450 (1959); *Foreign Car Center*, supra; *Teamsters Local 115*, 157 NLRB 588 (1966). However, an employer's disavowal of a contract in midterm and his refusal to bargain with the union on behalf of a one-man unit is not a refusal to bargain within the meaning of Section 8(a)(5) of the Act. *Foreign Car Center*, supra. I shall thus recommend dismissal of paragraphs 10(b), (c), (d), (e), and (f) of the amended complaint.

#### 4. The Union's request to audit the Company's books and records

On 23 April Haller wrote to the Company requesting permission for the Union to audit the Company's books. The Company refused. No reason was given for the request in the letter from Haller but earlier correspondence and testimony in the case lead me to conclude that the dispute over former employee Horvath's wage rate, which arose in the fall of 1983, was the primary (if not sole) reason for the request. Horvath had quit in late February (1984) and I doubt that Haller knew this in April. The contract did provide for inspection and audit of the Company's books and records, but also provided that such an inspection "shall be restricted to

<sup>15</sup> On 2 February 1985, the Company wrote to the Union, indicating it did not waive its position that after 31 May no contract existed, but additionally indicating it "would not renew any contractual agreement which may be found to exist with the union." The General Counsel, by amendment to the complaint during the hearing, alleges the 2 February 1985 letter to be an additional withdrawal of union recognition and a violation of Sec. 8(a)(5) and (1) of the Act. The 2 February letter should have at least put the Union on notice that as a minimum the contract terms were subject to negotiation, thus canceling the automatic renewal provisions of the contract. The subject of negotiating never really arose between the parties in this case. In reality, I doubt that Charles Wilson, at all times material herein, actually realized exactly what his obligation was with the Union regarding bargaining.

verification of payments made and/or due to the [Insurance, Pension and Educational] Funds." The contract also provided for the submission of weekly reports by the Company to the funds trustees regarding the required payments. The testimony and evidence reflects that such reports were properly and timely submitted by the Company up until 31 May, when it was initially assumed the contract had expired. Since Haller's audit request dealt with salary or pay, as opposed to funds contributions, I find that the Company's refusal was, perhaps unknowingly, legitimate. I shall thus recommend dismissal of the allegation in section 10(g) the complaint, charging that the Company's refusal violated Section 8(a)(5) and (1) of the Act.

#### 5. Discussions with employee Gould

On the last day of the hearing (17 April 1985) the General Counsel filed a motion to further amend the complaint by adding paragraph 10(h) to the complaint alleging that on 7 June 1984 the Company dealt directly with employee Gould in negotiating the terms and conditions of his employment. I reserved ruling on the motion.

Since late February, Gould was the only remaining unit employee. He had worked for the Company some 20 years. Gould was a union member, and testified that on 2 June Haller called him and told him that since the Company would not sign a new contract, he could no longer work there. On 4 June Gould found out from Haller that that there were no jobs currently available in the area, and he verified with the Wilsons that they were not going to sign a new contract. On 5 June he unsuccessfully tried to get work at Cornell University, but was offered a job at another company which he did not accept it. On 5 June he talked to Haller about how to get out of the Union, and Haller advised him that he only had to stop paying dues, which he then did. On 7 June Gould, on his own initiative, went to the Company and talked to Charles and Steve Wilson and indicated he knew that the Company was "severely in debt" but that he wanted to try and keep the Company open. He then offered to work for the Company on reduced wages and benefits. At home that night he drew up a paper containing figures and benefits he could get by on and the following day (8 June) he was accepted back at the Company on the new terms.

Gould, on his own, had withdrawn from the Union and solicited reemployment with the Company on his own suggested terms. I find there was no violation as alleged in the motion to amend the complaint, and thus the motion is denied.<sup>16</sup>

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended

#### CONCLUSIONS OF LAW

1. The Respondent Employer is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Union is a labor organization within the meaning of Section 2(5) of the Act.

<sup>16</sup> In my further opinion, the motion should also be denied because of the Board's decisions regarding an employer's duty to bargain with a representative of a one-man unit, as discussed earlier herein.

3. The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All journeymen and apprentice steamfitters, pipefitters, plumbers, welders, air conditioning, heating and acid piping employees performing plumbing work employed by Respondent within the jurisdiction of the Union in the counties of Chemung, Cortland, Tioga, schuyler, Seneca, Steuben and Tompkins, New York, excluding all office clerical employees, professional employees, guards and supervisors as defined in the Act.

4. The collective-bargaining agreement between the Respondent and the Union was automatically renewed, by its own terms, for the period 1 June 1984 to 31 May 1985.

5. That by unilaterally discontinuing applying the terms of the above agreement and repudiating said agreement on 31 May 1984, the Respondent did not violate Section 8(a)(5) and (1) of the Act.

6. That by withdrawing recognition of the Union as the collective bargaining representative of the employees in the above unit on 31 May 1984 and 2 February 1985, the Respondent did not violate Section 8(a)(5) and (1) of the Act.

7. That the Respondent has not otherwise violated the Act. [Recommended Order omitted from publication.]

*Carl B. Newsome, Esq.*, for the General Counsel.  
*Anna Holmberg, Esq. (Wiggins, Holmbe Galbraith and Holmberg)*, of Ithaca, New York, for the Respondent Employer.

*James R. LaVaute, Esq. (Blitman and King)*, of Syracuse, New York, for the Charging Union.

#### SUPPLEMENTAL DECISION

##### Background

RUSSELL M. KING, JR., Administrative Law Judge. This case was heard by me in Ithaca, New York, in March and April 1985. My initial decision was issued on December 19, 1985. On February 2, 1987, the Board issued its Decision and Order in *John Deklewa & Sons*, 282 NLRB 1375 (1987) (*Deklewa*), and on January 23, 1989, the Board entered an Order Remanding this case back to me in light of the possible impact of *Deklewa* on certain issues presented in this case.<sup>1</sup>

The complaint alleged, inter alia, that Wilsons & Sons Heating & Plumbing, Inc. (the Company) violated Section 8(a)(1) and (5) of the Act by unilaterally repudiating a collective-bargaining agreement (contract) which had been entered into by the Company and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 109 (the Union). In my initial decision, I found that the Company's repudiation was not unlawful under then-existing Board law. In *Deklewa*, the Board abandoned the "conversion" and "merger" doctrines that had been applied

<sup>1</sup>In *Deklewa*, the Board held that it would apply the new principles set forth therein to all pending cases in whatever stage. In its Remand herein, the Board provided for reopening the record "if necessary . . . to adduce further evidence on the collective-bargaining representative status of the Union." I do not deem further evidence necessary in the case in my considerations of the facts and evidence under the teachings of *Deklewa*.

to collective-bargaining agreements (relationships) permitted under Section 8(f) of the Act regarding the building and construction industry, and held that a party to an 8(f) relationship who asserts the existence of the collective-bargaining relationship under Section 9(a) of the Act has the burden of proving the existence of that relationship through either (1) a Board-conducted representation election or (2) a union's expressed demand for, and an employer's grant of recognition, based on a clear showing of support for the Union among a majority of the employees in an appropriate unit. However, the Board also held in *Deklewa* that a union signatory to an agreement permitted by Section 8(f) of the Act acquires limited status as a representative under Section 9(a) of the Act, to the extent that the 8(f) agreement may not be unilaterally repudiated during its term, and may be enforced during its term under the provisions of Section 8(a)(5) or Section 8(b)(3) of the Act.

The Union had entered into a master contract with an employers' association known as the Mechanical Contractors of South Central New York. Although the Company was not a member of the association, for some years it had adopted this contract, the most recent of which ran from June 1, 1983, to May 31, 1984. This was accomplished by letter of assent, executed by the Company and the Union. As of June 1, 1984, the Union's business manager, Louis Haller, mistakenly assumed that the contract had expired, as did the Company. However, the contract had an automatic renewal clause extending its terms and conditions for one additional year, unless the parties to the contract had requested a change in writing 3 months prior to the expiration date. On June 12, 1984, Haller discovered his mistake and informed the Company that it was still under contract. The Company denied that any contract remained, and after May 31, 1984, the Company refused to adhere to any of its terms. In my initial decision, I found that the contract was automatically renewed and was thus in effect for the additional period of June 1, 1984, to May 31, 1985. On February 2, 1985, the Company wrote to the Union, restating its position that no contract existed after May 31, 1984, but additionally indicating that it "would not renew any contractual agreement which may be found to exist with the Union." Thus, I found that the contract was properly terminated by the Company effective May 31, 1985.

As of February 1984, the unit involved consisted of three employees, as follows: Duane Ray; Frank Horvath; and John Gould. The Company's business had dwindled over a period of time and in February 1984, Ray was laid off and Horvath quit. Ray had supported the Union and Horvath was a union member, having joined the Union in September 1983. Gould was also a union member until he resigned from the Union on June 5, 1984. Thus, after February 1984, the unit contained only one employee, and this continued to be the case as of the hearing.<sup>2</sup> Notwithstanding the fact that the Company had repudiated the contract (and the Union), employee Gould desired to remain with the Company and on his own he withdrew his union membership and entered into a separate and individual arrangement with the Company. Gould had worked for the Company for some 20 years and although he knew that the Company was "severely in debt," he want-

<sup>2</sup>The Company never joined the employers' association and thus, the issue of a possible multiemployer unit was never an issue in the case.

ed to try and keep the Company open, and thus offered to work for the Company on reduced wages and benefits. At the end of the hearing, the General Counsel filed a motion to further amend the complaint to allege that the Company's direct dealing with employee Gould violated Section 8(a)(5) of the Act. I reserved ruling on the motion and in my original decision, I denied the motion to amend the complaint, based on the fact that Gould, on his own, had withdrawn from the Union and solicited reemployment with the Company on his own suggested terms. I further denied the motion to amend because of the Board's decisions regarding an employer's duty to bargain with the representative of a one-man unit. In light of *Deklewa*, my ruling is now incorrect, and I rescind the ruling and grant the motion to amend.

#### Discussion and Analysis

In this case, the Company voluntarily entered into an 8(f) relationship with the Union. Prior to *Deklewa*, 8(f) agreements did not immunize the Union's status as a collective-bargaining representative from challenge during the contract term. Such agreements could be repudiated by either party at any time, and the union's status could be determined by litigation in an ensuing 8(a)(5) proceeding, as was the case herein. However, under *Deklewa*, neither employers nor unions who are parties to 8(f) agreements are free to repudiate such agreements during their term, and an 8(f) contract will not act as a bar to petitions pursuant to Section 9(c) or (e) of the Act. On the contract's expiration, the signatory union will enjoy no majority presumption and either party may repudiate the 8(f) relationship.

Also under *Deklewa*, an employer's defense that it employed no unit members when it repudiated the contract was found to be without merit.<sup>3</sup> Subsequent to *Deklewa*, the Board has held that where a unit consisted of no more than a single employee "at all material times," the employer has no statutory duty to bargain. *Stack Electric*, 290 NLRB 575 (1988), citing *D & B Masonry*, 275 NLRB 1403 (1985). Although since February 1984 to the last hearing date (April 1985) there was only one unit member, prior thereto the unit had contained, at various times, some three to five employees who had been permanent. Although business had slowed, the unit was not, nor had it been, a traditional one-man unit.

In view of the Board's principles set forth in *Deklewa*, I must now find in this case that by repudiating the collective-bargaining agreement with the Union and withdrawing recognition from the Union on or about May 31, 1984, the Company violated Section 8(a)(5) and (1) of the Act. It necessarily follows therefrom that the Company's direct dealing with employee Gould, contrary to the terms of the contract,

even at his insistence, also violated Section 8(a)(5) and (1) of the Act.

#### AMENDED CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The collective-bargaining agreement between the Respondent and the Union was automatically renewed, by its own terms, for the period June 1, 1984, to May 31, 1985, but thereafter was effectively and properly repudiated by the Respondent.

4. That by unilaterally repudiating the terms of the above agreement on or about May 31, 1984, the Respondent violated Section 8(a)(5) and (1) of the Act.

5. That the appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act was that unit described in the collective-bargaining agreement, and as set out in the initial decision herein.

6. That by withdrawing recognition of the Union as the collective-bargaining representative of the employees in the above unit on or about May 31, 1984, the Respondent violated Section 8(a)(5) and (1) of the Act.

7. That by dealing directly with unit member and employee John G. Gould regarding changes in the terms and conditions of his employment, the Respondent, on or about June 7, 1984, violated Section 8(a)(5) and (1) of the Act.

8. That the Respondent has not otherwise violated the Act.

#### THE REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist and take certain affirmative action designed to effectuate the policies of the Act. The recommended Order shall order the Respondent to make whole, as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), and *Kraft Plumbing & Heating*, 252 NLRB 891 (1980), employee John G. Gould and any other employees for any losses they may have suffered as a result of the Respondent's failure to adhere to the collective-bargaining agreement in effect from June 1, 1984, until May 31, 1985, with interest as computed in the manner prescribed in *New Horizons for the Retarded*.<sup>4</sup> [Recommended Order omitted from publication.]

<sup>4</sup>In accordance with the Board's decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

<sup>3</sup>282 NLRB at 1389 and fn. 62.