International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 84 *and* DST Insulation, Inc. Case 8–CB–10424

September 24, 2007

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND KIRSANOW

This case raises the issue of whether the Respondent, International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 84, violated Section 8(b)(3) of the Act by failing and refusing to bargain with DST Insulation, Inc. (DST). For the reasons below, we adopt the judge's findings that the Respondent did not violate the Act and we dismiss the complaint.[1]

Facts

DST is a construction insulation contractor. On January 23, 2002, DST accepted the terms of, and agreed to be bound to, a multiemployer master agreement between the Respondent and Master Insulators' Association of Akron, Ohio, and Builders Association of Eastern Ohio & Western Pennsylvania (the Associations), effective from July 1, 2001 to June 30, 2004. This created an 8(f) relationship between DST and the Respondent.

On March 19, 2004, pursuant to the contract renewal and termination provisions of the master agreement,[2] DST, through its president, Skip Karl, notified the Respondent that "(d)ue to lack of support from Union people and the other Contractors following there [sic] own rules I will not be signing any new Contracts on or some time before July 1st, 2004."[3]

Thereafter, the Respondent and the Associations entered into a successor master agreement with an effective term from July 7, 2004 to June 30, 2008. DST did not participate in negotiations for that agreement and did not sign the agreement. But, as discussed below, DST honored virtually all its terms and, in other respects, evinced an intention to be bound to the 2004–2008 agreement.

On November 11, 2004, the Respondent requested that DST recognize it as the 9(a) representative of DST's insulation employees. The Respondent informed DST that it could either sign a formal recognition agreement or proceed to a Board election, and indicated a preference for the former. DST declined to execute the recognition agreement. The Respondent then filed a representation petition and, pursuant to an election held on March 25, 2005, the Respondent was certified on April 4, 2005 as the 9(a) representative of DST's insulation employees.[4]

Following the certification, DST sought to negotiate a bargaining agreement with the Respondent. Karl testified that he made several calls to the Respondent beginning in April 2005, and left messages indicating a desire to bargain for a contract, but that the Respondent did not return his calls and nothing "concrete" developed. The Respondent contends that DST and the Respondent are presently contractually bound to the 2004–2008 contract (the new master agreement), that DST employs union members in accordance with the new master agreement, and that the Respondent has no duty to bargain for another contract.

Discussion

The Board has long held that a binding agreement may be formed even when the parties have not reduced to writing their intent to be bound. *Haberman Construction Co.,* 236 NLRB 79, 85–86 (1978), enfd. 641 F.2d 351 (5th Cir. 1981). The inquiry is whether the party at issue has engaged in a course of conduct that manifests an intention to abide by the terms of the agreement. Whether a particular course of conduct demonstrates adoption of a contract is a question of fact. *Arco Electric Co. v. NLRB*, 618 F.2d 698 (10th Cir. 1980). This "adoption by conduct" doctrine applies to circumstances, as here, that

[1] On May 24, 2006, Administrative Law Judge Karl Buschmann issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief, and International Association of Heat and Frost Insulators and Asbestos Workers filed an amicus brief in response to the General Counsel's exceptions.

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

The Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

[2] Art. XIV of the master agreement provides that "Either party to this Agreement desiring to renew it in present form or with change or amendments shall make known such intentions, in writing, ninety (90) days prior to expiration of this Agreement. If notice is not given, then this Agreement shall remain in effect from year to year, even though new language and wages are negotiated with an existing Contractors' Association or their successor."

Art. XV of the agreement provides that "This Agreement shall become effective July 1, 2001, and shall be rigidly observed until its expiration, June 30, 2004, and from year to year thereafter unless either party notifies the other ninety (90) days prior to expiration of this contract in writing."

[3] The Respondent denied that it received or was aware of the March 19, 2004 notification until November 2005, in connection with the litigation of this proceeding. The judge found, however, that Karl sent the letter and the record contains a certificate of mailing from the Postal Service. Karl also testified that he faxed the March 19, 2004 letter to the Respondent.

[4] In its cover letter to the Board's Regional Office accompanying the representation petition, the Respondent stated that DST was formerly bound by an 8(f) agreement, that DST was currently working under the evergreen provision of that agreement, and that although DST had not signed the new bargaining agreement, "they have continued to employ our members in accordance with it."

arise under Section 8(f) of the Act. *E.S.P. Concrete Plumbing*, 327 NLRB 711 (1999).[5]

We find that the facts in this case establish that DST adopted by conduct the terms of the 2004–2008 master agreement and, therefore, the Respondent had no duty to bargain over terms of an entirely new contract.

As the judge found, DST engaged in substantial conduct manifesting an intent to be bound to the 2004–2008 master agreement.[6] First, DST paid to its employees the new wages rates set forth in the 2004–2008 master agreement. Second, DST made fringe benefit contributions to the fringe benefits funds under the terms of the new agreement. Third, when a dispute arose as to the correct amount of contributions owing to the funds, DST acquiesced to a Stipulated Judgment Entry pursuant to a cause of action brought against it under the 2004–2008 agreement by the benefit funds in the U.S. District Court for the Northern District of Ohio, and paid amounts owing under the agreement. Fourth, DST honored the union-security clause of the contract, and deducted and remitted union dues at the new rates specified in the 2004–2008 master agreement. An obligation to pay dues is permissible only during the existence of a collective-bargaining agreement containing a union-security provision. See the union-security proviso to Section 8(a)(3). Fifth, DST used the Respondent's exclusive hiring hall to secure employees as a union contractor. Sixth, DST corresponded and met with the Respondent in a manner that was consistent with the status of a union contractor. DST responded to the Respondent's requests to identify the nonunion contractors that it was competing against and, as required by the 2004–2008 agreement, DST notified the Respondent of impending employee layoffs, and attended union-management meetings open only to union contractors.

Based on all of these circumstances, we find that DST adopted the terms of the 2004–2008 master agreement by its conduct. DST adhered to significant substantive terms of the successor union contract, deliberately held itself out as a union contractor, and obtained the benefits of a union contractor.[7] See *E.S.P Concrete Plumbing,* supra (employer effectively held itself out as a union contractor by obtaining a union work project, acquiesced in a judgment against it for unpaid contributions to a union pension fund, and applied the collective-bargaining agreement to a project);[8] *Cab Associates*, 340 NLRB 1391, 1401–1402 (2003) (adoption by conduct when employer complied with virtually all contract terms, employed union stewards at projects, deducted and remitted union dues, and made full payment to union pension and welfare funds); *Marquis Elevator Co.,* 217 NLRB 461, 465–466 (1975) (adoption by conduct when employer adhered to terms of bargaining agreement, acquiesced in penalties imposed by the union for performance of unit work by supervisors, made monthly contributions to union funds, and used exclusive union hiring hall); *Vin James Plastering Co.*, 226 NLRB 125 (1976) (adoption by conduct when employer adhered to terms of bargaining agreement, including payments to various benefit funds, and deducted and remitted union dues).

The General Counsel contends that DST did not hold itself out as a union contractor or otherwise enjoy the benefits of a contractual relationship. Relying on *Marina Concrete Co*., 312 NLRB 1103 (1993), the General Counsel argues that DST was privileged to make unilateral changes after the expiration of the 2001–2004 agreement and that its voluntary compliance with certain terms of the expired contract and the 2004–2008 agree-

[5] In *E.S.P. Concrete Plumbing*, the Board overruled dictum in *Garman Construction Co*., 287 NLRB 88, 89 fn. 5 (1987), and stated that:

> [W]e have decided to reaffirm in the 8(f) context the Board's longstanding rule that an employer and a union may enter into a collective-bargaining agreement without having reduced to writing their intent to be bound. Instead, the formation of a contract is established by conduct demonstrating an intent to be bound by the terms of the agreement. These principles are equally applicable to 8(f) and 9(a) agreements. Indeed, their application in the 8(f) setting is necessary to promote industrial peace and effectuate the intent of Congress with respect to the adoption of collective-bargaining agreements in the construction industry.

327 NLRB at 713.

[6] The judge found that DST "arguably" was obligated to abide by the terms of the expired 2001–2004 agreement because its notice of March 19, 2004, purportedly was not a clear or unequivocal notice of termination of that agreement. We find it unnecessary to rely on the judge's finding as to the 2001–2004 agreement. Even assuming that DST's March 19, 2004 letter was adequate notice to terminate the 2001–2004 agreement, its subsequent conduct with respect to the 2004–2008 agreement bound DST to the latter agreement. We note in this regard that DST's termination letter stated that it would not sign a new contract on or before July 1, 2004, and did not address, one way or the other, the issue of contract coverage after July 1, 2004.

[7] This is a significant factor in determining whether there has been adoption by conduct, because an employer could otherwise secure all the benefits of labor stability without any corresponding obligations. "Nothing in the legislative history of Section 8(f) indicates that Congress intended employers to obtain free the benefits of stable labor costs, labor peace, and the use of the union hiring hall. Having had the music, he must pay the piper." *Jeff McNeff, Inc. v. Todd*, 461 U.S. 260, 271 (1983). In the instant case, DST enjoyed many of the benefits of a union contract, and nonetheless claimed that there was no contract. "Paying the piper" simply means that DST cannot have it both ways. The analogous conduct in *Jeff McNeff* is that the employer there could not obtain the benefits of a contract and nonetheless escape its obligations.

[8] As the Board observed in *E.S.P Concrete Plumbing*, 327 NLRB at 714, "it makes little difference whether that conduct be appraised as expressing the intent of the parties to an ambiguous contract or as the creation of an estoppel against repudiation," citing *Arco Electric Co. v. NLRB*, supra at 699.

ment did not bind it to the latter agreement. However, that case is distinguishable. The employer in *Marina* maintained certain terms and conditions of employment of the parties' expired agreement, but it also clearly manifested its intent not to be bound by the successor agreement by engaging in various conduct, including the filing of an action in Federal court to vacate an arbitration award purporting to bind the employer to that agreement. 312 NLRB at 1104. In contrast, as noted, DST entered into a stipulation judgment entry pursuant to a Federal court action filed by the benefit funds, effectively *assenting* to its obligations under the 2004–2008 contract. Further, in *Marina,* the Board cited with approval the *Garman* dictum that the adoption by conduct principle was inapplicable in 8(f) cases.[9] Thus, when *Marina* was decided, the Board did not apply the adoption by conduct principle to cases such as this one, in contrast to current law.[10]

The dissent asserts that DST's initial statement of March 19, 2004, tends to show that DST did not manifest an intention to be contractually bound. According to the dissent, this statement, although one of "evident inartfulness," sheds light on the meaning of the DST's subsequent conduct. We agree that the March 19 statement was "inartful" and, therefore, we look to DST's overall conduct to discern the meaning of its intent. That conduct, as the dissent concedes, was DST's adherence for many months to substantive terms of the successor contract, without deviation. And that longstanding conduct is plainly inconsistent with the notion that DST acted as a nonunion contractor that was not contractually bound. Even assuming arguendo that DST, on March 19, 2004, did not then intend to be bound to a contract to succeed the one expiring on June 30, DST's conduct after June 30 shows that it did bind itself to the successor contract.

The dissent would have us find that DST was actually a nonunion contractor, without any contractual obligation, which only "voluntarily" honored the union-security provision—with no contractual basis. But, as mentioned above, to do so would place it in legal jeopardy. In addition, DST paid fringe benefit contributions to the appropriate union benefit funds, another manifestation of an employer who is acting as a contractually bound union contractor. DST also adhered to contractual wage rates. It took advantage of the Respondent's hiring hall, exclusive to union contractors, to secure a work force. It informed the Respondent of DST's nonunion competitors without claiming to itself be a nonunion contractor itself. It assented to its contractual obligations by entering into a consent judgment in Federal court.

Our precedent, cited above, has long considered this course of conduct as compelling evidence that a party has manifested an intention to be contractually bound. Yet the dissent does not adequately distinguish these cases nor does it give sufficient weight to the many ways that DST manifested its intent to hold itself out as a union contractor, contractually bound. In these circumstances, we are not persuaded by the dissent's reliance on DST's March 19, 2004 "inartful" statement.

The dissent asserts that the Respondent did not actually believe that DST had adopted the contract by conduct. To the extent that such a belief would be relevant, a review of the evidence refutes that assertion. The Respondent's business agent, Reth, testified that DST adhered to all of the above-noted contractual terms and that DST never claimed that it was not contractually bound. By letter of November 11, 2004, the Respondent requested that DST sign a 9(a) recognition agreement. Of course, a union that is party to an 8(f) contract can seek to become the 9(a) representative without negating the contract itself. At the hearing, Reth testified that he could not speculate about DST's reasons for declining to recognize the Respondent as a 9(a) representative at that time. Reth testified further that perhaps DST was trying to have it both ways—that it wanted to be both union and nonunion. In context, it appears that Reth was referring to what, in his eyes, was the change from 8(f) to 9(a) status. In any event, there can be no doubt that the Respondent viewed DST as contractually bound at the time of the November 11 letter. We know that, because the Respondent stated in that letter that the terms of a 9(a) relationship "will simply be our current Collective Bargaining Agreement" after the recognition agreement is signed, i.e., there was nothing more to bargain.

Our dissenting colleague points to the Respondent's cover letter accompanying its election petition of January 31, 2005. Concededly, that letter refers to DST as an employer who was "formerly" bound to an 8(f) contract. Of course, that statement was true. DST was formerly bound to the 8(f) contract for 2001–2004. The issue in the instant case is whether DST was bound to the 2004–2008 contract, which the Respondent wished to convert to a 9(a) contract. As to that contract, the Respondent noted that DST was employing union members in accordance with the evergreen provision of the 2001–2004 contract. At the time, the Respondent maintained that DST had not provided timely notice to terminate and that

[9] Supra at 1106 fn. 11.

[10] The events in *Marina* occurred prior to the Board's abandonment of the "conversion" doctrine in *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988). The Board's decision in *Marina* noted that "pre-*Deklewa* law explains the Employer's maintenance of terms and conditions of employment past the expiration date and pending negotiations." 312 NLRB at 1105.

the 2001–2004 contract had renewed itself. Whatever the merits of that position, it cannot detract from the point that, in fact, DST had bound itself to the new contract. For example, its wages and benefits reflected those in the new contract.

The dissent further contends that DST's insistence on negotiating new contractual terms in April and June 2005, after the Respondent prevailed in a 9(a) election, shows that DST never manifested an intention to be bound in the first place. But, in our view, the practical effect of the election and certification was to have DST acknowledge directly, as a 9(a) contractor, what it had manifested by its conduct all along—that it was holding itself out as a union contractor that was contractually bound and receiving all the benefits that this may have entailed. That DST—so late in the game—belatedly sought to negotiate new terms does not establish the absence of a previous manifestation of assent through its prior unwavering conduct. In essence, DST's insistence on new bargaining is simply the reflection of its erroneous view, repeated here, that there was no contract.

Finally, we disagree with the dissent's claim that DST's July 19, 2005 stipulation to the entry of a court judgment for contributions owed to union benefit funds cannot support the Respondent's adoption-by-conduct argument, because DST earlier requested bargaining. Instead, as noted above, we find persuasive that the stipulation was pursuant to a cause of action brought against it under the 2004–2008 agreement. In our view, DST's acquiescence to the Stipulated Judgment Entry indicated its belief that it was bound to that current contract.

Because we find that the Respondent permissibly took the position that DST was already contractually bound, we find that the Respondent did not violate Section 8(b)(3) when it declined DST's request to bargain for a new contract. Accordingly, we shall dismiss the complaint.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

MEMBER KIRSANOW, dissenting.

I find that the Respondent International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 84 (Union) violated Section 8(b)(3) of the Act as alleged by declining to bargain with DST Insulation, Inc. (DST). Unlike the majority, I find that DST did not adopt by conduct the 2004–2008 agreement (the "current agreement") between the Union and two multiemployer associations, to neither of which DST belonged.

My colleagues summarize DST conduct arguably favoring their finding. They give short shrift, however, to DST statements that militate against adoption by conduct. Foremost among these is the March 19, 2004 notice sent to the Union by Skip Karl, president of DST, in which Karl stated: "Due to lack of support from Union people and the other Contractors following there [sic] own rules I will not be signing any new Contracts on or some time before July 1st, 2004." The contract in place at the time Karl sent this notice had a termination date of June 30, 2004. Thus, Karl's notice conveyed his clear intent *not* to enter into any contract succeeding that one.

My colleagues note that Karl stated that he "would not sign a new contract *on or before* July 1, 2004" but "did not address . . . the issue of contract coverage *after* July 1, 2004" [emphasis added]. In my view, this parsing of Karl's language is at odds with its evident inartfulness. The plain-enough meaning of Karl's statement was that he anticipated that a successor agreement ("new Contracts") would be available for signature before the expiration date of the 2001–2004 agreement (the "predecessor agreement") on June 30, 2004, and that DST had no intention of signing any such agreement, i.e., no intention of *ever* being bound by it "[d]ue to lack of support from Union people and the other Contractors following [their] own rules."

So understood, Karl's statement puts DST's subsequent adherence to particular terms of the current agreement in a different light. Did that adherence signify that Karl had changed his mind? The Union's own business manager, Rollin Reth, did not think so. Reth testified that Karl "was acting as if he did not want to be union or he wanted to be both." In Reth's view, Karl's conduct was, at best, ambiguous. But under the applicable standard, the formation of a contract by conduct requires "conduct demonstrating an intent to be bound by the terms of the agreement." *E.S.P. Concrete Plumbing*, 327 NLRB 711, 713 (1999). By the Union's own admission, Karl's conduct failed to demonstrate such an intent. (The explanation Karl gave at the hearing for his conduct is entirely plausible: he was "trying to keep up some sort of working communication with the Local to see if we could work this out before it got this far.")

Reth's testimony is not the only indication that the Union did not believe that DST had adopted the current agreement by conduct. On November 11, 2004, the Union sent DST a letter requesting 9(a) recognition, or in the alternative, announcing its intent to petition the Board for an election. As the majority notes, the letter suggests the Union's belief that DST was already contractually bound. In a subsequent letter, however, the Union indicated that it viewed DST as either *not* cur-

rently contractually bound or, if so, then bound to the predecessor agreement, not the current agreement. On January 31, 2005, the union filed a representation petition. In its cover letter accompanying the petition, the Union characterized DST as an employer "*formerly* bound by a Sec. 8(f) agreement" [emphasis added]. The Union also said that DST was continuing "to employ our members in accordance with" the current agreement, but it did not claim that DST had adopted that agreement. On the contrary, it claimed that DST was working under the evergreen provision of the *predecessor* agreement. Thus, as of January 31, 2005, the Union plainly did not believe that DST had adopted the current agreement by conduct.

The Union won the election on March 25, 2005, and was certified on April 4, 2005. Karl testified that he first phoned the Union on April 15 to request bargaining and left a voice mail. The Union did not respond. Karl testified that he left a second voice mail on June 10 requesting bargaining. Again, no response. If DST's conduct to this point had created any doubt as to whether it had adopted the current agreement, surely Karl's two voice mail messages must have dispelled it. Karl was trying to get the Union to negotiate a new agreement. Such efforts cannot be reconciled with an intent to be bound to an agreement already in existence.

But, as stated above, the Union did not have any such doubt as of January 31, 2005. What, then, if anything, did DST do *differently*, after January 31 and before Karl's April and June bargaining requests, that could have persuaded the Union to change its mind and conclude that DST had adopted the current agreement after all? Few dates are attached to the conduct relied on by the judge and the majority to find adoption by conduct. On October 14, 2004, DST notified the Union of impending layoffs as required under the current agreement. In December 2004, DST paid fringe benefits under the terms of the current agreement. Both of these events predated, however, the Union's January 31, 2005 letter to the Region, in which it described DST as "formerly" bound by an 8(f) contract and "currently" working under the evergreen provision of the predecessor agreement. Clearly, then, neither the layoff notice nor the fringe-benefit payment persuaded the Union that DST had adopted the current agreement. Other DST conduct the majority relies on—paying current-agreement wages, remitting current-agreement union dues, using the Union's hiring hall—began before January 31, 2005, and was therefore conduct the Union would have taken into account in concluding that DST had not adopted the current agreement by conduct as of that date.

DST also stipulated to entry of a court judgment concerning contributions owed to union benefit funds. But that happened on July 19, 2005—3 months *after* Karl's first bargaining request, and more than a month after his second request. Thus, DST's July 19 stipulation cannot furnish adoption-by-conduct grounds justifying the Union's *prior* 3-month failure to respond to DST's attempts to initiate bargaining. Neither could the Union rely on that stipulation *after* July 19 to form a reasonable belief that DST's conduct evinced an intent to be bound to the current agreement. Again, by that date, Karl was overtly trying to bring the Union to the table to negotiate a *new* agreement.

The majority suggests that it would be inequitable not to find adoption by conduct here, quoting the Supreme Court's statement in *Jeff McNeff, Inc. v. Todd*, 461 U.S. 260, 271 (1983), that "[n]othing in the legislative history of Section 8(f) indicates that Congress intended employers to obtain free the benefits of stable labor costs, labor peace, and the use of the union hiring hall. Having had the music, he must pay the piper." In *Jeff McNeff*, however, the employer entered into an 8(f) agreement and then failed to make contractually required fringe benefit fund contributions. In other words, that employer did fail to "pay the piper." Here, by contrast, DST *paid* the piper, and the piper then relied on those very payments to refuse to bargain and to assert adoption by conduct. Neither is DST, as the majority suggests, seeking to "secure all the benefits of labor stability without any corresponding obligations." DST has acknowledged its obligation to bargain with the Union as the 9(a) representative of its employees. It is the Union that is evading its obligation under Section 8(d) to join DST at the bargaining table.

In sum, viewed as a whole, DST's conduct did not evince an intent to be bound to the current agreement. DST contradicted such an intent repeatedly: in March 2004 when it gave notice that it would not sign the current agreement, in April 2005 when it sought bargaining following the Union's certification, and in June 2005 when it repeated its bargaining request. The Union did not believe that DST had adopted by conduct as of January 31, 2005; and neither the Union, the judge, nor the majority points to any conduct after that date that reasonably could have changed the Union's mind. At best for the Union, DST's conduct sent a mixed message—as Reth noted in testifying that Karl "was acting as if he did not want to be union or he wanted to be both"—but a mixed message fails to convey the requisite intent to be

bound.[1] Accordingly, I would find the 8(b)(3) violation as alleged and order the Union to bargain.

Iva Y. Choe, Esq., for the General Counsel.

William D. Brady, Esq. and *Joseph Allotta, Esq. (Allotta, Farley & Widman Co., LPA),* of Toledo, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

KARL H. BUSCHMANN, Administrative Law Judge. This case was tried in Cleveland, Ohio, on February 14, 2006. The charge was filed by DST Insulation, Inc., on September 1, 2005,[1] and the complaint was issued November 30, 2005, alleging that the Union violated Section 8(b)(3) of the National Labor Relations Act (the Act), by failing and refusing to bargain collectively and in good faith with the Employer, DST Insulation, Inc. (DST or the Company).

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

DST Insulation, Inc., a corporation, engaged in the business of insulation contracting services at its facility in Bedford, Ohio, where it annually provides services valued in excess of $50,000 to other enterprises located in Ohio which are engaged in interstate commerce. The Company admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent, International Association of Heat and Frost Insulators and Asbestos Workers, Local No. 84, Akron/Youngstown (the Union or Local 84) is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The Union and DST International, Inc. (DST) have had a bargaining relationship pursuant to Section 8(f) of the Act since January 23, 2002, when DST executed an agreement accepting the terms and conditions of the collective-bargaining agreement, effective July 1, 2001 to June 30, 2004, between Master Insulators' Association of Akron, Ohio, and Builders Association, as well as Local Union No. 84 (Jt. Exhs. 1, 2). When the 2001 agreement expired, a new agreement became effective from July 7, 2004 to June 30, 2008, between Master Insulators' Association, the Builders Association and Local 84 (Jt. Exh. 3). The parties disagree as to whether DST became a party to the new "2004 agreement."

III. ALLEGED UNFAIR LABOR PRACTICES

The Union and DST International, Inc. (DST) have had a bargaining relationship pursuant to Section 8(f) of the Act since January 23, 2002, when DST executed an agreement accepting the terms and conditions of the collective-bargaining agreement, effective July 1, 2001 to June 30, 2004, between Master Insulators' Association of Akron, Ohio, and the Builders Association as well as Local Union No. 84 (Jt. Exh. 3). The parties disagree to whether DST became a party to the new "2004 agreement."

The Company maintains that on March 19, 2004, it notified the Union by fax and by letter, of its intention not be bound by a new agreement. Skip Karl, president of DST, testified that he faxed and mailed a letter, dated March 19, 2004 to Mike Mollohan, business agent for the Respondent. The handwritten letter, addressed to Mike, states (GC Exh. 3):

> Due to lack of support from Union people and the other Contractors following there (sic) own rules I will not be signing any new Contracts on or some time before July 1st, 2004, I will be mailing this to you through regular mail.

Karl's testimony was supported by a certificate of mailing showing that DST had proof of a mailing to Local 84 (GC Exhs. 4, 5). The Union denies ever receiving any communication to that effect from the Company, Rollin Reth, business manager for Local 84, testified that the Union did not have such a letter in its files and that he personally was unaware of such a communication from DST until the current controversy. In any case, DST did not sign a new agreement, it did not participate in the negotiations leading up to the 2004 agreement, but it complied with all the substantive terms of the new agreement.

By letter of November 11, 2004, the Union demanded that DST recognize Local 84 as the exclusive bargaining representative of its employees (Jt. Exh. 4). After DST failed to respond to the Union's request, it filed a representation petition (Case 8–RC–16691) on January 31, 2005 (Jt. Exh. 5). Following an election on March 25, 2005, where the Union won, it was certified on April 4, 2005 (Jt. Exhs. 6, 7). The unit is defined as:

> All full-time and part-time insulation installers and fabricators, including journeymen, apprentice and improvers employed by the Employer from its residential office at 56 Gould Avenue, Bedford, Ohio 44146 but excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, and all other employees.

DST's President Karl testified that he had left several messages with Local 84 requesting that the parties negotiate a contract.

The General Counsel argues that DST effectively terminated the July 1, 2001 to June 30, 2004 contract by letter of March 19, 2004, that DST did not become a party to the new contract, effective July 7, 2004 until June 30, 2008, and that the Union refused to bargain in good faith with DST. The Respondent argues that DST never properly terminated the collective-bargaining agreement which expired on June 30, 2004, and was still bound by it, that it failed to show unconditional and un-

[1] The majority says that I have given insufficient weight to the ways DST manifested an intent to be bound to the 2004–2008 contract and have inadequately distinguished applicable caselaw. My colleagues seem to suggest that I am not adhering to the Board's adoption-by-conduct precedent. To be clear, I do adhere to that precedent. As stated above, I apply the test set forth in *E.S.P. Concrete Plumbing,* supra. I simply find, for the reasons explained herein, that DST's conduct, viewed as a whole and in the context of what it said to the Union, failed to manifest an intent to be bound.

[1] All dates are in 2004, unless otherwise indicated.

equivocal intent to withdraw from the multiemployer bargaining unit and by its conduct in conformity with the current bargaining agreement is bound by it, and that the conversion from an 8(f) relationship to a 9(A) relationship had no effect on the agreements.

Analysis

Initially I find Karl's testimony, supported by other evidence, credible that DST had sent the letter, dated March 19, 2004 to the Respondent. The letter informed the Union that for certain reasons Karl "would not be signing any new contracts on or sometime before July 1, 2004." That notification, according to the General Counsel, constituted an effective termination by DST of any further contractual obligations of the multiemployer unit. Generally, a withdrawal from a multiemployer bargaining unit requires that written notice of withdrawal be given which is both timely and unequivocal. *Retail Associates*, 120 NLRB 388 (1958). As observed by the General Counsel, that standard is not applicable to 8(f) relationships dealing with employers engaged primarily in the building and construction industries. At the point in time when DST wrote the letter, it had an 8(f) agreement with the Union. The Board has held that the standard applies to a Section 9 relationship but not to one arising under Section 8(f) of the Act. *James Luterbach Construction Co.,* 315 NLRB 976 (1994). According to that decision the employer is bound by a multiemployer unit only if it was part of that unit prior to the controversy and if it acted to recommit itself to be bound by the new negotiations. The record here does not show that DST had been a member of the multiemployer unit prior to its signing the 2001 to 2004 agreement.

However, the Company's message of March 19, 2004 was not a clear or unequivocal repudiation of the existing bargaining agreement, nor did it in clear and unmistakable language inform the Union that the Company no longer recognized the Union as the employees' bargaining representative, it merely stated that the Employer did not intend to sign a new agreement. Arguably, DST remained obligated to abide by the terms and conditions of the expired contract.

In the meantime, the Respondent adhered to the terms of the new collective-bargaining agreement, even though DST did not participate in the negotiations for a successor agreement. According to the Respondent, Karl also had not formally resigned from the multiemployer unit but displayed a continued involvement with it. For example, the Union sent letters to the Master Insulators Association of Ohio with copies to DST, as a member, about the ongoing negotiations for a new contract (R. Exhs. 2A, 3). Yet DST did not disavow the attempt by the Union to remain connected with it. From 2002 to 2005, the Respondent made contributions to the Asbestos Workers Local 84 benefits funds (Jt. Exh. 3). Among the deductions from the employees' pay were contributions to the Contractors Administrative Fund, as well as deductions for health and welfare, pension, union fees and apprenticeship funds. DST paid the union dues and fringe benefits on the Kent State job, which Karl characterized as public where contractors are required to pay prevailing wages, even though union membership is not required (R. Exh. 9). The Company also accepted referrals through the union hall (R. Exh. 10). Indeed, the Company maintained a correspondence with the Union as if it were a union contractor. For example, as required by the new 2004 agreement, DST informed the Respondent by letter of October 14, 2004 that there will be layoffs (R. Exh. 11). The Company communicated on several occasions with the Union on mutual concerns relating to its employees.

I agree with the Respondent that the overwhelming evidence shows that DST has complied with all aspects of the 2004 agreement. In accordance with the new agreement, DST: (1) in December 2004, paid all relevant fringe benefits as outlined in the Union's letter of August 19, 2004, (2) withheld the 7.5 percent union dues, an increase from the 5 percent in the expired contract, (3) used the exclusive referral procedures, including the Union's out of work list, (4) informed the Union of impending layoffs and disclosed to the Union its bids on nonunion construction jobs. In addition, the Company's president attended the Union's Labor Management Committee Meeting open only to contractually bound employers. Finally, in a dispute about fringe benefits, DST and the Respondent executed a Stipulated Judgment Entry on July 19, 2005 (R. Exh. 14) and by letter of August 8, 2005, DST referred to its compliance with the 2004 contract (R. Exh. 6).

The General Counsel has not disputed any of these contentions, stating that DST was privileged to make unilateral changes following the expiration of the 2001 agreement not chose to follow the wage and fringe benefit increases detailed in the 2004 agreement. The General Counsel referred to Karl's testimony that his reason for complying with the 2004 agreement "was trying to keep up some sort of working communication with the Local to see if we could work this out before it got this far" (Tr. 115). Relying on the Board's decision in *Plasterers Local 337 (Marina Concrete),* 312 NLRB 1103 (1993), the General Counsel argues that DST which lawfully terminated its bargaining obligation to the Union, had the right to comply with the terms of the contract without incurring any contractual obligations and without any inference of an adoption-by-conduct. The employer in that case, however, had informed the Union and the multiemployer unit in timely written and unequivocal notices that it would not be bound in any shape or form by any agreements negotiated between the union and the multiemployer unit. The employer's message was a clear and unequivocal repudiation of its bargaining relationships with the union. According to the Board, the employer manifested every intention not to be bound by either the old or the new agreement.

Here, the Company's president merely informed the Union that it would not sign any new contracts, but left open the questions of whether he would continue to abide by the terms of the expired contract, whether he considered himself to be a member of the Masters Insulator's Association and whether the relationship with the Union was terminated. I agree with the Respondent that DST voluntarily adopted the 2004 successor contract by manifesting its intentions to abide by its terms. *E.S.P. Concrete Pumping,* 327 NLRB 711 (1999). There, the Board held that an employer and a union may enter into a collective-bargaining agreement without having reduced to writing their intent to be bound; instead the formation of the contract is es-

tablished by conduct demonstrating intent to be bound by the terms of the agreement. The Board held that the adoption by conduct principles are equally applicable to 8(f) and 9(a) agreements.

Under these circumstances, I find that DST is bound by the 2004 agreement, and that Karl's repeated requests to bargain with the Union following its certification on April 4, 2005 were properly rejected. In sum, even though the Union's certification resulted in a 9(a) relationship, the Company remained bound by the 2004 contract by virtue of its adoption by conduct. Accordingly, I dismiss the allegations in the complaint.

Based on these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The complaint is dismissed.

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.