

Yorkaire, Inc. and Sheet Metal Workers Local Union No. 19. Cases 4-CA-16100, 4-CA-16199, and 4-CA-16225

November 30, 1989

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND DEVANEY

On July 21, 1987, Administrative Law Judge Thomas A Ricci issued the attached decision concluding that the Respondent had violated Section 8(a)(5) and (1) of the Act by changing the contractual terms and conditions of employment of its sheet metal workers without giving the proper notice to the Federal Mediation and Conciliation Service and the Pennsylvania Bureau of Mediation as required under Section 8(d)(3) of the Act,¹ and by withdrawing recognition from the Union thereafter

The Respondent excepted, arguing, inter alia, that it was free to repudiate the collective-bargaining agreement upon its expiration, in accordance with the principles established in *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd sub nom *Iron Workers Local 3 v NLRB* 843 F.2d 770 (3d Cir 1988)

On December 17, 1987, the Board issued a Notice to Show Cause why the Board should not dismiss the complaint pursuant to the principles established in *Deklewa*. The General Counsel, the Charging Party, and the Building and Construction Trades Department, AFL-CIO, together with the American Federation of Labor and Congress of Industrial Organizations, filed responses

The Board has considered the decision and the record in light of the papers filed by the parties and has decided to affirm the judge's rulings, findings, and conclusions² and to adopt the recommended Order

We find that the Respondent's *Deklewa* exception was untimely raised. The Board issued *Deklewa*, February 20, 1987. The hearing in the in-

stant case was held March 24 and 25, 1987, and the judge's decision issued July 21, 1987. The Respondent did not during the hearing or in its brief to the judge assert that its relationship with the Union was governed by Section 8(f) of the Act. In August 1987, at the exceptions stage of the proceeding, the Respondent contended that the judge failed to consider the application of *Deklewa* to the case

We find that the Respondent has not timely raised its defense that its relationship with the Union was presumptively governed by Section 8(f). See, e.g., *Armour Con-Agra*, 291 NLRB 962 fn 1 (1988), *Ellis Tacke Co*, 229 NLRB 1296 fn 2 (1977). A contention raised for the first time in exceptions to the Board is ordinarily untimely raised and, thus, deemed waived.³

Here, despite the fact that the case was entirely litigated and briefed to the judge after *Deklewa* issued, the Respondent failed to raise the *Deklewa* issue until it filed exceptions with the Board. The Respondent denied the Union's Section 9(a) status in answering the complaint based on employee resignations from the Union and nonmember replacements, and it litigated the case without questioning the status of the Union at times prior to the Respondent's withdrawal of recognition on September 24, 1986. Thereby the Respondent implicitly conceded that the Union enjoyed 9(a) status at least until September 24, 1986.

Consequently, we find that the General Counsel carried the burden of establishing the Union's majority status. The Respondent did not rebut the General Counsel's case and cannot now be allowed to do so on 8(f) grounds that have been untimely raised. We therefore conclude that the relationship between the Respondent and the Union is governed by Section 9(a) of the Act.

AMENDED CONCLUSIONS OF LAW

1 By changing the terms and conditions of employment of its sheet metal workers in August 1986 without giving the proper notice in advance to the Federal Mediation and Conciliation Service and the Pennsylvania Bureau of Mediation, the Respondent has violated and is violating Section 8(a)(5) and (1) of the Act.

2 By withdrawing recognition from the Union in September 1986, the Respondent has violated and is violating Section 8(a)(5) and (1) of the Act.

¹ The judge concluded, inter alia, that the Respondent violated Sec 8(d) of the Act. We note that Sec 8(d) defines the obligation to bargain collectively. It is not itself an unfair labor practice section of the Act. See *Accurate Die Casting Co*, 292 NLRB 284 fn 5 (1989). In addition the judge failed to conform his formal Conclusions of Law to his statement in the decision that the Respondent's changing terms and conditions of employment of its employees without serving proper notice in advance to the requisite mediation services violated Sec 8(a)(5) and (1) of the Act. We correct this oversight.

² Member Cracraft concurs in her colleagues' adoption of the judge's finding that by changing its sheet metal workers terms and conditions of employment in August 1986 without giving proper notice to FMCS and the Pennsylvania Bureau of Mediation, the Respondent violated Sec 8(a)(5) and (1) of the Act. However, she does not pass on whether she would find a violation of the Act had the Union, as noninitiating party, given timely 8(d) notice not only to FMCS but also to the appropriate state agency.

³ *Ron E Savoia Construction Co*, 289 NLRB 200 (1988), is inapposite because the case was already pending on exceptions to the Board when the decision in *Deklewa* issued. Member Cracraft, who dissented in *Savoia*, finds it unnecessary to distinguish that case.

3 The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge⁴ and orders that the Respondent, Yorkaire, Inc, York, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order

⁴ In so doing, we note that the Respondent's liability for loss of earnings from fringe benefits does not include industry advancement funds. As industry advancement funds are permissive, nonmandatory subjects of bargaining, it is not an unfair labor practice for an employer unilaterally to discontinue its contributions to such funds. *American Thoro-Clean*, 283 NLRB 1107, 1109 (1987). This matter may be resolved at the compliance stage of this proceeding.

Barbara C Joseph, Esq, for the General Counsel
Thomas R Davis, Esq and *Harry R Harmon, Esq*
(Harmon & Sears), of Lancaster, Pennsylvania, for the Respondent
Ira Silverstein, Esq (Spear, Wilderman, Sigmond, Borish, Endy & Silverstein), of Philadelphia, Pennsylvania, for the Charging Party

DECISION

STATEMENT OF THE CASE

THOMAS A RICCI, Administrative Law Judge. A hearing was held in this proceeding at York, Pennsylvania, on 24 and 25 March 1987, on complaint of the General Counsel against Yorkaire Mechanical Contractors, a/k/a Yorkaire, Inc (the Respondent or the Company). The complaint issued on 29 December 1986, based on charges filed on 29 September and 7 and 20 November 1986, by Sheet Metal Workers Local Union No 19 (the Charging Party or the Union). The issue presented is whether the Respondent violated Section 8(a)(5) of the Act by unilaterally changing conditions of employment. Briefs were filed by all parties.

On the entire record and from my observation of the witnesses I make the following¹

FINDINGS OF FACT

I THE BUSINESS OF THE RESPONDENT

Yorkaire, Inc, a Pennsylvania corporation, is engaged in the installation of sheet metal fabrication. During the 12-month period before issuance of the complaint in the course of its business it received gross revenues in excess of \$500,000 and during the same period of time it purchased and received materials and supplies valued in excess of \$50,000 directly from locations outside the Commonwealth of Pennsylvania. I find that the Respondent is an employer within the meaning of the Act

¹ Separate motions by the General Counsel and the Respondent to correct inadvertent errors in the record transcript, unopposed, are granted.

II THE LABOR ORGANIZATION INVOLVED

I find that Sheet Metal Workers Local Union No 19 is a labor organization within the meaning of Section 2(5) of the Act

III THE UNFAIR LABOR PRACTICES

Yorkaire Mechanical Contractors uses two categories of employees—sheet metal workers and pipefitters. At the time of the events that gave rise to this proceeding it had on its payroll about six or seven sheet metal workers. For some years these had been represented by Local 19, the Union here, under successive collective-bargaining agreements. The last contract in effect covered the period 2 June 1984 to 31 May 1986. It was a multiemployer association contract, of which the Respondent was an integral part.

In January 1986 the Respondent withdrew from the Association and advised the Union that it wished to bargain directly and independently of the Association. The Union agreed. The parties met in negotiation three times, on 3 June, 25 June, and 13 August. There was no agreement and that same day, 13 August, the Respondent advised the Union that it intended to put in effect all conditions of employment which it had failed to convince the Union to accept. On 23 August it did that. The changes were extreme. Apart from small variances on matters of minor consequence, the principal change made—the one that had been the main bone of contention between the parties—was a reduction in pay, from the \$21.65 per hour which the employees had been receiving under the terms of the old contract, to \$14 per hour.

The Respondent never gave notice to the Federal Mediation and Conciliation Service (FMCS) or to the Pennsylvania State Mediation Agency of its intent to change the conditions of employment, until long after it had so drastically altered the terms under which the employees worked.

The complaint now alleges that the Respondent violated the statute on two separate grounds. (1) Despite its desire and intent to modify the existing contract, it did so without first giving the statutory requisite 30-day notice to the FMCS and Pennsylvania State Mediation Agency. (2) It failed to bargain in good faith with the Union, and thereby violated Section 8(a)(5) of the Act when it unilaterally changed all the conditions of employment and bypassed the established majority representative of its employees.

As the facts set out below will show the Respondent clearly violated Section 8(d) of the Act when it implemented what it called its last offer to the Union, or in the language of the statute, when "it modified the terms of the contract then still in effect." If only because it admittedly took this unilateral action without first giving the requisite 30 days' notice to the FMCS and the Pennsylvania State Mediation Agency, it committed an unfair labor practice that day. It may be that it also violated Section 8(a)(5) because an honest impasse had in fact not been reached in the bargaining that had taken place. In my considered judgment this second theory of complaint is also supported by the evidence. But no useful purpose will be served by detailing in this decision all the record

facts related to that aspect of the case. Even if the second theory were found to be correct, the remedy would still be the same.

Section 8(d) provides, in pertinent part, that

where there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(3) notifies the Federal Mediation and Conciliation Service within 30 days after such notice of the existence of such a dispute and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the state or territory where the dispute occurred, provided no agreement has been reached by that time, and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of 60 days after such notice is given or until the expiration date of such contract, whichever occurs later.”

When, in August 1986, the Respondent changed unilaterally all the conditions of employment, there was still “in effect” a collective-bargaining contract between the parties. The contract which took effect in 1984 read as follows:

Section 1 This agreement shall become effective on the first day of June, 1984 and remain in full force and effect until the last day of May, 1986, and shall continue in force from year to year thereafter unless written notice of reopening is given not less than 90 days prior to the expiration date. In the event such a notice of requested reopening is served, this agreement shall continue in force and effect until conferences relating thereto have been terminated by either party.

Clearly there was a contract “in effect” when the Respondent violated Section 8(a)(5) by modifying it without first giving notice to the FMCS and the Pennsylvania State Mediation Agency. On the face of things the Respondent committed the unfair labor practice alleged. Its defense is that it was the Union which first desired to change the conditions of employment, that it was the Union which first gave notice of such intention, and that, therefore, because the Union was the “initiating party” to the idea of changes, it was its duty to comply with the requirements of Section 8(d) and not the Respondent’s.

As set out above the last contract between the Respondent and the Union was a multiemployer agreement, between the Sheet Metal Contractors’ Association of Central Pennsylvania and Local Union No. 19. It was due to expire on 31 May 1986, with explicit provision that in the event either party requested reopening of the contract the agreement was to “continue in force and effect” until the subsequent bargaining ended. On 27 Jan-

uary 1986 the Respondent wrote to the employer association resigning from that organization and withdrawing all authorization to bargain on its behalf, “effective immediately.” By letter dated the same day it also wrote to the Union, informing it that it had withdrawn from the association and stating its intention to bargain individually with the Union. It is the contention of the Respondent in this proceeding that because neither of the two letters used the word “modify,” it of necessity follows that the Respondent did not thereby reveal an “intent” to change the terms of the old contract. The facts of record completely belie the assertion.

By chance, on the very same day—27 January 1986—the Union also wrote to the Employer Association, advising it that it sought “to terminate and/or modify” the about-to-expire contract. The Respondent now contends that this Union letter of 27 January must be viewed as a notice to it—the individual Respondent Company—of the Union’s intent to change the terms and conditions under which these employees—working for the Respondent—were to work under a new contract. This position rests entirely upon the fact that the Union, in writing to the Association, used the word “modify,” whereas the Respondent’s letter to the Union spoke only of “concerning contractual negotiations.”

When the Union wrote to the Association on 27 January the Respondent was no longer a member of the multiemployer group. It had withdrawn the same day. What the Union’s letter referred to, when it spoke of “our present collective-bargaining agreement which expires on May 31, 1986,” was the Association contract. It stated intent as to the future therefore meant what terms and conditions of employment were to follow that contract, and not any other. The Respondent no longer being a member of the Association it follows that the Union’s letter had nothing to do with the Respondent Company. It was not until 24 February, a month after the Respondent’s initiating letter, that the Union wrote to the Respondent about modifying whatever new agreement might be made separately with it.

Moreover, the Union could not know—as early as January 1986—what its demands upon this employer could be the day the two should meet in negotiations. Its position always has been, to start all negotiations first with the Association, a contract that really covers hundreds and hundreds of members of the Union. Only after those negotiations are completed does the Union meet with small, separate employers who desire separate contracts. The Respondent’s total of about six or seven sheet metal workers could hardly have been of moment to the Union at that time.

As to the argument that because the Respondent’s letter to the Union of 27 January speaks only of prospective negotiations while the Union’s letter of 24 February speaks of modification, the complaint against the Respondent must be dismissed, I view it all as but a play on words. It ignores the substantive meaning of the statutory requirement.²

² See *Mar Len Cabinets*, 243 NLRB 523 (1979). A letter requesting contract negotiations towards a new agreement is the equivalent of an intent to “terminate” the old agreement, and therefore makes the sender the initiating party.

The very purpose of Section 8(d) is to alert the mediation services—Federal and state—to the possibility of an industrial strike when the parties to the collective-bargaining process are in serious dispute. If the FMCS and the state agency can step into the picture, peace may take the place of financial hurt both to the employees and the employer. Was this a case where such a danger should have been anticipated? Restated: Was it the intention of the Respondent, when it withdrew from the association and told the Union it wished to bargain separately, to change, or “modify” the terms and conditions under which its sheet metal workers were to work? If there is one thing this record proves beyond doubt, it is a “yes” to that question.

Again and again at the hearing the Respondent’s principal witness admitted the Company could not remain in business at all if it had to pay the ordinary union wages. The reason why it withdrew from the Association was exactly in order to demand, and insist upon, a lower wage scale it knew the Union would never concede to the industry as a whole. Actually, it is enough to look at its initial wage cut demand—about 33 percent—to appreciate the Respondent’s position from first to last. For 2 years, under the old contract, labor for sheet metal workers have been costing it \$21.65 per hour—\$16 in direct payment to the employee and \$5.65 indirect payment for fringe benefits. At its first meeting with the Union’s representatives the Respondent said the total amount had to be reduced to \$13.50 per hour. During the two meetings which followed it never deviated from that fixed demand. Although the Company agents referred to that one single payment as a “total package,” they never really explained in what manner the fringe benefits were to be covered. They spoke of \$1 out of the total package as being intended to replace all the \$5.65 for fringe benefits in the past, but never explained exactly how they were suggesting all that be arranged. All this proves is that the Respondent had, from first to last, but one idea in mind—to cut the wages by 33 percent. It was not until the last minute of the third and last meeting between the parties on 13 August that it raised its offer to \$14 total package per hour.

As already explained above no useful purpose would be served by restating here all the details of evidence, which, according to the General Counsel, are sufficient to prove that the few meetings between the parties did not justify the unilateral action taken by the Respondent on 23 August. If she is right, the Respondent violated Section 8(a)(5) of the Act entirely apart from having failed in its duty, under Section 8(d), to serve notice on the FMCS and the Pennsylvania state agency.

On 24 September the Respondent formerly withdrew recognition from the Union. In either event, the remedy would be the same. I therefore shall ignore that collateral allegation in the complaint. Were I to consider it on its merits, I would find the violation as alleged if only because the Respondent’s initial request for bargaining was for a meeting after 31 May, the first meeting of the parties actually took place on 3 June, on 3 June the parties exchanged detailed proposals, the Company came up with 12 changes in the contract and the Union with 7 or 8, and all were mutually explained, when the parties met

again on 25 June there was very little talk because the union president was busy with larger negotiations with companies having many more unionized employees than the Respondent’s six or seven sheetmetal workers, at the last meeting of 13 August again the proposals and counterproposals were discussed, and the Union came up with a number of concessions to the Respondent in response to its insistence that economic conditions required them, in the face of all this the Respondent never varied from each of its demands, it never explained how, and to what extent it intended to utilize the \$1 per hour that was to go towards all the fringe benefits, when it claimed impasse and put its proposals in effect, one of them at least—the health insurance program—was not the one it had offered to the Union at the meeting.

On 13 August, the day of its last meeting with the union agents, the Respondent announced it would put in effect its \$14 total package in replacement of the existing conditions of employment of the old contract still in effect. It told its employees of its intent the next day, and on 25 August it did exactly that.

I find that the Respondent was the initiating party to the intended modification of the old contract. And I find that because it had never served notice upon either the FMCS or the Pennsylvania state agency of its intent to terminate and change the old contract before initiating those changes, the Respondent violated Section 8(d) of the Act *Weather Craft Co of Topeka*, 276 NLRB 452 (1985). In September the Respondent formally withdrew recognition from the Union as the exclusive bargaining representative of the employees in the appropriate unit. Because it was currently violating the statute in a very substantial sense, I find that such denial of recognition to the established bargaining agent was a further violation of Section 8(a)(5).

As the Respondent had so drastically lowered the wage scale in violation of the statute, some of the sheet metal workers refused to work—and went on strike. I find that that strike was an unfair labor practice strike.

In the light of the unfair labor practices here found, the Respondent must be ordered to resume bargaining with the Union in good faith, to make whole its sheet metal workers for any deductions in pay and fringe benefits due them under the old contract which were denied them starting on 25 August 1986, and to post the appropriate notices. At the hearing there was talk of the Respondent and the Union having resumed their bargaining a few days earlier, in an attempt to remedy all the disputes and claims that resulted from the events of 1986. I do not know the facts about what happened there or since. If the parties have reached an amicable adjustment of their differences, good. I will leave all that to be investigated in the compliance stage of this proceeding.

IV THE EFFECT OF THE UNFAIR LABOR PRACTICES ON COMMERCE

The activities of the Respondent set forth in section III, above, occurring in connection with the operations of the Respondent described in section I, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States, and tend to lead to

labor disputes burdening and obstructing commerce and the free flow of commerce

THE REMEDY

The Respondent must be ordered to cease and desist from again committing the unfair labor practices found herein. It must be ordered to make whole its sheet metal workers for any reductions in pay, and loss of fringe benefits, they suffered in consequence of the Respondent's unlawful action in implementing its 1986 offer to their union. The Respondent must also post the usual appropriate notices.

CONCLUSIONS OF LAW

1 By changing the terms and conditions of employment of its sheet metal workers in 1986 without serving the proper notice in advance to the Federal Mediation and Conciliation Service and the Pennsylvania Bureau of Mediation the Respondent has violated, and is violating Section 8(d) of the Act

2 By withdrawing recognition from the Union in September 1986 the Respondent has violated, and is violating Section 8(a)(5) of the Act

3 By the foregoing conduct the Respondent has violated, and is violating, Section 8(a)(1) of the Act

4 The above-described unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³

ORDER

The Respondent, Yorkaire, Inc., York, Pennsylvania, its officers, agents, successors, and assigns, shall

1 Cease and desist from

(a) Changing the terms and conditions of employment of its sheet metal workers represented by Sheet Metal Workers Local Union No 19, without first serving the appropriate notices upon the Federal Mediation and Conciliation Service and the Pennsylvania Bureau of Mediation

(b) Withdrawing recognition from the Sheet Metal Workers Local Union No 19 as the bargaining representative of its sheet metal workers

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization, to form, join or assist Sheet Metal Workers Local Union No 19, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection as guaranteed in Section 7 of the Act, or to refrain from any and all such activities

³ 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

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

(a) Make whole its sheet metal workers for any loss of earnings, either in the form of direct pay or fringe benefits, they may have suffered in consequence of the Respondent's unlawful action in reducing those benefits in August 1986, with interest thereon to be computed in the manner prescribed in *F W Woolworth Co.*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987)

(b) On request, bargain with Sheet Metal Workers Local Union No 19 as the exclusive representative of its sheet metal workers

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order

(d) Post at its place of business in York, Pennsylvania, copies of the attached notice marked "Appendix"⁴. Copies of the notice, on forms provided by the Regional Director for Region 4, 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

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

⁴ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board"

APPENDIX

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

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

WE WILL NOT alter the terms and conditions of employment of our sheet metal workers represented by the Union without first serving the appropriate notices upon the Federal Mediation and Conciliation Service and the Pennsylvania Bureau of Mediation

WE WILL NOT refuse to bargain with Sheet Metal Workers Local Union No 19, as the exclusive representative of our sheet metal workers

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

WE WILL make whole our sheet metal workers for any loss of pay or fringe benefits they may have suffered by reason of our having altered their terms and conditions of employment illegally in August 1986

WE WILL, on request, bargain in good faith with Sheet Metal Workers Local Union No 19, as the exclusive representative of our sheet metal workers

YORKAIRE, INC