North American Refractories Company, a Division of Eltra Corporation *and* United Brick and Clay Workers of America, AFL-CIO. Case 9-CA-10785 (formerly 14-CA-9487)

September 27, 1978

DECISION AND ORDER

On April 17, 1978, Administrative Law Judge Sidney J. Barban issued the attached Decision in this proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.[1]

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith.

The Administrative Law Judge found the "joint industry group," as constituted during the joint negotiations in 1976, to be an appropriate multiemployer bargaining unit within the meaning of Section 9(b) of the Act, and that the Respondent's withdrawal of its operations at Ironton, Ohio, from the multiemployer bargaining unit and its refusal to apply the 1976-79 joint agreement on behalf of the Ironton plant violated Section 8(a)(5) and (1) of the Act. The Respondent has excepted to these findings. We agree with the Administrative Law Judge's finding that the joint industry group is an appropriate multiemployer bargaining unit. However, we find merit in the Respondent's exception to the Administrative Law Judge's finding that the Respondent violated Section 8(a)(5) and (1) of the Act, for the reasons discussed below.

The Respondent, North American Refractories Company, has bargained with the United Brick and Clay Workers of America (hereinafter Union) since the early 1950's in a joint industry group consisting of approximately 6 to 12 employers in the refractories industry. A number of the employers, including the Respondent, operate several plants, some of which are represented by the Union, and others of which are unrepresented or represented by another union. Each plant of each employer which is represented by the Union is represented by a separate local of the Union. In the case of the Respondent, the Union represents four units of employees at plants located in Curwensville, Pennsylvania (Local Union No. 448); Farber, Missouri (Local Union Nos. 858 and 950); and Ironton, Ohio (Local Union No. 910).

Toward the end of each joint contract term, those employers who wish to engage in joint bargaining with the Union gather together and appoint a chairman, who then serves as the chief negotiator during the negotiations for the joint industry group. Those employers who participated in joint bargaining for the prior contract term, but who wish not to be bound by further joint negotiations, formally withdraw all of their plants from such negotiations in a timely and unequivocal manner. In addition, at the outset of joint negotiations, the chairman of the joint industry group announces which individual plants of each participating employer will be included in that year's joint negotiations.

When agreement is reached between the joint industry group and the Union over economic terms and conditions to be applicable to all employers participating in the group, the terms are embodied in a "memorandum of agreement" which is signed by the chairman of the joint industry group and representatives of the Union. Each local union then bargains with each employer over local conditions applicable only to individual plants. The locals then voted on whether to ratify the joint and local agreements.

The instant case arose prior to the onset of the 1976 joint negotiations. By letter dated May 19, 1976, the Respondent advised the Union, as well as the five other employers who had negotiated jointly in 1974, that the Respondent would participate in the 1976 joint negotiations, but that "the Ironton, Ohio, plant is withdrawn from industry negotiations because of our concern that the economic impact of an industry settlement will adversely affect the continuance of operation. We stand ready to enter into separate good faith collective bargaining with the representatives of Local Union 910 [the Ironton Local]. . . ." The Union thereafter advised the Respondent that it objected to the withdrawal of Ironton, and that it would not agree to any terms for Ironton which were less than those negotiated in joint industry bargaining in 1976. The Union then filed the charge in the instant case.

The Respondent held several meetings with the Union, Local 910, and the employees at Ironton, seeking to persuade them that Ironton would close unless the facility was granted special contract terms. However, the Union refused to agree to the Respondent's demands. Thereafter, on August 25, 1976, the chairman of the joint industry group and the Union signed a memorandum of agreement covering the term 1976-79, with the Ironton plant excluded. On or about the same day, the Respondent announced the closing of the Ironton plant.

The Union then filed another charge with the Board alleging that the Respondent had closed the Ironton plant in order to discourage membership in the Union and to retaliate for the Union's prior unfair labor practice charges against the Respondent. The Regional Director refused to issue a complaint, as his investigation revealed that "the Employer consis-

[1] The Respondent has requested oral argument. This request is hereby denied, as the record, the exceptions, and the brief adequately present the issues and the positions of the parties.

tently took the position that the economic situation at the Ironton, Ohio, plant was such that it could not afford to continue that plant in operation under the terms and conditions of the industry contract settlement . . . [and] that on June 17, and 18, 1976, the Employer presented its economic arguments in support of its position to the employees and the Union representing them at the Ironton plant . . . ."The Regional Director concluded that the plant was closed "for the economic reasons of which the Union was advised in advance and in detail on a number of occasions between June 16 and August 23, 1977." The Regional Director's dismissal was subsequently upheld by the General Counsel's Office of Appeals.

In finding that the Respondent's withdrawal of the Ironton plant from the multiemployer bargaining unit and the refusal to apply the 1976-79 joint agreement to the Ironton plant violated Section 8(a)(5) and (1) of the Act, the Administrative Law Judge cited the Board's "consistently stated" principle that "under ordinary circumstances, the Board does not permit an employer to withdraw only a part of his operation from a multiemployer unit while leaving the remainder in the multiemployer unit."[2] According to the rationale of the Administrative Law Judge, to permit the Respondent to alter the character of the multiemployer bargaining unit at its discretion would "make it very difficult or impossible to achieve the uniform conditions of employment conducive to labor relations stability in the industry." The Administrative Law Judge rejected the Respondent's assertion that the economic condition of the Ironton plant constituted a special circumstance justifying its withdrawal from the multiemployer unit and distinguished the Board's decisions in *Spun-Jee Corp. and The James Textile Corp.*,[3] and *U.S. Lingerie Corporation*,[4] because those cases dealt with the untimely withdrawal of an employer's *entire* operation, for economic reasons, from a multiemployer unit.

Contrary to the Administrative Law Judge, we find that the economic condition of the Ironton plant distinguishes this case from the "ordinary circumstances" under which we would deny an employer the right to withdraw only a part of its operation from a multiemployer bargaining unit while leaving the remainder of its operation within the unit.[5] The Respondent, in a timely and unequivocal manner, notified the Union prior to the onset of 1976 joint negotiations that it was withdrawing the Ironton plant because that plant could not survive the economic effects of an industry settlement. The Respondent repeatedly attempted to negotiate a separate settlement with the Union covering Ironton, and on several occasions, presented the facts regarding the economic condition of that plant to representatives of the Union, Local 910, and the employees. The Union, however, insisted upon the inclusion of Ironton in the joint negotiations. When the Union refused to agree to a separate, no-cost agreement covering Tronton, and when the joint agreement was reached in late August, the Respondent closed the Ironton plant. In light of these facts, and in view of the Regional Director's dismissal of the unfair labor practice charge alleging that the closing of Ironton violated Section 8(a)(5) of the Act, we do not adopt the Administrative Law Judge's finding that "there is no direct evidence as to the exact economic situation at Ironton in this record, though it may be inferred from the fact of its closing that it was not profitable." In fact, the Regional Director found that Ironton was closed in late August 1976 for valid economic reasons, and that the Respondent had presented its economic justification for closing Ironton to the Union and the employees in June 1976. In addition, the Union presented no evidence in the instant case to dispute the poor economic status of the Ironton plant. Since business entities do not go out of business overnight, we assume that the Respondent had a valid economic justification in May 1976 for announcing its intention to exclude the Ironton plant from the 1976 joint negotiations and seeking a separately negotiated settlement covering Ironton.

The Administrative Law Judge attempts to rationalize his economic finding regarding the Ironton plant by noting that if we were to allow the Respondent to refuse to apply the 1976-79 joint agreement to the Ironton plant, we would be permitting the Respondent "at its discretion to alter the character of the bargaining confrontation to its own advantage and to disrupt the bargaining process by so gerrymandering

[2] *Pacific Coast Association of Pulp and Paper Manufacturers*, 163 NLRB 892, 897 (1967). There, a union attempted to withdraw two of four plants owned by a single employer from a multiemployer bargaining unit. The Board reasoned that inasmuch as employers were not permitted to withdraw partially from multiemployer bargaining units, neither could unions. This principle regarding employers was apparently derived from *Coca-Cola Bottling Works*, 91 NLRB 351 (1950), and *Pioneer, Inc.*, 90 NLRB 1848 (1950). Each of those cases dealt with a petition by a union for severance of certain employees of a single employer which was part of an established multiemployer bargaining unit. The petition in each case was dismissed because the petitioned-for unit was not coextensive with the multiemployer unit. The Board reasoned in both cases that since the employer's attempt, before the petition was filed, to withdraw those same employees in the petitioned-for unit from the multiemployer unit was impermissible, then the union's petition for a unit of those employees allegedly withdrawn was also impermissible. The only other case where the Board has applied its principle regarding partial withdrawal from multiemployer bargaining units is *Commercial Automotive Corp.*, 169 NLRB 394 (1968). There, an employer's attempted withdrawal from a multiemployer bargaining unit of one of its garages *after* negotiations had begun, for the stated reason that it had a good-faith doubt that the union still represented a majority of employees in the garage, was held invalid. Thus, the Board has never before faced the question presented by the instant case: namely, can an employer withdraw only a part of its operation from a multiemployer bargaining unit, in a timely manner, and for valid economic reasons?

[3] 171 NLRB 557 (1968).

[4] 170 NLRB 750 (1968).

[5] *Pacific Coast Association, supra* at fn. 2.

the unit as to make it very difficult or impossible to achieve the uniform conditions of employment conducive to labor relations stability in the industry."

Under the circumstances of this case, however, the Respondent's refusal to apply the 1976-79 joint agreement to the Ironton plant did more to *promote* the stability of the multiemployer unit than to detract from it. Under established Board law, the Respondent could have withdrawn its entire operation, in a timely and unequivocal manner and for any reason whatsoever, from the multiemployer bargaining unit.[6] In the present case, the Respondent withdrew only one plant which employed 33 employees and which was in imminent danger of economic collapse. However, it continued to bargain on a multiemployer basis for its two other plants, which employ 167 employees. Clearly, a total withdrawal, as required by the Administrative Law Judge's rationale, would certainly have had a more serious adverse impact on the stability of the multiemployer unit than the partial withdrawal sought by the Respondent.

The history of negotiations between the joint industry group and the Union provides further justification for the Respondent's refusal to apply the 1976-79 joint agreement to the Ironton plant. The record reveals that employers have freely withdrawn in whole or in part from the joint negotiations. For example, in 1960, General Refractories, a member of the multiemployer bargaining unit, bargained for over 12 different local plants. In 1962, it withdrew two plants, but added two others, and in 1963 it withdrew three more plants. In 1964, it withdrew entirely from joint bargaining, but it returned in 1966, adding two more plants than had been included in the 1963 negotiations, but withdrawing five others. In 1969 and 1972, it withdrew one plant each year. There was no change in the number of plants it included in joint bargaining in 1974 and 1976. Thus, from the original 12 plants in 1960, General Refractories included only 4 as part of the multiemployer unit in 1976. Similarly, Harbison-Walker, another member of the joint industry group, began with six plants in 1960, but it included only three plants in the 1976 joint negotiations.

According to Thomas Crowe, International vice president of the Union, the reason for such fluctuations was that the employers would drop local plants from one year to the next because of plant closings or "something of that nature." In the case of the Respondent, it withdrew its Ironton plant in 1963 because it was damaged by fire. In 1964, the Respondent withdrew entirely from joint bargaining, but when it returned in 1966 and 1969, the Respondent refused to include in joint negotiations its plant at Strasburg, Ohio, because that plant was in poor economic condition.[7] The Strasburg plant subsequently closed in the early 1970's. In 1972, the Respondent again withdrew the Ironton plant from joint negotiations, but after the Union filed an unfair labor practice charge alleging that the withdrawal was *untimely,* the Respondent agreed to include Ironton and the charges were dropped.

Clearly, the historical expansion and contraction of the number of plants included in joint bargaining by each employer has not affected the stability of the multiemployer bargaining unit since its creation in the early 1950's. There is no reason to believe that the withdrawal of Ironton from the 1976 joint negotiations would have had a more serious impact on the multiemployer unit than the multitude of similar withdrawals which have occurred over the years. The clearest proof that the stability of the multiemployer unit was not adversely affected by the withdrawal of Ironton is that the joint industry group and the Union reached a joint agreement covering the 1976-79 period prior to the expiration of the 1974-76 joint agreement.

Finally, the facts in this case fall squarely within the legal conclusion reached by the Board in *Spun-Jee Corp., supra.* In that case, the Board found that the following factual circumstances justified the *untimely* withdrawal from a multiemployer bargaining unit, by several employers, of their *entire* operation:

> After two meetings between the Union and Association in late April and early May, at which the Union presented and pursued its contract demands, Respondent's President Pillet sought out Union Business Manager Schoenwald, explained to him the Respondents' economic problems and requested a 1-year extension of the contract for the Respondents' benefit regardless of the outcome of association bargaining. When Schoenwald refused to give Respondents the benefit of any separate or different treatment, Pillet replied that his back was to the wall and that unless he received such an extension he would have to terminate the present enterprise . . . .
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> Respondents subsequently closed out the New York operation . . . and transferred the buying and selling aspects of the business to . . . New Jersey. . . .

From the facts recited it is thus apparent that

[6] *Retail Associates, Inc.,* 120 NLRB 388 (1958).

[7] In fact, in a letter dated June 21, 1969, from Earl Bellow, the Union's general secretary-treasurer, to E. A. Williams, Jr., Respondent's vice president of operations, in which the Union acknowledged the withdrawal of Strasburg, the Union also stated that "as you know we have no way of forcing the company to negotiate in joint negotiations for each and every local, however you may be assured that we do not intend to settle for any less at Strasburg, than we do in the refractories negotiation."

> the Union was aware, having been so informed by the Association even before the commencement of new contract negotiations, that employers in this industry in the New York area were facing a difficult economic situation, and that to meet this exigency they were seeking a measure of forbearance by the Union in contract negotiations. After it had become apparent that such forbearance would not be accorded to the Association, the Respondents separately advised the Union that their own economic distress was such that without the special consideration which they sought—continuance of their own operations under the existing contract regardless of Association bargaining—they could not continue to operate their business in the New York area. On its part the Union, throughout all this, gave essentially one answer . . . to the Respondents that it would insist upon the acceptance of the contract eventually reached with the Association.[8]

Clearly, then, the economic condition of the Ironton plant in 1976 was sufficient to meet the Board's criteria for *untimely* withdrawal from a multiemployer bargaining unit had Ironton been the only plant of the Respondent within the multiemployer unit. We see no reason to apply a different standard here, where the Respondent sought to exclude from the bargaining unit, in a timely manner, only one of its plants which was in "*dire* economic circumstances,"[9] but to leave its remaining plants, which were functioning economically, within the bargaining unit.[10]

Therefore, we find that the Respondent's timely refusal to include its Ironton plant in the 1976 joint negotiations and to apply the 1976-79 joint agreement to the Ironton plant, based upon valid economic reasons, did not violate Section 8(a)(5) and (1) of the Act. Accordingly, we shall dismiss the complaint in its entirety.

ORDER

It is hereby ordered that the complaint herein be, and it hereby is, dismissed in its entirety.

DECISION

Statement of the Case

Sidney J. Barban, Administrative Law Judge: This matter was heard in Cincinnati, Ohio, on June 30, 1977, upon a complaint issued on August 23, 1976, based on a charge filed by the above-named Charging Party (herein called the Union) on July 16, 1976. The complaint alleges that the above-named Respondent, at times material to this proceeding, was a member of an employer group which represented its members in collective bargaining with the Union for a unit of employees consisting of employees of such members, and that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally withdrawing its plant at Ironton, Ohio, from the multiemployer unit set forth, and refusing to bargain with the Union with respect to that plant as part of such unit. Respondent's answer denies the allegations set forth above and denies the commission of the unfair labor practices alleged but admits allegations of the complaint justifying the assertion of jurisdiction under current standards of the Board. (Respondent, engaged in the manufacture, sale, and distribution of fire brick and other refractory products at its plants in Missouri, Pennsylvania, and Ohio, during a recent annual period shipped products valued in excess of $50,000 directly in interstate commerce from said plants.)

Upon the entire record in this case,[1] from observation of the witnesses, and their demeanor, and upon consideration of the briefs filed by General Counsel, the Union and the Respondent, I make the following:

Findings and Conclusions

I. THE ISSUES

Respondent argues that Respondent did not refuse to bargain in violation of the Act by withdrawing one of its three facilities from multiemployer bargaining with the Union in 1976, asserting that:

1. The record does not establish a multiemployer bargaining unit within the Board's criteria, contending that reservation to the individual locals of the Union of the right to

[8] 171 NLRB at 557-558. See *U.S. Lingerie Corp., supra* at fn. 3.

[9] *Hi-way Billboards, Inc.*, 206 NLRB 22, 23 (1973). There, the Board stated that "unusual circumstances" permitting an untimely withdrawal from a multiemployer bargaining unit has been limited to situations in which "the withdrawing employer is faced with *dire* economic circumstances, i.e., circumstances in which the very existence of an employer as a viable business entity has ceased or is about to cease."

[10] In this regard, we note that the Ironton plant was a distinct and separate portion of the Respondent's entire operation. The Respondent's plants at Farber, Curwensville, and Ironton were separated by several hundred miles. There was almost no interchange of personnel among the three plants, and employees at each plant worked under entirely separate supervision and working conditions. In addition, there was no functional or divisional relationship among the manufacturing processes at the three plants, although there was some movement of raw materials and equipment among the plants. The record further reveals that the Ironton plant had a different process for manufacturing its products which entailed substantially higher labor and fuel costs than the other two plants. In fact, in 1972 Ironton was about to be closed, but was saved only because of an increased demand for refractories from the steel industry, one of its primary customers. By 1975, the demand for refractories from the steel industry had declined, and the cost of fuel had skyrocketed, thereby placing Ironton in a precarious economic state once again. These facts, combined with the history of frequent openings and closings of plants in the refractories industry, indicate clearly that the Respondent was not attempting "to alter the character of the bargaining confrontation to its own advantage." Rather, the Respondent in good faith sought to salvage a distinct portion of its operation which was in imminent danger of economic collapse. After failing to achieve the cooperation of the Union in its efforts, it lawfully closed the Ironton plant.

[1] Respondent's motion to correct the record in this case, which is unopposed, is granted.

Included in the record in this case are the transcript and exhibits from the Board's files in *Harbison-Walker Refractories Co., et al.*, 14-RC-7048, which is sometimes referred to herein as the "representation case."

ratify (or reject) the results of such multiemployer bargaining, and the "changes in the makeup of the Industry Group" are inconsistent with a multiemployer unit. (Br., pp. 5, 18-24.)

2. The economic condition of the Ironton plant justified its withdrawal from multiemployer bargaining without the Union's consent, and, assertedly, that such withdrawal would not affect the stability of the multiemployer unit. (Br., pp. 5, 25-31.)

3. The Union had waived any right to object to such withdrawal by assertedly conceding to similar withdrawals in the past. (Br., pp. 5, 33-37.)

II. THE BARGAINING PATTERN

A. *In General*

Since at least the early 1950's, certain large or significant employers in the refractories industry have bargained as a group[2] with the Union for employees of those employers represented by the Union. It appears that the Union has established local unions to service each unit of employees at each plant or operation of such employers.

It has been the practice of the Union, prior to the termination of its bargaining contracts with the employers participating in the Joint Industry Group, to notify each employer with respect to each of the employer's facilities that the Union desired to enter into negotiations for a contract to succeed those then in effect.[3]

Since at least 1956, toward the end of each previous contract term, the Joint Industry Group (except as discussed hereinafter) has met with the Union in St. Louis and Pittsburgh to bargain for economic terms and conditions to be applicable to all the employers participating in the group. These economic terms and conditions agreed to during such bargaining constitute what it referred to in the record as the "national agreement" or the "basic agreement." It has been customary for such agreed terms (the basic agreement) to be embodied at the end of the group bargaining in a written "memorandum of agreement," signed by the chairman of the Joint Industry Group for all those employers participating in the bargaining and by the Union. These memorandums of agreement customarily provide that the terms of the previous agreements shall be continued for the term of the new contract except for the changes agreed at the bargaining table.

However, local conditions, applicable only to individual plants, are negotiated separately between the individual employer concerned and the Union and the union local involved. When the basic agreement (containing the economic conditions applicable to all the participating employers) and the local agreement affecting the plant involved have been ratified by the union local concerned, as discussed below, the terms of the basic agreement and the local agreement are embodied in a single document applicable to that plant and signed by the parties. It appears that in each case the agreements have had a uniform term of duration and uniform termination dates.

B. *Ratification of the Agreements*

Representatives of each of the union locals form a policy committee which selects the Union's bargaining team to bargain with the Joint Industry Group. Whatever terms of agreement arrived at in such bargaining must be approved by the policy committee before the Union signs the memorandum of agreement incorporating the agreed terms. However, the employers were aware that the new basic agreement was also subject to ratification by the various separate locals of the Union. Nevertheless, it seems clear that prior to 1969 the parties did not doubt that the agreement of the Union and the Joint Industry Group on the basic agreement was final and binding, and would be accepted. So far as the record shows, there was never an occasion prior to 1969 when any union local balked at the terms of the basic agreement, and only two occasions (Respondent contends three), discussed below, when the union locals created any difficulty over the terms agreed between the Union and the Joint Industry Group. One of these instances of local recalcitrance, in 1969, in particular, caused consternation among the employers in the Joint Industry Group, because, as testified by David W. Bates, an official of J. H. France Refractories Company (herein called J. H. France), "it was our understanding that once the economic package [the basic agreement] was negotiated and agreed in Pittsburgh that was it, that was the Settlement." Union President Roy L. Brown asserted in the present proceeding that this continues to be the case, that agreement on the basic agreement constitutes a final and binding settlement which the locals would not be permitted to reject, for the Union would not renegotiate those terms.[4]

C. *Industry Participation in Bargaining*

1. Generally

It was testified by Bates in the representation case that in 1972 there were over 50 companies in the refractories industry operating over 100 plants and mines. A considerable number of these belong to a trade association referred to as the Refractories Institute, which through its labor relations committee provides its members labor relations information and assistance, but does not engage in collective bargaining. A smaller number of the members of the Institute have through the years bargained jointly with the Union as described generally above. It was stated that in one year, prior to 1956, there were as many as 19 employers involved in such joint bargaining sessions. However, it seems that

[2] This employer group is discussed hereinafter. In various communications it is referred to as the Joint Refractories Industry Group. It will be referred to herein as the Joint Industry Group or the group.

[3] In a number of instances the union letters, since at least 1956, stated "the desire of the Union to negotiate jointly with the various refractories companies . . . as we have done for the past several years," and asked the employees' cooperation to this end, stating that the chairman of the Joint Industry Group, Harbison Walker, had been requested to arrange such meetings. See, e.g., Narco Exh. 2, and France Exh. 1F in the representation case. In some instances, the request for joint bargaining was not specified, but joint bargaining occurred as in the past. In some years, as in 1976, though the individual letters contained no reference to joint bargaining, the Union also sent a letter to the chairman of the Joint Industry Group requesting joint bargaining.

[4] In effect, Brown seems to take the position that the locals have, in fact, agreed to the Basic Agreement through approval of the terms by the representatives of the locals on the policy committee.

plants and operations often are closed or sold to other companies, or operating companies go out of business, tending to consolidate the operations carried on in the industry. For these and other reasons, since 1956 the number of employers participating in the Joint Industry Group bargaining with the Union has varied from a high of 12 to a low of 6.[5]

A number of the employers, as in the case with the Respondent, operate, or have operated several plants or facilities. While some of these plants are represented by the Union, other plants of the same employer may be represented by another union. In the case of Respondent, at the times material here, the Union represented employees at its plants at Curwensville, Pennsylvania, Farber, Missouri, and Ironton, Ohio,[6] while the United Steelworkers of America represented employees at its Womelsdorf, Pa. and Mt. Union, Pennsylvania, facilities. Respondent has bargained separately with the Steelworkers for each of these latter facilities.

The record does not show how the Joint Industry Group came into being to bargain with the Union. Undoubtedly, as is often the case, some employers in the industry, faced with similar problems and desiring to achieve a uniform basis of labor costs, saw an advantage in presenting a united front to the Union, and the Union on its part saw an advantage in united rather than fragmented bargaining. The Joint Industry Group does not seem to have had any formal organization. However, the employers have customarily selected one of their number to act as chairman of the group. Presumably he acted as spokesman for the group, and at the conclusion of the negotiations he signed the memorandums of agreement on behalf of all the others. From the correspondence and the record as a whole, the position of chairman of the Industry Group seems to have been a relatively continuing or permanent position. Thus, as has been noted, in between negotiations, correspondence was addressed to him in that capacity—in particular, correspondence seeking to reopen joint negotiations for a new contract.

Though the number of employees participating in the Joint Industry Group tended to change somewhat over the years, a study of the documents in the record indicates that the six employers involved in the joint bargaining in 1976 have rather consistently participated in such bargaining with the Union since at least 1956, except as may be noted hereinafter. The record further makes clear that those employers which participated in the Joint Industry Group bargaining understood and intended that they would be bound by the results of such bargaining. This is demonstrated by the testimony of David Bates of J. H. France, noted above, that it was the understanding of the parties that when agreement was reached in joint bargaining, "that was it, that was the settlement." It was further emphasized by the letters from various employers, including Respondent, in 1972, to the Union asserting that they were withdrawing from the Joint Industry Group that year and consequently would not be bound by the results of such negotiations that year.[7]

2. Withdrawals from joint bargaining

a. *From 1956 to 1976*

There is much litigation in the record concerning instances in which employers sought to withdraw or did withdraw in whole or in part from joint negotiations with the Union. The earliest of these instances shown by the record was in 1962, when, it was stated, the industry was in a particularly distressed economic situation. In that year three companies withdrew from the Joint Industry Group. Two of these seem never to have rejoined the group.[8] Another rejoined briefly in 1968 but not thereafter, according to the memorandums of agreement.

In that same year (1962), J. H. France sought to exclude one of its several facilities from joint bargaining, but, according to David Bates, upon objection by the Union, agreed thereafter to include that operation in the agreement reached by the Joint Industry Group with the Union. The record shows that through the years the Union has vigorously objected to attempts by an employer to withdraw one or more plants from the joint negotiations while remaining in the joint negotiations for other facilities, the Union asserting that if it could not compel the employer to negotiate jointly for all the employer's facilities, the Union would not settle for less than the negotiated conditions (or for asserted substandard conditions) at the facilities which the employer desired to withdraw from group bargaining.[9]

However, in 1963, in negotiations pursuant to a limited reopening of the 1962-64 agreement, the Union apparently agreed to the withdrawal by Respondent from joint bargaining of its facilities at Ironton (which had been destroyed by fire) and Hayward, Kentucky (later closed). Later, Respondent decided to rebuild Ironton, and finally both

[5] From the various memorandums of agreement in the record, I find that the number of employers participating in multiemployer bargaining during each year in which bargaining took place since 1956 are the following: 1956-12; 1960-12; 1962-9; 1963 (a contract reopener)-9; 1964-7; 1966-10; 1969-10; 1972-7; 1974-7; 1976-6.

[6] Respondent acquired the Ironton facility from another company sometime between 1956 and 1960. The Union represents two units of employees (one production and maintenance and the other a laboratory unit) at both Curwensville and Farber. For some reason not shown in the record, the Curwensville lab unit has never been represented in joint bargaining, although the other units have been, except as noted hereinafter.

[7] See, e.g., Respondent's letter dated May 3, 1972, stating: "This is to advise you that North American Refractories Company is formally withdrawing from the Joint Refractories Industry Group and will not be bound by any collective bargaining agreements or commitments made during the negotiations. . . ." (N. Amer. Exh. lc in the representation case.)

[8] One of these, H. K. Porter, appears to have sold or closed several of its facilities.

[9] Respondent argues the contrary, relying principally upon a letter from the Union in 1969, set forth hereinafter, and certain testimony of Union Representative Thomas Crowe in the representation case to the effect that "whether a plant or facility was not bargained for as a part of a larger group depended upon what the employer chose to do in those negotiations" before the negotiations opened. (Resp. br., pp. 8-9.) However, Crowe had previously testified that though some employers sought to exclude some plants, this caused "a continual argument." Respondent President Williams in the present case recalled "there was always a helluva lot of argument" over this issue. On the record as a whole, as noted, it is found that though the Union considered it could not exert force on the occasional employer which sought to exclude some particular plant from the joint bargaining, the Union objected to such withdrawal, and asserted that the employer would derive no advantage therefrom.

Ironton and Hayward were included in the memorandum of agreement negotiated pursuant to the 1963 reopener.[10]

In 1964, when the Union, following a plan of the AFL-CIO, sought to bring representatives of other unions into the joint negotiations in an attempt at "coordinated bargaining," Respondent and General Refractories Company withdrew from the joint negotiations, but later apparently signed agreements similar to that negotiated in joint bargaining that year.

Respondent's president, E. Avery Williams, testified that in 1964 Respondent withdrew its facility at Strasburg, Ohio, from joint bargaining because of its noncompetitive situation in the industry, which withdrawal continued until the facility was closed in 1972.[11] According to the testimony of Bates in the representation case, the Union protested the withdrawal of Strasburg when Respondent returned to joint group bargaining in 1966. In 1969, the Union protested again, by letter, stating, "As you know we have no way of forcing the Company to negotiate in joint negotiations for each and every local, however, you may be assured that we do not intend to settle for any less at Strasburg than we do in the refractories negotiation." It appears that during this period the Union did negotiate separately for the Strasburg facility. The results of those negotiations are not shown.

Other than the situation at Strasburg, the record shows no disputes over employer desires to withdraw from joint bargaining from 1964 until 1972. The 1972 negotiations between the Union and employers in the refractories industry was rather tumultuous. In the first instance, the employers involved in the Joint Industry Group became quite concerned over the fact that in 1969 the union local at the Mexico, Missouri, facility of Kaiser Refractories struck to obtain more money than was provided in the basic agreement, and, in fact, received more money.[12] A preliminary meeting between the joint employers and the Union was arranged in an effort to obtain assurances that this sort of thing would not occur again. Since the Union insisted that the local unions must vote on the Basic Agreement as well as the applicable local agreement, it appears that the employers were not entirely reassured.[13] Also, in that same year (1972), District 50 filed petitions for representation at some of the plants then represented by the Union. In this situation, a number of employers, including Respondent, as has been noted, withdrew from the Joint Industry Group in May of that year. Later, in the fall of that year, after District 50 had withdrawn its representation petitions, bargaining between the Union and the Joint Industry Group resumed. At this point, Respondent,though participating in the group, withdrew its Ironton facility from the joint bargaining. Respondent refused to include that facility in the memorandum of agreement reached as a part of such bargaining, and the Union filed an unfair labor practice charge against Respondent. Region 14 of the Board issued a complaint on that charge, but before a hearing on the complaint could be held, Respondent relented and signed an agreement with the Union for the Ironton facility, and the charge and complaint were withdrawn.

Union President Brown recalled that in 1972 General Refractories Company also said that it would like to exempt its facility at Hitchins, Kentucky, that year. Brown replied that "we would not agree with exempting Hitchins; if he insisted, and worse came to worse, we knew where Hitchins was and we would be there and we would attempt to impose a more costly contract . . . at Hitchins in order to keep [it] in the joint negotiations." It appears from the memorandum of agreement between the Joint Industry Group and the Union that Hitchins was in fact included in the joint bargaining that year.[14]

According to Respondent President Williams, during the time Combustion Engineering and H. K. Porter participated in the joint industry bargaining not all of their plants were involved in the bargaining. However, the record provides no details as to these situations. Each of these two companies appears to have acquired operations from other employers whose workers were previously represented by the Union.

A somewhat different situation obtained among the Kaiser Refractories operations, where Kaiser was apparently balked in its desire to have its Columbiana plant included in the joint negotiations (together with its Mexico, Missouri, facility) because the union local at Columbiana objected until 1972.

b. *In 1976*

By letter dated May 19, 1976, Respondent advised the Union and five other employers which had formed the Joint Industry Group in the 1972 and 1974 negotiations that, though Respondent would participate with the Joint Industry Group in negotiations that year for a successor agreement for the production and maintenance units at Farber and Curwensville and the laboratory unit at Farber, "the Ironton, Ohio plant is withdrawn from industry negotiatons because of our concern that the economic impact of an industry settlement will adversely affect the continuance of operation. We stand ready to enter into separate good faith collective bargaining with the representatives of Local Union 910 [the Ironton local]. . . . By copy of this letter the Refractory Industry Association's bargaining committee is

[10] The letter to the Union from the chairman of the Joint Industry Group (G.C. Exh. 9) confirming Respondent's agreement to include Ironton and Hayward also refers to the J. H. France facility, noted above, and to three facilities of General Refractories Company not otherwise explained.

[11] Respondent, in fact, as noted, in 1964 withdrew all of its facilities from joint bargaining. When Respondent signed an agreement with the Union that year, however, it signed for all of its facilities, including Strasburg. (G.C. Exh. 10.)

[12] Union President Brown asserted that the Basic Agreement was not changed for the Mexico workers, but that the additional pay was granted to alleviate a local inequity. It seems agreed, as Bates testified in the representation case, that rectification of local inequities is a matter for local bargaining and is not part of the national bargaining. Nevertheless, it is clear that other employers in the industry saw the incident as undermining the stability they had sought to achieve by joint bargaining.

There is also a vague reference in Bates' testimony that the employees had some concern about this time that Heram Swank and Sons had some problem "with the application of the wage rates in the increase in the wages." However, it is not asserted that the union local did not ratify the contract.

[13] A similar situation did arise again in 1974, when the union local at Respondent's Curwensville plant struck in protest over the 1974-76 basic agreement, contending that employees at a nearby competitor in the industry were receiving higher pay. With President Brown's assistance, the employees went back to work and ratified the basic agreement.

[14] From the General Refractories exhibits in the representation case it appears that the union locals at Hitchins were numbers 429 and 616. These were included in the memorandum of agreement for 1972-74.

hereby notified that it has no authority to act as the collective bargaining representative for North American Refractories with regard to the Ironton plant." Shortly thereafter the Union advised Respondent that it objected to Respondent's attempt to withdraw the Ironton facility from the joint industry bargaining in 1976, would continue to press for its inclusion of that facility in the joint bargaining, and would not agree to any terms for Ironton less than those negotiated with the industry bargaining group.[15] The Union maintained this position consistently throughout the bargaining in 1976. When the negotiations between the Joint Industry Group and the Union opened in that year, as was customary, the chairman of the Industry Group announced the employers and facilities represented at the bargaining table, including Respondent's facilities at Curwensville and Farber but not including Ironton. The Union announced its representation at the outset of the bargaining for Ironton as well as the others.

The employer had several conversations and meetings with the Union, with Local 910 at Ironton and with the union member employees at Ironton seeking to persuade them that unless Ironton was granted special contract terms, the facility at Ironton would close. The Union refused to concede to Respondent's demands. On August 25, 1976, the chairman of the Joint Industry Group and the Union executed a memorandum of agreement setting forth the terms of the basic agreement for 1976-79. Ironton was not included. On that same date Respondent's Ironton facility was closed. General Counsel does not contend that the shutdown of the Ironton facility violated the Act.

There is indication that the production process at Ironton was different from that at Curwensville and Farber. Respondent claimed to the Union that it was losing money at Ironton. The figure of $6,000 was mentioned. There is no direct evidence in the record of the economic situation at Ironton, though a normal inference from the closing of that operation would be that its operation in fact was uneconomic.

III. ANALYSIS AND CONCLUSIONS

A. *The Multiemployer Unit*

The General Counsel contends, and Respondent denies, that in 1976 Respondent was a part of a multiemployer bargaining unit. As the Board has recently stated "a multiemployer unit, unlike other types of bargaining units, is consensual in nature. The Board has consistently held that 'the essential element warranting the establishment of multiple employer units is clear evidence that the employers unequivocally intend to be bound in collective bargaining by group rather than by individual action. The correlative standard for excluding an employer from such unit is evidence of an intent to pursue an individual course of action with respect to labor relations.'" See *Ruan Transport Corporation,* 234 NLRB 241 (1978). When such an intent to be bound by joint action appears from the record, it is not important that the instrument of such joint action is an informal, unstructured association or group, or that the results of the negotiations are contained in separate, but substantially identical contracts (see, e.g., *Neville Foundry Company, Inc.,* 122 NLRB 1187 (1959)), or that local issues may be excluded from the joint bargaining (see, e.g., *Weyerhauser Company, et al.,* 166 NLRB 299 (1967)). Nor is the viability of such a multiemployer unit affected by the occasional timely withdrawal, temporary or permanent, of some participants who previously were part of the unit, or by the inclusion of employers who have not previously participated, so long as such changes are not destructive of the bargaining process. See *Pacific Coast Association of Pulp and Paper Manufacturers,* 163 NLRB 892 (1967).

For over 20 years in the refractories industry, a substantial number of companies with employees represented by the Union have bargained with the Union jointly through the agency of an informal association. There is no question but that those companies participating in such joint bargaining intended thereby to be bound by the results of such group action rather than by individual dealing with the Union. Thus those employers not only bargained jointly through the association, but the agreement reached was embodied in a memorandum signed by the chairman of the association for all the participating employers. Significantly, those employers who, from time to time, wished not to be bound by the uniform terms agreed in such joint bargaining formally withdrew from such negotiations in advance and expressed their intent thereby not to be bound by the joint negotiations of the remaining employers that year. The record further shows that those employers understood, and insisted to the Union, that when agreement was reached in joint bargaining on the economic issues applicable to all the employers, "that was it, that was the settlement."

The basic objective in multiemployer bargaining is to achieve a uniform basis of labor costs, insofar as that is possible, in the industry, so that no employer achieves a significant competitive advantage by means of lesser employee working conditions. The Union, conversely, achieves its aim of having all members, wherever situate, receive the same pay and conditions for the same work. The process of joint bargaining in the refractories industry appears to have generally achieved these purposes to the satisfaction of the parties, despite occasional hitches, inasmuch as it has met the essential test of any bargaining history: it has survived and the parties continue to find it useful.

Respondent, however, argues that the requisite intent to be bound by joint bargaining is not shown here because (1) the multiemployer group has no formal structure and is not rigid and unchanging; Respondent's assertion that the "constant change in the makeup of the Industry Group from year to year at the employers' *discretion* hardly gives rise to the existence of a rigid multiemployer bargaining unit" (br., p. 23); (2) the Union has traditionally permitted each local separately to ratify the terms arrived at in the joint bargaining,as well as the terms traditionally reserved to local bargaining, with Respondent's assertion that this "right either to accept or reject the settlement resulting from the joint negotiations . . . destroys any claim that a

[15] The Union apparently sent separate letters to Respondent with respect to each facility represented advising that the Union desired to negotiate a new contract in 1976. This more or less seems to have been the Union's custom. In 1976, the Union also notified the chairman of the Joint Industry Group of the Union's desire to negotiate successor contracts for the various facilities (including Ironton) of seven named employers.

multiemployer exists" (br., pp. 18-19); and (3) the parties have customarily included the terms of the basic agreement arrived at in joint bargaining together with local terms and conditions in separate contracts for each facility. The Union has customarily sent contract termination notices to each employer in respect to each facility represented; and, by reason of the separate contracts, each employer could terminate the separate contracts irrespective of what the others do. (Br., p. 23.)

I have carefully considered these matters and find that they do not require a finding that the parties in this industry through the years and in 1976 intended to be bound by individual rather than joint bargaining in face of the rather overwhelming evidence to the contrary previously referred to. First: The Board has never held, to my knowledge, that a multiemployer unit must be rigid and unchanging, only that it be viable and workable in its purpose to stabilize the industry by providing standard and uniform conditions applicable to the industry. Changes in the composition of the multiemployer unit from time to time, so long as they do not affect the viability of the unit, do not affect its appropriateness for bargaining, and may, in fact, contribute to its vitality. See *Pacific Coast Association, etc., supra.*

Contrary to Respondent's argument, I find that the record does not show that the employers involved had any unilateral discretion to withdraw from the unit other than that permitted by law. The record shows that on occasion apparently for specific reasons, the Union agreed to some withdrawals. On most occasions the Union vigorously protested withdrawals from the unit, the Union position being that it would not agree to less than the basic agreement, in any event, at the facilities sought to be withdrawn. There is some evidence that in many of these cases, if not most, the employer seeking to withdraw either returned to the joint bargaining or signed the basic agreement eventually.

Second: Though the Union has customarily submitted the terms agreed in joint bargaining to ratification by each separate local, the record as a whole does not show that the Union thereby intended not to be bound by the results of the joint bargaining. The record, indeed is to the contrary. Union President Brown testified, and I credit, that the Union intends the result of such bargaining to be final and binding and will not renegotiate such terms for any local. During the many years in which multiemployer bargaining has been carried on in this industry, there is probative evidence of only two occasions when a union local balked at accepting the agreed upon national terms. The testimony of Brown, which is credited, and the record as a whole are to the effect that these two disputes were settled without compromising the basic agreement (though some members of the multiemployer group, in one instance at least, thought otherwise). The important fact here, however, is that these two rather isolated instances did not destroy (though for a short time they unsettled) the multiemployer bargaining pattern. The parties thereafter resumed bargaining on the same basis as before, intending to arrive at a mutually binding uniform contract applicable to all.[16]

Third: The fact that the Union customarily sent termination notices to each employee on behalf of each facility, on the facts of this case, is of no particular consequence. The Union frequently in these notices also added a request that bargaining be held jointly, as in the past. Even where this was not specifically stated, it was apparently understood, for the parties did, in fact, continue to engage in multiemployer bargaining as in the past. In many instances, the Union also requested the assistance of the chairman of the Joint Industry Group in arranging joint bargaining. Nor does the fact that the parties customarily included the terms of the basic agreement in separate local agreements require a finding that no multiemployer unit exists, as the Board has frequently held. Finally, the fact that each of the employers theoretically might have given notice to the Union under each individual contract, without consultation with, or binding the others, does not in itself indicate that a multiemployer unit did not exist in this case. Indeed, the effect of such a notice, if given by an employer, might show an intent on that employer's part to withdraw from the Joint Industry Group prior to negotiations and bargain separately. As a matter of law, each employer retained the right to withdraw by unequivocal notice prior to the beginning of the bargaining, or thereafter with the consent of the Union. See, e.g., *Hi-Way Billboards, Inc.*, 206 NLRB 22 (1973). As has been noted, whether such action might destroy the multiemployer would depend on the facts of the case. Here, however, the issue is whether the Joint Industry Group, as constituted during the joint negotiations in 1976, on the facts of this case, constituted an appropriate multiemployer bargaining unit within the meaning of Section 9(b) of the Act. I find that it did.

B. *The Exclusion of Ironton*

In the 1976 negotiations the Respondent, in advance of negotiations, agreed to participate in the multiemployer bargaining for two of its three facilities, but insisted that it would not include the third facility, at Ironton, in such bargaining because it did not want Ironton to be bound by the results of the negotiations. Respondent sought the assent of the Union, and of the members of the Union, to the exclusion of Ironton from the joint bargaining, and sought to bargain separately for the facility with the Union, asserting that it would not be economic to operate Ironton under the contract terms expected to result from the 1976 joint bargaining. The Union would not agree and, on its part, insisted that the Ironton facility be included in the multiemployer bargaining. The Respondent persisted in the withdrawal of Ironton and refused to include it in the coverage of the agreement reached in bargaining that year. On the day that the parties to the joint negotiations signed the

[16] Respondent seems to rely principally upon *Van Eerden Company*, 154 NLRB 496 (1965), in support of its argument that separate ratification by each local necessarily negates the existence of a multiemployer unit. That case, involving a petition for decertification of the union there, presented a situation in which, at the times material, the union was actually bargaining with, and had secured an agreement from only one of the three employers who previously had bargained jointly with the union. There was no evidence that the remaining employer at the bargaining table was authorized to bargain for the others. The union, unable even to get the employees of the three employers together to vote on the contract, held separate votes for the employees of two of the employers. The evidence indicates a multiemployer unit (if it ever existed) which had disintegrated. That case is completely distinguishable from the present matter. I also find *Weyerhauser Co. supra*, and various cases dealing with multiplant issues cited by Respondent also to be distinguishable or not applicable to the problem herein.

new basic agreement. Respondent closed the Ironton facility.

As consistently stated in the Board's decisions, "Under ordinary circumstances, the Board does not permit an employer to withdraw only a part of his operaton from a multiemployer unit while leaving the remainder in the multiemployer unit." See *Pacific Coast Assn. etc., supra* at 897, and cases cited therein. See also *Commercial Automotive Corporation*, 169 NLRB 394 (1968). To hold otherwise, as Respondent argues, would permit Respondent at its discretion to alter the character of the bargaining confrontation to its own advantage and to disrupt the bargaining process by so gerrymandering the unit as to make it very difficult or impossible to achieve the uniform conditions of employment conducive to labor relations stability in the industry.

Respondent asserts, nevertheless, that the Ironton plant "was in a desperate economic situation in the Spring of 1976," in that it "utilized an outmoded and overly expensive process for burning brick," which made it uneconomic, "[s]ubjecting Ironton to multiemployer negotiations in 1976 would have *guaranteed* its demise." Respondent argues "[t]his is exactly the situation that the Board recognizes as a special circumstance that allows and justifies an otherwise untimely withdrawal from multiemployer bargaining," citing *Spun-Jee Corp., and The James Textile Corp.*, 171 NLRB 557 (1968), and *U.S. Lingerie Corporation*, 170 NLRB 750 (1968). (Br., pp. 27-28.)

In each of these cited cases, the employer involved was permitted to withdraw its entire operation after multiemployer negotiations had begun—thus untimely—and without the consent of the union there concerned because the Board found in those cases that the withdrawing employer was "faced with *dire* economic circumstances, i.e., circumstances in which the very existence of the employer as a viable business entity has ceased or is about to cease." *Hi-Way Billboards, Inc., supra* at 23. That is a far cry from the instant case. Indeed, there is no direct evidence as to the exact economic situation at Ironton in this record, though it may be inferred from the fact of its closing that it was not profitable.

What Respondent is asking, in effect, is that the Board decide that the Union should have agreed, in these circumstances, to the withdrawal of Ironton from the joint bargaining process so that Respondent could bargain for less onerous terms and conditions of employment at Ironton than the Union required of other employers elsewhere. This clearly is a decision that should be left to the bargaining process. The Union and the employers have dealt with the problem in the past, and, for better or worse, have resolved it eventually on the facts of each situation through the bargaining process.[17] I consider it inappropriate in these circumstances to substitute my opinion as to what the parties should have agreed on this issue.

I find therefore that the facts in this case—certainly prior to the closing of the Ironton facility[18]—do not establish such unusual circumstances as would justify the unilateral withdrawal of the Ironton plant from the multiemployer unit within the meaning of *Pacific Coast Assn., etc., supra.*

Finally, Respondent argues that "the Union has consistently engaged in such a course of conduct as to preclude it from insisting that [Respondent] include Ironton in the 1976 negotiations." (Brief, p. 33) Although Respondent argues this point in terms of "waiver" by the Union, it seems clear that Respondent is claiming that the Union gave consent to the withdrawal by its prior conduct and is estopped from claiming otherwise now. In support, Respondent asserts "historically the Union has agreed that its consent is not necessary to the timely withdrawal of [one or all of an employer's plants from multiemployer bargaining] . . . since the Union has *never* before objected to an employer's timely withdrawal of one plant and not all, it has waived any right that it may have to do so."(Br., p. 35; emphasis in original.)

Assuming that the requisite union consent to a specific partial withdrawal from the unit may be inferred from a course of conduct, no such inference is justified on the facts of this case. The facts show and it has been found that, though the Union sometimes agreed to the exclusion of one or more plants from joint industry bargaining in specific cases, for the most part it objected to such employer attempts to fractionate the unit, and did so vigorously. Though the Union on occasion did observe that it had no means to compel an employer to engage in multiemployer bargaining, in whole or in part, if it did not want to (which may or may not have been legally sound), it consistently asserted that it would use its bargaining strength to compel such employer to accept the results of such bargaining.

On the basis of the above and the entire record, I find that the Union did not by its course of conduct agree to the withdrawal of Ironton from the unit in 1976, or waive its right to object to such withdrawal.

C. *The Appropriate Unit*

On the basis of the memorandum of agreement executed by the Union and the employers participating in the Joint Industry Group, on August 25, 1976, as a result of collective bargaining (G.C. Exh. 13), the above findings and conclusions, and the record as a whole, I find that an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act consists of all the employees of Respondent, J. H. France Refractories Company, General Refractories Company, Harbison-Walker Refractories Division of Dresser Industries, Inc., Kaiser Refractories Division, and Wellsville Fire Brick Company represented by the following locals of the Union: Nos. 902, 429, 585, 616, 763, 853, 900, 927, 523, 660, 448, 858, 950, 910, and 891 in jobs or functions covered by said memorandum of agreement.

D. *The Unfair Labor Practices*

Based upon the above and the entire record in this case I find that by withdrawing its operations at Ironton, Ohio,

[17] Thus when Ironton was destroyed by fire, the Union agreed to its withdrawal. When Respondent rebuilt the facility, it was again placed under the basic agreement. On another occasion when Ironton was withdrawn, apparently untimely, Respondent finally agreed (under some pressure of a complaint issued by General Counsel) to include that facility in the joint negotiations. There is indication that other employers also were induced to rescind efforts to withdraw plants from the multiemployer unit.

[18] There is some question as to whether the facility, in fact, is completely closed. There is indication that some functions which may have been covered by Union contracts in the past may continue to be performed.

and the employees employed at the facility represented by Local 910 from the bargaining between the Joint Refractories Industry Group and the Union, beginning July 7, 1976, in the circumstances set forth, and by refusing and failing to apply the memorandum of agreement executed on August 25, 1976, to the aforesaid operation and employees, Respondent engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act. See *Commercial Automotive Corporation, supra.*

Conclusions of Law

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. At all times material herein the Union has been and continues to be the exclusive representative of employees of the Respondent in the appropriate multiemployer unit set forth hereinabove in section III C of this Decision for the purposes of collective bargaining within the meaning of Sections 9(a) and (b) of the Act.
4. Respondent, by the acts and conduct set forth hereinabove in section III D of this Decision has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, which unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

It having been found that the Respondent has engaged in and is engaging in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

As has been noted, there is evidence that Respondent's Ironton, Ohio, facility has been closed. However, there are also other indications that some functions previously represented by the Union continue to be performed there. There is also the possibility that Respondent may reopen that facility, as it did on a previous occasion after it had been closed. For these reasons, it will be recommended that Respondent execute the 1976-79 agreement with the Union on behalf of its Ironton, Ohio, facility, apply that agreement to that facility retroactive to its effective date, and make whole its employees at that facility for any loss of wages or other employment benefits they may have suffered as a result of Respondent's failure or refusal to execute that agreement on behalf of, or to apply it to, the employees employed at that facility. Backpay, if any, shall be computed, and shall bear interest, in accordance with the formulae set forth respectively in *F. W. Woolworth Company,* 90 NLRB 289 (1950), and *Florida Steel Corporation,* 231 NLRB 651 (1977).[19] See *Commercial Automotive Corp., supra.*

[Recommended Order omitted from publication.]

[19] See, generally, *Isis Plumbing & Heating Co.,* 138 NLRB 716 (1962).