

*United States Government*  
*National Labor Relations Board*  
OFFICE OF THE GENERAL COUNSEL

## Advice Memorandum

REVISED

DATE: June 6, 2018

TO: Kathleen M. McKinney, Regional Director  
Region 15

FROM: Jayme L. Sophir, Associate General Counsel  
Division of Advice

SUBJECT: International Association of Sheet Metal, Air, 420-9042-0000  
Rail and Transportation Workers, Local 36 542-3333-8300  
Cases 15-CB-205766; 15-CB-205788 and 15-CB- 542-3333-8900  
205811 554-1450-5700  
554-1450-0100

This case was submitted for advice as to whether the Union violated Section 8(b)(3) when it unilaterally submitted the parties' unresolved 8(f) renewal to interest arbitration and refused to respond to the Charging Party Employers' proposals after the Employers' untimely attempt, after expiration of the 8(f) agreement, to withdraw from a multi-employer group and negotiate their own agreement. We conclude that the Union did not violate Section 8(b)(3) because the parties' expired agreement provided for binding interest arbitration, the Charging Parties were at least arguably bound by the agreement, and there is no indication that the Union submitted the dispute to evade its good-faith bargaining obligation.

### FACTS

#### 1. Background

The International Association of Sheet Metal, Air, Rail and Transportation Workers, Local 36 (the Union) and the Arkansas Contractors (Contractors) have had a longstanding collective bargaining relationship since the 1950's. Presently, there are 13 contractors in the multi-employer group, three of whom are the Charging Parties in this case. Although the parties have been and continue to be in an 8(f) relationship, the parties have entered into successive bargaining agreements over the last several years. The agreements consist of the Standard Form of Union Agreement, a nationwide standard contract for the sheet metal industry, as well as local addenda governing wages and benefits.

The parties' most recent contract expired on May 31, 2017.<sup>1</sup> Article X of the expired contract states, "[t]he Union and the Employer, whether party to this Agreement independently or as a member of a multi-employer association unit, agree to utilize and be bound by this Article." Article X, Section 8 (the interest arbitration provision) states:

In addition to the settlement of grievances arising out of interpretation or enforcement of this Agreement as set forth in the preceding sections of this Article, any controversy or dispute arising out of the failure of the parties to negotiate a renewal of this Agreement shall be settled as hereinafter provided:

(a). Should the negotiations for a renewal of this Agreement or negotiations regarding a wage/fringe reopener become deadlocked in the opinion of the Union representative(s) or of the Employer(s) representative(s), or both, notice to that effect shall be given to the National Joint Adjustment Board [NJAB].

Additionally, Article XVI states in pertinent parts:

Section 1 This Agreement . . . shall continue in force from year to year unless notice of reopening is given not less than ninety (90) days prior to the expiration date. In the event such notice of reopening is served . . . if this Agreement contains Article X, Section 8, it should continue in force and effect until modified by order of the National Joint Adjustment Board or until the procedures under Article X, Section 8, have been otherwise completed.

Section 4 Each Employer hereby waives any right it may have to repudiate this Agreement during the term of this Agreement or during the term of any extension, modification or amendment to this Agreement.

Section 5 By execution of this Agreement the Employer authorizes Arkansas Contractors to act as its collective bargaining representative for all matters relating to this Agreement. The parties agree that the Employer will hereafter be a member of the multi-employer bargaining unit represented by said Association unless this authorization is withdrawn by written notice to the Association and the Union at least one hundred and fifty (150) days prior to the then current expiration date of this Agreement.

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<sup>1</sup> Sometime during the negotiations at issue here, the parties discovered that they had never signed the two most recent contracts—the one that expired on May 31, 2017 as well as the 2013–2015 agreement. This appears to have been inadvertent and the parties all adhered to the terms of the agreements.

2. 2017 Bargaining for a Successor Collective Bargaining Agreement

On February 15, 2017,<sup>2</sup> the Union sent notice to the 13 contractors and the FMCS that it was seeking to reopen the contract to negotiate a successor collective-bargaining agreement. None of the contractors, including the Charging Parties, had exercised their option to withdraw from the multi-employer group by giving the appropriate notice 150 days before the contract's expiration date.

On April 11, the parties held their first bargaining session. Representatives from three of the contractors, including one of the Charging Parties, represented the Contractors. Neither side raised any issues with the interest arbitration provision or any concerns about being bound to it because of the expired contract, nor did anyone propose major changes to the contract. On May 5, the parties held their second bargaining session. As before, the representatives for the Contractors included one of the Charging Parties. During the session, the Union proposed modifying the language in the contract regarding the apprentice program, Health and Welfare, recognition, and some other items recommended by the International, and asked two of the representatives for the Contractors to review the new language. There was also a discussion about apprentice wages, and increased contributions to the various funds. The Union proposed a three-year collective bargaining agreement with a wage and benefit package increase of (b) (4). Additionally, the parties agreed that the new contract would be retroactive to June 1, 2017. On June 6, the parties held their third bargaining session. As before, one of the Charging Parties was a representative for the Contractors. The Contractors presented a counterproposal on wages, which the Union agreed to take to the membership.

On June 8, the Union emailed and/or hand delivered a redlined copy of the proposed collective bargaining agreement (i.e., including the Contractors' wage counterproposal) to the Contractors with a requested deadline of June 16 to respond before the Union held a ratification meeting. The redlined copy of the agreement included Article X, Section 8 with the same language as in previous contracts. No contractor responded to the Union with any concerns about anything in the proposed contract.

On July 7, the Union presented the proposed contract to the membership for a ratification vote. The members voted down the contract and requested that the Union return to the bargaining table to seek a larger wage increase.

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<sup>2</sup> All dates are 2017 unless otherwise noticed.

On July 20, the Charging Parties notified the Union by letter that they had retained new counsel. In that letter, counsel referred to the Charging Parties as “*signatories*” (emphasis added) to the June 1, 2015 collective bargaining agreement between the Arkansas Contractors and the Union.

On August 10, the parties held their fourth and final bargaining session. The Charging Parties, their attorney, and two other contractor representatives attended the session representing the Contractors. The Union informed the Contractors that the employees had voted down the proposed contract because of the amount of the wage increases. After some discussion regarding the membership’s counter-proposal, the Contractors caucused. According to testimony by one of the Charging Parties, during the caucus, in response to the attorney’s suggestion that the Contractors go back to the table with a dramatically different proposal, one of the other Contractor representatives stated that the Charging Parties were “trying to change everything” and [REDACTED] couldn’t be a part of it. According to another Charging Party, the other representative in attendance said that [REDACTED] did not necessarily disagree with the Charging Parties but did not want their attorney to speak for [REDACTED]. When the Charging Parties and their attorney returned to the bargaining session, the Charging Parties’ attorney presented a redlined copy of the June 6 tentative agreement with revisions to most of its language, and stated that he would like to go through that new proposed contract. He initially stated that he represented the Contractors as a group, but then clarified that he represented three of the five contractors in attendance. The Union objected that the Charging Parties had been given an opportunity to modify the language before it was presented for the ratification vote and did not respond at that time. The Union also noted that the Contractors had negotiated as a group since 1991. The Charging Parties’ attorney continued to insist that they go over his modified proposal but the Union refused and said that the parties were deadlocked under Article X, Section 8.

On August 17, the Union notified the Contractors in writing that it was committed to bargaining with the multiemployer group and would not engage in bargaining with individual contractors. That same day, the Union submitted a Notice of Unresolved Dispute to the NJAB per Article X, Section 8 of the expired contract. Its submission laid out the background of the parties’ negotiations and the June 6 tentative agreement. The Union explained that the parties were deadlocked because it would not engage in individual and regressive bargaining. According to the Union, the only remaining unresolved issue was wages.

On August 24, the Charging Parties filed their response to the Union’s unilateral submission. The Charging Parties objected to the jurisdiction of the NJAB and asked that the NJAB remand the matter back to the bargaining table for continued negotiations. In making this argument, they stated that the Charging Parties traditionally had not agreed to Article X, Section 8 but that in recent years the Union had taken the position that the Arkansas Contractors had consented to the inclusion

of Article X, Section 8.<sup>3</sup> With regard to the substance of the dispute, the Charging Parties argued that the parties were not deadlocked and denied that they had reached a tentative agreement on June 6. They also asserted that they had the right to bargain on behalf of the Contractors because they constituted a majority of the “active” signatory contractors and collectively employed a majority of the members represented by the Union. Finally, they argued that the Union should have to respond to the Charging Parties' non-economic proposals and its absolute refusal to do so was evidence of bad-faith bargaining.

On September 6, the Charging Parties filed charges in the instant cases alleging that since on or around August 17, the Union has refused to bargain with the Charging Parties by refusing to respond to contract proposals, and by unilaterally submitting negotiations to interest arbitration pursuant to a disputed interest arbitration provision.

On September 11, the NJAB issued its decision in the matter and determined, pursuant to a review of the parties' 2011 NJAB hearing record, that the Contractors had voluntarily agreed to include the interest arbitration provision in the contract as part of a settlement of the parties' 2011 contract renewal dispute. The NJAB further noted that the language had been included in subsequent agreements without any objection. As a result, the NJAB determined that the interest arbitration provision in the contract was enforceable and that the NJAB had jurisdiction to hear the matter.

The NJAB also found that, because there is no evidence that the Charging Parties timely withdrew from the multi-employer group, the Contractors constituted a multi-employer bargaining group for which one contract was appropriate. The NJAB further noted:

[T]he multiemployer group had no clear spokesperson. With no procedures or past practice as to how to resolve their internal disputes, the employers appeared before [the NJAB] with conflicting positions. Having no means to resolve this conflict for the employers, [the NJAB] has looked for the most recent point in the negotiations when the multiemployer group held a cohesive position. The record reflects and the parties testified that the last consensus position held by the multiemployer group was the June 6, 2017 tentative agreement with the Local Union . . . .

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<sup>3</sup> In fact, the provision has been in all but one of the parties' collective-bargaining agreements since 2004, with the sole exception being a 1-year agreement in 2007. During that period, the Contractors submitted contract bargaining disputes to the NJAB for binding interest arbitration on at least two occasions.

Thus, it directed the parties to execute a three-year agreement with the same terms and conditions they had tentatively agreed to on June 6 (notwithstanding that the agreement had not been ratified by the employees).

The Charging Party Employers state that the Contractors have never adopted formal rules regarding voting or bargaining authority and have no clear record of past practice with regard to voting, but that the informal practice appears to have been one vote per contractor present at negotiations. Based upon the parties' bargaining notes for the 2017 successor agreement negotiations, it appears that only the contractors present at negotiations voted on specific contract provisions, but all member contractors had the opportunity to weigh in on the tentative agreement before the Union submitted it to a ratification vote.

### ACTION

We conclude that the Region should dismiss the charge because the parties' expired agreement provided for binding interest arbitration, the Charging Parties were at least arguably bound by the agreement, and there is no indication that the Union submitted the dispute to evade its good-faith bargaining obligation.

The Board has long recognized that either party to an 8(f) agreement may repudiate the 8(f) relationship upon the expiration of the agreement with no obligation to bargain for a renewal agreement.<sup>4</sup> The Board has also held, however, that nothing in the Act prevents parties from voluntarily incorporating an interest arbitration clause in an 8(f) agreement, nor does it preclude automatic renewal of an 8(f) agreement pursuant to such a clause.<sup>5</sup>

In *Collier Electric*, the Board held that a union may lawfully invoke an interest arbitration clause even against an employer that has withdrawn from a multiemployer bargaining unit where the union has bargained in good faith prior to its submission of unresolved issues to interest arbitration and where "there is a

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<sup>4</sup> See *John Deklewa & Sons*, 282 NLRB 1375, 1386-87 (1987), *enforced sub nom. Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988).

<sup>5</sup> See *Sheet Metal Workers Local 20 (Baylor Heating)*, 301 NLRB 258, 260 (1991) (interest arbitration provision "contemplates a renewal of the agreement . . . leaving open the terms and prescribing a means of resolving disputes arising from the failure to negotiate the renewal"). See also *C.E.K. Industrial Mechanical Contractors*, 295 NLRB 635, 636 (1989), *enforced* Docket No. 89-2008 (1<sup>st</sup> Cir. 1990) (*Deklewa* does not preclude a finding that an 8(f) agreement may, in appropriate circumstances, automatically renew).

reasonable basis in fact and law for the union's submission."<sup>6</sup> Thus, if the collective-bargaining agreement at least arguably binds the employer to the arbitration provision, the union will be free to seek enforcement of its contractual rights by submitting the unresolved bargaining issues to interest arbitration without violating Section 8(b)(3) or Section 8(b)(1)(B) of the Act.<sup>7</sup> The Board's premise in adopting this rule was that "collective bargaining should be fostered and that when parties have bargained for and reached an agreement, fairness requires that they be allowed to enforce it," even though interest arbitration is a non-mandatory subject of bargaining that can be repudiated by either party.<sup>8</sup> In support of its decision, the Board explicitly relied on *Bill Johnson's Restaurants*,<sup>9</sup> where the Supreme Court held that a lawsuit that is reasonably based in fact or law may not be enjoined by the Board, but must be allowed to proceed in court.<sup>10</sup>

We note that the Board has considered this issue in multiple cases involving alleged Section 8(b)(1)(B) violations, which were based on the Union's submission of disputes to interest arbitration pursuant to substantially similar contract language in

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<sup>6</sup> *Electrical Workers IBEW Local 113 (Collier Electric)*, 296 NLRB 1095, 1098 (1989).

<sup>7</sup> *Id.* See also *Sheet Metal Workers Local 102 (R & J Sheet Metal)*, 316 NLRB 382, 392 (1995) (ALJ's finding, affirmed by the Board, that union's position that an independent signatory was bound by an interest arbitration clause "while not clear, overwhelming, or necessarily even ultimately persuasive, [was] also simply not properly characterized as inarguable").

<sup>8</sup> *Id.* The Board specifically stated: "[W]hen parties have agreed on an interest arbitration provision, even though that provision is a nonmandatory subject of bargaining that, under *Tampa Sheet Metal Co.*, 288 NLRB 322 (1988), can lawfully be repudiated by either party, the parties nevertheless retain their right to seek court enforcement of the provision in a Section 301 suit, without violating Section 8(b)(3) or Section 8(b)(1)(B)." (Footnotes omitted.)

<sup>9</sup> *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983).

<sup>10</sup> *Collier Electric*, 296 NLRB at 1100; see also *Bill Johnson's Restaurants*, 461 U.S. at 744 (finding it an enjoinable unfair labor practice to prosecute a lawsuit only if the suit is both baseless and retaliatory). See also, e.g., *Beverly Health & Rehabilitation Services*, 331 NLRB 960, 961 (2000) (allowing employer's defamation suit to proceed in state court because the General Counsel failed to "conclusively prove[]" that the employer's state court suit lacked a reasonable basis in law or fact).

previous versions of the Sheet Metal Workers' Standard Form of Union Agreement.<sup>11</sup> Even in situations where the employer timely withdrew from the multi-employer association that was signatory to the agreement, the Board has held that the union acted lawfully in unilaterally submitting disputes over contract renewal to the NJAB, provided the agreement in question contained the interest arbitration provision.<sup>12</sup>

Thus here, under the principles set forth in *Collier Electric* and *Baylor Heating*, the Union's submission of the unresolved contract dispute to the NJAB was lawful if the expired 8(f) agreement at least arguably bound the Charging Parties to the interest arbitration provision contained therein and the Union bargained in good faith prior to the interest arbitration submission. We conclude that both requirements were met here.

As an initial matter, the Charging Parties did not timely withdraw from multiemployer bargaining. The parties' recently expired agreement required any contractor that intended to withdraw the Contractors' authority to bargain on its behalf to give notice to that effect no later than 150 days prior to the expiration of the agreement. The Charging Parties did not withdraw from the Contractors at any time prior to expiration, or even after contract expiration. Thus, by the terms of the expired agreement, the Charging Parties are still represented by the Contractors for

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<sup>11</sup> See, e.g., *Sheet Metal Workers Local 102 (R&J Sheet Metal)*, 316 NLRB at 382, 391-93 (1995) (no 8(b)(1)(B) violation where union unilaterally submitted dispute over renewal of 8(f) contract to NJAB over objection of employer); *Sheet Metal Workers Local 20 (Baylor Heating)*, 301 NLRB at 260-61 (1991) (union did not violate Section 8(b)(1)(B) by unilaterally submitting contract renewal dispute to NJAB despite employer's refusal to negotiate new 8(f) agreement). See also cases cited in n.12, *infra*. Cf. *Sheet Metal Workers Local 9 (Concord Metal)*, 301 NLRB 140, 144 (1990) (union violated Section 8(b)(1)(B) by submitting contract renewal disputes to NJAB where the employers had repudiated their 8(f) relationships with union and their agreements did not include interest arbitration provisions).

<sup>12</sup> See, e.g., *Sheet Metal Workers Local 206 (Warrens Industrial)*, 298 NLRB 760, 761-62 (union did not violate Section 8(b)(1)(B) or (3) by unilaterally submitting to NJAB despite employer's timely withdrawal from multiemployer group because multiemployer agreement arguably bound it to the binding arbitration procedure, *enforced sub nom. West Coast Sheet Metal v. NLRB*, 938 F.2d 1356 (D.C. Cir. 1991); *Sheet Metal Workers Local 54 (Texas Sheet Metal)*, 297 NLRB 672, 677 (1990) (same); *Sheet Metal Workers Local 283 (Conditioned Air)*, 297 NLRB 658, 660 (1990) (no 8(b)(1)(B) violation where union unilaterally submitted contract renewal to NJAB over objections of employer that timely withdrew from multiemployer association).

collective-bargaining purposes and remain bound by any agreement the Contractors enter into for the term of that agreement.<sup>13</sup>

Moreover, even if the Charging Parties *had* timely withdrawn, and despite the contract's expiration, the terms of that agreement remained in effect during the course of negotiations for a successor agreement.<sup>14</sup> The expired agreement states that if notice of reopening is served and the agreement contains Article X, Section 8—the interest arbitration provision—the contract remains in force until modified by the NJAB or until the procedures under Article X, Section 8, have been otherwise completed. The agreement at issue here includes Article X, Section 8 and the Union served timely notice to reopen negotiations. Therefore, although the parties are in an 8(f) relationship, they agreed by the terms of the expired contract to extend their voluntary contractual relationship beyond the expiration date of their 8(f) agreement, and the *Deklewa* privilege to repudiate had not yet been triggered at the time of the NJAB submission.<sup>15</sup>

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<sup>13</sup> We note that, although the Charging Parties inadvertently never signed the expired agreement, they have consistently adhered to its terms, including making the requisite payments into Union benefits funds. The Board has held that a party can bind itself to an unsigned contract by its conduct, *Haberman Construction Co.*, 236 NLRB 79, 85-86 (1978), *enforced* 641 F.2d 351 (5th Cir. 1981), i.e., where it has “engaged in a course of conduct that manifests an intention to abide by the terms of the agreement.” *Asbestos Workers Local 84 (DST Insulation, Inc.)*, 351 NLRB 19, 19 (2007). Here, in addition to abiding by all terms of the agreement, the Charging Parties specifically acknowledged in letters to the Union and to the NJAB that the Charging Parties were “signatories” to the expired agreement.

<sup>14</sup> See, e.g., *Sheet Metal Workers Local 54 (Texas Sheet Metal)*, 297 NLRB at 676-78 (1990); *Collier Electric*, 296 NLRB 1095, 1100.

<sup>15</sup> See *Baylor*, 301 NLRB at 260. Had the Charging Parties timely withdrawn from multi-employer bargaining and began bargaining for a new contract on their own, the Union could not have compelled the Charging Parties to include interest arbitration in any new agreement because it is a non-mandatory subject of bargaining. See, e.g., *AFSCME Council 5, Local 3558 (St. Luke's Hospital of Duluth, Inc.)*, 364 NLRB No. 25, slip op. at 2 (June 10, 2016) (8(b)(3) violation where union insisted to impasse on inclusion of interest arbitration in new agreement). Cf. *R&J Sheet Metal*, 316 NLRB at 393 (noting that courts will not allow an objecting party to be trapped by a cycle of interest arbitration proceedings leading to imposed agreements containing interest arbitration provisions).

Additionally, Article X, Section 8 allows for unilateral submission to the NJAB; any party to the agreement may invoke the provision and request interest arbitration if negotiations for a renewal of the agreement or negotiations regarding a wage/fringe reopener “become deadlocked in the opinion of the Union representative(s) or of the Employer(s) representative(s) or both.” Thus, the fact that the Union submitted the dispute unilaterally and over the objections of the Charging Parties was permissible under the terms of the agreement.

Finally, it does not appear that the Union used interest arbitration to relieve it of its duty to bargain. Rather, it provided the Contractors, including the Charging Parties, with timely notice that it intended to reopen the 8(f) agreement. The Union subsequently met with the Contractors on four occasions to negotiate a successor contract, during which time the parties had discussions that resulted in the June 6 agreement that was presented to the membership for a vote.<sup>16</sup> When the ratification vote failed, the Union notified the Contractors of the members’ wage request and engaged in additional bargaining. The Union announced that the parties were deadlocked and invoked the interest arbitration provision only when the Charging Parties proposed an agreement that was a radical departure from the parties’ tentative agreement and that did not have the support of the other contractors.<sup>17</sup> Notably, the Charging Parties have not presented any evidence that the other contractors authorized them to bargain on behalf of the multiemployer association, nor that the Contractors had rules in place that granted the Charging Parties bargaining authority. To the contrary, their own testimony indicates that the other two contractor representatives present at the final bargaining session both refused to

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<sup>16</sup> *Compare Sheet Metal Workers Local 206 (Warrens Industrial)*, 298 NLRB 760, 762 (1990) (no violation in submission to interest arbitration where parties held six bargaining sessions and discussed many subjects) *and Collier Electric*, 296 NLRB at 1096, 1100 (Board found no evidence that union used the interest arbitration mechanism to relieve it of its duty to bargain over a new contract where the parties met four times and exchanged and discussed each other’s proposals) *with Electrical Workers IBEW Local 46 (Puget Sound)*, 302 NLRB 271, 273, 274 (1991) (union violated Section 8(b)(3) by submitting issues to interest arbitration after it unlawfully refused to meet and bargain with employers that had withdrawn from the multiemployer association because of an alleged conflict).

<sup>17</sup> We note that the Union may not have been in a good faith bargaining posture, at the time it submitted the dispute to interest arbitration, had it been unwilling to engage on a regressive proposal that was legitimately proffered by the multi-employer association or a duly-authorized representative of the association. The rejection of a proposed contract by the employees typically permits a broader re-opening of topics as to which a union has an obligation to bargain, even where the union has been instructed by the employees to seek changes in only one issue.

allow the Charging Parties' attorney to bargain on their behalf. In light of the divergent bargaining positions taken by the various contractors in attendance at the final bargaining session and the Charging Parties' shifting position as to who they spoke for, the Union had a reasonable basis for declaring deadlock and submitting the dispute to the NJAB.<sup>18</sup> Thus, we conclude that there is insufficient evidence to find that the Union's refusal to negotiate over the Charging Parties' proposed changes constituted bad-faith bargaining.<sup>19</sup>

In *Taylor Ridge Paving & Construction*, former Chairman Miscimarra issued a vigorous dissent regarding the majority's treatment of 8(f) automatic renewal clauses.<sup>20</sup> The employer in that case was signatory to a multi-employer 8(f) contract as well as a me-too MOA with a local union council.<sup>21</sup> The me-too MOA bound the employer to any agreements between the union and local employer associations.<sup>22</sup> Although the respondent employer gave the union timely notice that it intended to terminate the parties' bargaining relationship upon expiration of the 8(f) agreement and the me-too MOA, the majority found that the employer was bound, by virtue of the me-too, to a different multi-employer agreement that had been signed subsequent to the employer's agreements with the union and that had several years remaining in its term.<sup>23</sup> Former Chairman Miscimarra argued that such an interpretation of the me-too MOA violated the principles of *Deklewa* by binding an "unwitting employer" in perpetuity with no means of repudiating the 8(f) relationship.<sup>24</sup> Additionally, former

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<sup>18</sup> See, e.g., *Collier Electric*, 296 NLRB at 1100 (holding that union should be allowed to pursue interest arbitration because it had an arguable right to do so; analogizing to the Supreme Court's holding in *Bill Johnson's*, 461 U.S. 731 (1983), that the Board may not enjoin a lawsuit that has a "reasonable basis" but must allow it to proceed).

<sup>19</sup> We further note that allowing the NJAB ruling to stand is an equitable result given that the contract the NJAB imposed was the contract to which the Contractors had tentatively agreed on June 6 and which they would have been bound to but for the Union members' refusal to ratify.

<sup>20</sup> *Taylor Ridge Paving & Construction Co.*, 365 NLRB No. 168, slip op. at 7-10 (Dec. 16, 2017) (Chairman Miscimarra, dissenting).

<sup>21</sup> *Id.*, slip op. at 1.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*, slip op. at 1-2.

<sup>24</sup> *Id.*, slip op. at 8-9.

Chairman Miscimarra argued that the majority's interpretation was in conflict with the principle of employee free choice because it indefinitely extended the union's representative status with no showing of majority status.<sup>25</sup> He argued that 8(f) agreements that effectively continue in perpetuity are unenforceable under the Act.

The instant case does not present the sort of inescapable 8(f) agreement that former Chairman Miscimarra found objectionable in *Taylor Ridge Paving & Construction*. In that case, the employer was "trapped" in its 8(f) relationship by the me-too MOA, which the Board majority interpreted as binding the employer to subsequent contracts between the union and other employer groups. Here, by contrast, the Charging Parties have not signed an additional agreement requiring them to adopt new contracts the Union may negotiate with other employers. Additionally, the Charging Parties will be able to repudiate the 8(f) relationship or attempt to negotiate their own 8(f) agreements with the Union by timely withdrawing from the Contractors prior to the expiration of the next contract.

For all of the foregoing reasons, we conclude that the Union did not violate Section 8(b)(3) by submitting the parties' contract renewal dispute to binding interest arbitration. Accordingly, the Region should dismiss the charge, absent withdrawal.

/s/  
J.L.S.

H.ADV.15-CB-205766.Response.Sheet Metal Local 36 (b) (6), (b)

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<sup>25</sup> *Id.*, slip op. at 9.