Fortney & Weygandt, Inc. *and* Capital District Council of Carpenters, United Brotherhood of Carpenters & Joiners of America. Case 9–CA–24407

June 26, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On October 11, 1988, Administrative Law Judge Irwin Kaplan issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Respondent filed cross-exceptions and a supporting brief. The Respondent also filed an answering brief in response to the General Counsel's and the Charging Party's exceptions.

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

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

The judge found that the letter of assent signed by the Respondent on July 29, 1985, did not bind the Respondent to the automatic renewal provision in the referenced collective-bargaining agreement. For the reasons set forth below, we find that the letter of assent did bind the Respondent to the automatic renewal provision of the collective-bargaining agreement. Consequently, we find that the Respondent violated Section 8(a)(5) and (1) of the Act by repudiating the collective-bargaining agreement before its automatically renewed expiration date.

The Respondent is a general contractor engaged in the construction and renovation of retail chain stores. The Respondent has employed a regular core of unrepresented carpenters and helpers. In June or July 1985, the Respondent obtained a contract to renovate a Foxmoor store in Columbus, Ohio. The Respondent was informed by the Union's representative for the Columbus area that the store was located in a union mall and that it would have to use union labor. On July 29, 1985, the Respondent signed a letter of assent, which provided that it did "hereby join in, adopt, accept, and become a party to" the collective-bargaining agreement between the Associated General Contractors (AGC) and the Union effective May 1, 1984 through May 31, 1986. The Respondent was not a member of the AGC.

The AGC agreement referenced in the letter of assent also contained a year-to-year renewal provision in the absence of either party giving a 60-day written notice of an intent to modify or terminate the agreement. On March 20, 1986, the Union provided the AGC with a 60-day notice to terminate the 1984–1986 agreement, and the AGC and the Union thereafter negotiated a new agreement effective from June 1, 1986, to May 31, 1989. The Union had not advised the Respondent of this notice to terminate the 1984–1986 agreement, and the Respondent did not provide the Union with any notice regarding the 1984–1986 agreement.

The Foxmoor job was completed in August 1985, and the Respondent did not return to the Columbus area until November 1986, when it commenced work on a Columbus restaurant. There was no contact between the Respondent and the Union from August 1985 until November 1986, when the Union produced the letter of assent and asked the Respondent to sign the 1986–1989 AGC agreement. On December 15, 1986, the Respondent advised the Union that it was repudiating the letter of assent because it had been executed solely for the Foxmoor job and, as an 8(f) agreement, the Respondent was now free to terminate it. The Union filed the instant charge on June 15, 1987.

In determining whether the letter of assent bound the Respondent to the automatic renewal clause, the judge first addressed the Respondent's argument that under article XIII of the AGC agreement, only the AGC and the Union—not an individual employer—had the option to modify or terminate the contract 60 days prior to the May 31, 1986 termination date.[1] Noting that under article XIII, individual employers had such an option only 60 days prior to May 31, 1985, or the first anniversary date, the judge agreed with the Respondent that individual employers were treated differently than the multiemployer group.[2] He further stated that as the letter of assent was not executed until July 1985, well after May 31, 1985, it appeared that the Respondent had no option to modify or terminate the agreement. The judge then found in any event, for the reasons discussed below, that the evi-

[1] Art XIII of the agreement provided, in pertinent part:

> The remaining part of this Agreement shall remain in full force and effect through May 31, 1986 except as noted herein for an individual employer and shall continue from year to year until termination at the option of either party after giving sixty (60) days notice in writing to either party
>
> An individual employer may modify and/or terminate this Agreement by notifying the other party, in writing, sixty (60) days prior to May 31, 1985 of his intent to modify and/or terminate this Agreement following which, this Agreement shall terminate as of May 31, 1985, for that employer only

[2] The judge interpreted the phrase "either party" in art XIII as meaning either the AGC or the Union

dence fell short of establishing that the Respondent and the Union by the letter of assent had contemplated successive or future contracts or anything other than the existing 1984–1986 contract.

The judge found that the letter of assent did not automatically renew for another year. In this regard, he noted that the letter of assent itself did not contain an express automatic renewal provision. He also found that the negotiations between the Respondent and the Union regarding the letter of assent did not involve the duration of the agreement, and that there was no other evidence to support reading renewal features into the letter of assent. The judge concluded that the letter of assent created an 8(f) arrangement that ended when the referenced 1984–1986 AGC agreement terminated, and thus that the Respondent's repudiation of the letter of assent subsequent to the expiration of the 1984–1986 AGC agreement did not violate Section 8(a)(5) of the Act as an unlawful midterm repudiation. We disagree.

Although the letter of assent itself did not contain an automatic renewal clause, it directly incorporated by reference the 1984–1986 AGC agreement, which contained an automatic renewal clause absent timely written notice of an intent to modify or terminate the agreement. Further, the letter of assent provided that the signatory contractor became a party to the underlying agreement.

In a similar case, *C.E.K. Industrial Mechanical Contractors*, 295 NLRB 635 (1989), the Board held that an individual employer who signed an employer association contract as a nonassociation member was a "party" to the contract and thus was bound to the contract's automatic renewal clause. In *C.E.K.*, the respondent signed a copy of the 1981–1983 employer association contract, which had an expiration date of June 30, 1983, and which automatically renewed absent "either party" giving timely notice. The respondent was not a member of the association. The association timely notified the union that it wished to negotiate a new agreement, and in July 1983 the union and the association reached accord on a new contract. The respondent did not sign the new agreement. The judge in *C.E.K.* found that the renewal clause's reference to "party" meant only the union and the association, and thus the contract was lawfully terminated as to the respondent when the association provided notice to the union. The Board, however, reversed the judge, finding that if the contract had meant to exclude nonassociation members from the meaning of "party," it would have been more explicit. The Board declined to find that an employer who signs a contract as an individual employer is not a party to the contract merely because the contract was negotiated by an employer association. The Board concluded that as the respondent was not a member of the association and had not delegated bargaining authority to the association, the association's notice of a desire to change the contract did not preclude the effectiveness of the automatic renewal clause as to the respondent.

In the instant case, the letter of assent specifically provided that the contractor signatory to the letter of assent became a party to the underlying AGC agreement. As in *C.E.K.*, we reject the judge's reading of "party" here as meaning only either the AGC or the Union. We further note that the contractual relationship between the Respondent and the Union was defined by both the letter of assent and the underlying AGC agreement. Thus, we find that the AGC agreement's automatic renewal clause applied to the Respondent in the absence of either the Respondent or the Union giving timely notice to the other. The Union's notice to the AGC to terminate the 1984–1986 agreement did not preclude the effectiveness of the automatic renewal clause as to the Respondent, as the Respondent had never delegated bargaining authority to the AGC.[3]

Further, we also reject the argument that under the terms of article XIII of the AGC agreement, individual employers could give notice to modify or terminate the agreement 60 days before May 31, 1985, but not before the 1986 termination date. Rather, we find that a reasonable interpretation of article XIII, which is supported by testimony in the record,[4] is that individual employers could give notice to modify or terminate the agreement 60 days either before May 31, 1985, or before the May 31, 1986 termination date.[5] Thus, we do not read the first cited paragraph of article XIII as excluding individual employers. Rather, we find that the term "party" in that paragraph refers to the AGC, the Union, or an individual employer, in contrast to the judge's finding that "party" refers only to the AGC or the Union.

Thus, we find that by signing the letter of assent, the Respondent was bound to all the terms in the 1984–1986 AGC collective-bargaining agreement, including the provision for automatic renewal for 1 year unless either the Respondent or the Union

[3] *C.E.K.*, above at 635 *Victor Block, Inc.*, 276 NLRB 676, 679 (1985)

[4] Richard Hobbs, executive director of the AGC, testified that art XIII was intended to give individual employers an option to terminate after the contract's first year, but was not meant to preclude an individual employer from being able to terminate 60 days prior to the contract's expiration date

[5] We reject the General Counsel's contention that the May 31, 1985 date is a misprint, as we note that art XIII of the 1986–1989 contract similarly provides that an individual employer may give notice to terminate 60 days prior to May 31, 1987, or May 31, 1988.

gave timely notice of a desire to modify or terminate the agreement.[6] The Respondent failed to comply with this contractual notice requirement. Accordingly, we conclude that the Respondent was bound for 1 year [7] by the automatic renewal clause of the 1984–1986 AGC agreement.[8]

CONCLUSIONS OF LAW

1. The Respondent was bound by the automatic renewal clause of the 1984–1986 collective-bargaining agreement between the AGC and the Union.

2. By repudiating the automatically renewed 1984–1986 agreement on or about December 15, 1986, the Respondent has violated Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that the Respondent has violated the Act, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the purposes of the Act. We shall order the Respondent to make whole its employees, as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), for any losses they may have suffered as a result of the Respondent's repudiation of the automatically renewed 1984–1986 AGC contract. We shall also order the Respondent to make whole its employees by making all fringe benefit fund contributions to the union funds as provided by the agreement,[9] and by reimbursing the employees for any expenses ensuing from the Respondent's failure to make such contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). All payments to employees shall be made with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, Fortney & Weygandt, Inc., Lakewood, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Repudiating the automatically renewed 1984–1986 collective-bargaining agreement between the Associated General Contractors and the Capital District Council of Carpenters, United Brotherhood of Carpenters & Joiners of America.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

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

(a) Make whole its employees in the following appropriate unit for any losses suffered as a result of the Respondent's repudiation of the automatically renewed 1984–1986 agreement, and by making contributions to the union funds as required by that agreement, in the manner set forth in the remedy section of this decision. The appropriate unit is:

> All carpenter craftsmen employed by [Respondent] within the jurisdiction of the Union, but excluding all professional employees, guards and supervisors as defined in the Act.

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

(c) Post at its office in Lakewood, Ohio, copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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[6] We agree with the judge that the Union's conduct in asking the Respondent to sign the 1986–1989 AGC agreement in November 1986 was not tantamount to an admission by the Union that the 1984–1986 agreement did not automatically renew

[7] We leave to compliance whether the contract renewed again in 1987 *C.E.K.*, above at 635, fn 3.

[8] The judge found, and we agree, that the contract between the Respondent and the Union was an 8(f) agreement However, nothing in the Board's decision in *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd sub nom *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir 1988), precludes a finding that an 8(f) agreement may, in appropriate circumstances, automatically renew. See also *William N Taylor, Inc.*, 288 NLRB 1049 (1988).

We agree with the judge that the Respondent's other defenses are without merit

[9] Because the provisions of employee benefit fund agreements are variable and complex, the Board does not provide at the adjudicatory stage of a proceeding for the addition of interest at a fixed rate on unlawfully withheld fund payments. We leave to the compliance stage the question of whether the Respondent must pay any additional amounts into the fringe benefit funds in order to satisfy our "make whole" remedy. These additional amounts may be determined, depending on the circumstances of each case, by reference to the provisions in the documents governing the funds at issue and, where there are no governing provisions, to evidence of any loss directly attributable to the unlawful withholding action, which might include the loss of return on investment of the portion of funds withheld, additional administrative costs, etc, but not collateral losses. See *Merryweather Optical Co*, 240 NLRB 1213 (1979).

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

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

CHAIRMAN STEPHENS, dissenting.

For the reasons stated by the administrative law judge, I would dismiss the complaint.

APPENDIX

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

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

WE WILL NOT repudiate the terms and conditions of the 1984–1986 Associated General Contractors collective-bargaining agreement with Capital District Council of Carpenters, United Brotherhood of Carpenters & Joiners of America, covering our employees in the following appropriate unit:

> All carpenter craftsmen employed by [Respondent] within the jurisdiction of the Union, but excluding all professional employees, guards and supervisors as defined in the Act.

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

WE WILL make whole employees for any losses suffered as a result of our failure to honor the automatically renewed 1984–1986 agreement, plus interest, and by making contributions to the union funds as required by that agreement.

FORTNEY & WEYGANDT, INC.

Carol L. Shore, Esq., for the General Counsel.
Alan G. Ross, Esq. (Wickens, Herzer & Panza Co. L.P.A.), of Cleveland, Ohio, for the Respondent.
Jack Gregg Haught, Esq. (Benesch, Friedlander, Coplan & Aronoff), of Columbus, Ohio, for the Charging Party.

DECISION

STATEMENT OF THE CASE

IRWIN KAPLAN, Administrative Law Judge. This case was heard in Columbus, Ohio, on November 3 and 4, 1987. The underlying charges were filed on June 15, 1987, by the Capital District Council of Carpenters, United Brotherhood of Carpenters & Joiners of America (Charging Party or Union). These charges gave rise to a complaint and notice of hearing dated July 20, 1987, and an amended complaint and order scheduling hearing dated October 6, 1987.

The gravamen of the amended complaint alleges that on or about December 15, 1986, Fortney & Weygandt (Respondent or Employer) unlawfully repudiated a construction industry or an 8(f) agreement before the expiration date in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). The Respondent and Charging Party were parties to a "Letter of Assent" which document, in essence, is alleged to have incorporated by reference a collective-bargaining agreement between the Central Ohio Division, Ohio Building Chapter, Associated General Contractors of America, Inc. (AGC) and the Union. That collective-bargaining agreement by its terms was effective from May 1, 1984, through May 31, 1986, but contained a year-to-year renewal provision in the absence of either party giving a 60-day notice in writing (evergreen provision). According to the General Counsel, as neither the Respondent nor the Union provided timely notice to each other to terminate the aforenoted agreement, it is alleged that the agreement was thereby extended for an additional year to May 31, 1987. As such, it is alleged that the repudiation thereof by Respondent on or about December 15, 1986, was a midterm violation and violative of Section 8(a)(5) under the general principles set forth by the Board in *John Deklewa & Sons*, 282 NLRB 1375 (1987).

The Respondent filed a corresponding answer and amended answer conceding, inter alia, certain jurisdictional facts but denying that it committed any unfair labor practices. In particular, the Respondent contends that the Letter of Assent was a project-only agreement which terminated by its own terms on May 31, 1986, or terminated on that date as a result of the Union's termination notice on March 20, 1986, to the AGC. The Respondent also raised various other defenses including the appropriateness of the unit, majority status, deferral to arbitration, constitutionality of any retroactive application, and that the charges are time-barred by Section 10(b) of the Act.

Based on the entire record, including my observations of the demeanor of the witnesses as they testified, and after careful consideration of the posttrial briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, an Ohio corporation with a principal office and place of business in Lakewood, Ohio (a suburb of Cleveland), is a carpentry contractor in the construction industry constructing commercial facilities in Columbus, Ohio, and other locations. During the 12-month period ending June 30, 1987, the Respondent, in connection with the aforenoted business operations, purchased and received at its various locations throughout the State of Ohio, products, goods, and materials valued in excess of $50,000 directly from points outside the State of Ohio. The Respondent admits, the record supports, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *Background and Sequence of Events*

The Respondent is a general contractor engaged in the construction and renovation of retail chain stores located largely in midwestern states but also down to Kentucky and the east coast, except for the major cities on the eastern seaboard. The carpentry work on the various jobsites is performed by Respondent's employees (carpenters and helpers); the noncarpentry work, i.e., painting and decorating, glass and glazing, electrical wiring, etc., is subcontracted to various local specialty subcontractors. The average length of these national retail chain or account projects is from 4 to 6 weeks. At any one time the Respondent may have from 8 to 10 projects in operation.

Over the past 2 to 3 years, the Respondent employed a regular core of unrepresented carpenters and helpers averaging approximately 30 in number. They are paid in accordance with Respondent's set salary structure which proceeds from $10 to $11 per hour for new employees to $16 to $17 per hour for the more experienced and senior employees. In addition, the Respondent provides a fringe benefit package that includes paid vacation, hospitalization, personal time, and sick time. These various fringe benefits are described in an employee manual or packet. Respondent's employees work in two, three, or four-man crews, but their composition is subject to change as employees interchange from project to project as needed. All carpentry work assignments emanate from Respondent's headquarters located in Lakewood, Ohio (near Cleveland, Ohio).

In June or July 1985,[1] the Respondent obtained a contract to renovate a retail store for one of its national retail accounts, Foxmoor, at the Northland Shopping Mall located in Columbus, Ohio. In early July, two of Respondent's employees (Job Superintendent Tom Mannarina and a helper) were dispatched to the Northland Mall to do some demolition and related preliminary work to get the Foxmoor project started. Soon after their arrival, Union Business Representative Diego Moreno[2] approached Mannarina and inquired whether Respondent intended to do the work or subcontract. Mannarina referred Moreno to Robert Fortney, president of Respondent.

Moreno phoned Fortney that same day and posed to the latter the same question he had to Superintendent Mannarina, to wit, whether Fortney was going to use his own carpenters, union contractors or subcontract. According to Fortney, Mannarina had already informed him of Moreno's inquiry and that Moreno wanted a contract for the carpentry work at the Northland Mall. As testified by Fortney, the conversation in pertinent part went as follows:

> I talked to Moreno and he stated this was a union situation, a union mall, no non-union labor would be permitted and that if we wanted to do work in the mall we had to have a union agreement to get men to do work in that mall.
>
> Then I asked him why we needed this contract, if there was another way around it. He stated that if we wanted to use labor that was on our payroll, it would have to be union labor.

According to Fortney, "he [Fortney] did not have a subcontractor lined up because of the pressures on the job" and therefore he agreed to sign a labor contract "for that job."[3] Moreno's account of the conversation was somewhat broader in scope as to whether anything other than the Foxmoor job was discussed. Thus, Moreno testified that they also touched on other carpentry work to be performed in the area and that "[Fortney] said he probably would have some coming up."

The Fortney-Moreno phone conversation resulted in union employees performing the carpentry work on the Foxmoor job and a labor agreement known as a "Letter of Assent." According to Moreno, while the terms of that agreement were not discussed, he asserted that Fortney was "well aware of what is in the assent form." That same day, Moreno mailed the Letter of Assent (G.C. Exh. 2) to Fortney for his signature. The agreement in its entirety provides as follows:

> *Letter of Assent*
>
> In consideration of One Dollar ($1.00) and other valuable considerations and, further, inconsideration [sic] of the benefits to be derived herefrom, the undersigned contractor, or its successors and assigns, although not a member of the Central Ohio Division, Ohio Building Chapter, Associated General Contractors of America, Inc., the Associated General Contractors of America, Inc., does hereby join in, adopt, accept and become a party to the certain Collective Bargaining Agreement between Central Ohio Division, Ohio Building Chapter, Associated General Contractors of America, Inc., and the Capital District Council, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, effective May 1, 1984 through May 31, 1986, including, but not limited to, all of the provisions contained in said Agreement pertaining to contributions to various funds providing for Health and Welfare, Pensions, Apprenticeship Training, or any other fringe benefit provided for therein, and agrees to be bound by any Trust Agreement presently in existence or hereafter to be entered into by and between the Capital District Council and the Central Ohio Division, Ohio Building Chapter, Associated General Contractors of America, Inc., and agrees to make

[1] All dates refer to 1985 unless otherwise indicated.

[2] *Moreno's* duties include the monitoring of union and nonunion jobs within the charging Union's jurisdiction This covers three and a half counties including Franklin County where Columbus is situated

[3] As noted previously, the Respondent contends that the contract in question was a "project only" contract

> contributions as required thereunder, and authorizes the Capital District Council and the Associated General Contractors to name the Trustees to administer any such funds and ratifies and accepts such Trustees and the terms and conditions of the Trust(s) as made by the undersigned.

For the Foxmoor job, the Respondent was immediately serviced for its manpower exclusively from the Union's hiring hall in Columbus, Ohio, although Fortney waited a few weeks before he actually executed the Letter of Assent. In all, the Respondent hired four union carpenters: two worked a total of 2 weeks, the other two approximately 3-1/2 weeks, at which time the carpentry work on the Foxmoor job was completed. At that time all four union carpenters were permanently laid off.

The Respondent did not return to the Columbus, Ohio area until November 1986. From the time the Foxmoor job was completed back in August 1985 until November 1986 when Respondent commenced work on a restaurant project in the Columbus, Ohio area named the Confluence Park Restaurant, there was no contact between the Union or Respondent. In October 1986 the Respondent was awarded a major subcontract to perform the carpentry work on the Confluence Park Restaurant project. The entire project involved the construction of a new building and for the first time the Respondent performed as a subcontractor rather than as a general contractor.

In the meantime, the Union had provided the AGC with a 60-day notice to terminate the May 1984-May 1986 collective-bargaining agreement and the parties thereafter negotiated a new agreement effective by its terms from June 1, 1986, to May 31, 1989 (G.C. Exh. 4). The Union had not separately advised the Respondent of the aforenoted notice to modify or terminate the 1984–1986 Agreement. Nor had the Respondent provided any such notice. (As noted previously, counsel for the General Counsel contends that the 1984–1986 Agreement thereby automatically renewed itself for another year.)

According to Moreno, in early November 1986,[4] he learned from the construction manager at the Confluence Park Restaurant site that the Respondent had been awarded the carpentry work on that project. There, Moreno observed two or three carpenters employed by Respondent engaged in "prefabbing some roof trusses." As testified by Moreno, he asked one of them to name their employer and asked about the work they were doing. Moreno was told that they were employed by "Fortney and Weygandt (Respondent) out of Cleveland." As for the work, Moreno testified that he was told that they were just "prefabbing" but "that the jobsite wasn't actually ready for construction because of some delays with the foundations." Moreno asserted that he did not take any immediate action because Respondent's carpenters were about to leave and he planned on calling Fortney when Respondent's carpenters returned to the project.

On or about November 25, Moreno phoned Fortney and spoke to him for the first time in about 18 months or since the Foxmoor job. They reintroduced themselves and spoke about anticipated manpower requirements on the Confluence Park Restaurant job as well as wages and benefits. In this regard, they spoke about the possibility of covering or treating Respondent under a Market Recovery Agreement. Such an agreement, inter alia, would permit an employer to pay a lower wage rate than specified in the Union-AGC Master Agreement. It also allows union contractors to compete more equally with nonunion contractors to regain a market in an area recently lost and/or dominated by nonunion contractors. No agreement was reached on the phone but Fortney and Moreno agreed to meet at the Confluence Park Restaurant site on December 5 to discuss the matter further.

On December 5, Fortney met Moreno as planned at the Confluence Park Restaurant (Confluence) site. On that occasion, Moreno was joined by another union official, Frank Casto. Fortney joined Moreno and Casto in their car where they discussed, inter alia, manpower needs for the Confluence job and whether the Respondent could be provided "market recovery" terms and conditions. As for market recovery, Moreno indicated that he would check with his superiors and with the AGC.

According to Fortney, while in the car, Moreno gave him a package of materials (R. Exhs. 2–6) which included the new 1986–1989 collective-bargaining agreement between the AGC and the Union (R. Exh. 2) which Moreno asked him to sign and a copy of the Market Recovery Agreement (R. Exh. 3). Moreno denied that he asked Fortney to sign any document but, rather, he produced for Fortney the original Letter of Assent which the latter had signed at the time of the Foxmoor job. It is undisputed that Fortney indicated that he would abide by that document (Letter of Assent) containing his signature. However, Fortney testified that he also told Moreno that he believed that the Letter of Assent was no longer valid.

During the course of the discussion on December 5 Fortney insisted on carrying five of his own carpenters on the Confluence job, but he also indicated that he would require 10 to 15 additional employees within the next 1 to 2 weeks and asked Moreno if he could satisfy that need. Fortney also invited Moreno and Casto to meet his project foreman, Steve Zsinko. Thereupon, they left the car and proceeded to meet the foreman. Zsinko raised a number of job-related questions which Moreno put off discussing stating that he and Fortney would address those matters at a later date. Moreno also stated that he would discuss wages and market recovery prospects with his boss and would call Fortney on Monday, December 8.

Fortney testified that Moreno called him 2 or 3 days later and asked him if he was going to sign the agreement, and that Fortney responded that no decision had been reached. According to Moreno, Fortney told him in that phone conversation that there were still some problems at the Confluence jobsite and referred him to Zsinko. Moreno testified that he met Zsinko that same day and was told by the latter that there were certain job-related problems but that he would soon be in touch with the Union to supply employees for that job. Later that week Moreno assertedly stopped by the jobsite for

[4] All dates refer to 1986 unless otherwise indicated

an update from Zsinko and was again told about job delays and that he was not yet ready to use the Union for its labor pool. (Zsinko did not testify at the hearing.)

Moreno called Fortney again on December 15. Fortney informed Moreno that he had mailed a letter to him and that rather than discussing the situation over the telephone, that Moreno would better understand the Company's position after he read that letter. The letter, dated December 15, 1986, was essentially a notice of termination and repudiation of the Letter of Assent (G.C. Exh. 5). Thus, in pertinent part, it stated:

> The purpose of this letter is to advise Capital District Council of the United Brotherhood of Carpenters and Joiners of America, AFL–CIO that Fortney and Weygandt, Inc. does hereby terminate, repudiate and declare null, void and unenforceable the above referenced Letter of Assent for the reasons set forth below.
>
> As you will recall, the above-referenced Letter of Assent was executed solely for the purpose of obtaining carpenters for work at the Foxmoor Store at the Eastland Mall in Columbus, Ohio. The workforce thus employed, consisting of a total of four carpenters was a temporary workforce to perform certain carpentry work at the project involved. At the end of the project all of those carpenters were permanently laid off and have never been re-employed by Fortney and Weygandt, Inc.
>
> The agreement entered into by Fortney and Weygandt, Inc. and the District Council, United Brotherhood of Carpenters and Joiners of America, AFL–CIO was a Section 8(f) agreement within the meaning of the National Labor Relations Act. Such a Section 8(f) agreement does not become binding upon an employer in the construction industry unless and until the union involved attains majority status in the signatory employer's permanent and stable workforce. To the extent that the four carpenters temporarily employed at the above-referenced job in 1985 were not and are not part of the permanent and stable workforce of Fortney and Weygandt, Inc. and the Capital District Council of the United Brotherhood of Carpenters and Joiners of America cannot demonstrate that it represents a majority of the carpenters employed at the current jobsite wherein Fortney and Weygandt, Inc. is performing construction work, Fortney and Weygandt does hereby terminate and repudiate the Letter of Assent.

Thereafter, the attorneys for the Union and the Respondent exchanged correspondence setting forth their respective views concerning the continued viability of the Letter of Assent and Respondent's contractual obligations thereon. (See G.C. Exhs. 6, 7, 8, and 9.) Subsequently, the Union filed a grievance and a hearing was held on March 12, 1987, before a joint panel of the Union and the AGC. The Respondent elected not to attend that hearing, challenging the panel's jurisdiction and instead set forth its position in a letter dated March 9, 1987 (G.C. Exh. 11). The joint panel deadlocked over the question of jurisdiction and failed to reach any decision (G.C. Exh. 12). No further action was taken over the grievance and on June 15, 1987, the Union filed the instant charge.

B. *Discussion and Conclusions*

1. The alleged renewal or evergreen provision

This case turns principally on whether the Letter of Assent, which incorporated by reference the May 1, 1984 through May 31, 1986 AGC collective-bargaining agreement, automatically renewed itself for another year when neither the Union nor the Respondent provided a 60-day notice to the other to modify or terminate said collective-bargaining agreement. The Letter of Assent, by itself, did not expressly contain an automatic renewal or so-called "evergreen" provision. On the other hand, the referenced collective- bargaining agreement provided for a year-to-year renewal where "either party" (AGC or the Union) fails to provide a 60-day written notice prior to the termination date to "either party" except as follows:

> An individual employer may modify and/or terminate this agreement by notifying the other party, in writing, sixty (60) days prior to May 31, 1985 of his intent to modify and/or terminate this Agreement following which, this Agreement shall terminate as of May 31, 1985 for that employer only. (G.C. Exh. 3, p. 7, art. XIII.)

It is undisputed that no timely written notice was sent or received by the Respondent under the aforenoted provision or otherwise under the 1984–1986 AGC agreement. The General Counsel contends that, as a result, the terms of the 1984–1988 AGC agreement as applicable to Respondent were automatically extended for 1 year to May 31, 1987. In these circumstances, and on reliance on the Board's decision in *John Deklewa & Sons*, 282 NLRB 1375 (1987), dealing with construction industry 8(f) arrangements, as in the instant case, the General Counsel further contends that the Respondent's letter dated December 15, 1986, rejecting any collective-bargaining obligations "constitutes an unlawful mid-term repudiation."

The record disclosed that the Union provided timely written notice to the AGC with regard to the 1984–1986 contract and that the same parties thereafter negotiated a new 3-year agreement by its terms effective from June 1, 1986, to May 31, 1989. (G.C. Exh. 4.)

The Respondent contends "that the contractual obligations created by the Letter of Assent terminated on the date of the expiration of the 1984–1986 Agreement." According to the Respondent, the language in that agreement effectively foreclosed it from exercising any option to modify or terminate and was never intended to apply to employers similarly situated. Thus, Respondent points out that under article XIII of the AGC agreement only the multiemployer group (AGC) and the Union have the option to modify or terminate 60 days prior to the termination date of that agreement. As for individual employers, under article XIII, they have such option only 60 days prior to May 31, 1985, or the first anniversary date

and not the termination date.[5] As such, the Respondent correctly points out, individual employers are treated differently from the multiemployer group of which the Respondent is not a member. Here, the Letter of Assent was not executed until July 1985, well after the anniversary date, so that it appears, as contended by the Respondent, that it had no option to modify or terminate on any basis under that agreement. In any event, I find, on the state of this record, for reasons noted below that the evidence falls far short of establishing that the Respondent and Union had contemplated successive or future contracts or anything other than the then current 1984–1986 AGC contract.

First, as noted previously the Letter of Assent, by itself, contained no renewal provision. Compare, *W. B. Skinner, Inc.*, 283 NLRB 989 (1987), (the "short-form" document contained an express "evergreen" provision); *City Electric*, 288 NLRB 443 (1988). (The Respondent's "Letter of Assent—A" authorized the Association to act as its collective-bargaining representative for successive agreements unless terminated at least 150 days prior to the contract's then current anniversary date.) *Garmon Construction Co.*, 287 NLRB 88, 89 fn. 6 (1987). (The signed memorandum contained a provision which stated that it would continue in effect unless timely notice of termination was given.)

Second, the negotiations between Fortney and Moreno did not touch upon the duration of the agreement. The record disclosed that Fortney and Moreno spoke to each other only once before the Letter of Assent was executed, and that was on the telephone. On that occasion, their conversation focused on the union providing carpenters for the Foxmoor job and nothing was said about the terms of agreement. According to Fortney, he had agreed to a project only contract. Moreno acknowledged that Fortney did not ask him about any of the terms contained in the Letter of Assent (Tr. 76–77). Further, Moreno testified that all he told Fortney about the document was that it is a basic agreement which all contractors sign who deal with the Union (Tr. 77). Moreno did not participate in negotiating any of the master agreements nor was he involved in drafting the language in the Letter of Assent. In fact, Moreno did not know who drafted the language in question. The only other witness to testify regarding the reach of the renewal provision in the AGC contract was Richard Hobbs, executive director for the AGC and one who participated in negotiating the 1984–1986 master agreement. According to Hobbs, the assent form binds a contractor only to the termination date of the referenced collective-bargaining agreement with no renewal features. In these circumstances, and in the absence of any other probative evidence tending to support the General Counsel's "evergreen" contention, I find no cogent basis to read renewal features into that assent document where, as here, it is totally silent on the subject of duration.

In rejecting the General Counsel's "evergreen" contention, I have not relied on the Respondent's additional argument that as Moreno also requested Fortney to sign the new AGC 1986–1989 agreement, this tends to belie the notion that the former believed the parties were then (the Confluence job) governed by an automatic renewal or 1-year extension.[6] Thus, I do not find that Moreno's request to have Fortney's signature on a new full-term agreement is tantamount to an admission that the assent form was without continuing vitality for at least another year. See *Victor Block, Inc.*, 276 NLRB 676, 679 (1985).

Having found that the Letter of Assent created a construction industry 8(f) arrangement which ended when the referenced collective-bargaining agreement terminated, I turn now to consider whether a collective-bargaining relationship survived that agreement. Thus, it is also alleged that the Union by virtue of "Section 9(a) of the Act, has been, and is, the exclusive representative" for the alleged appropriate unit. One of the major principles set forth by the Board in *Deklewa*, supra at 1377, 1378 is that "upon the expiration of 8(f) agreements, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship." There, the Board also noted, at footnote 41, that it will require the party asserting the existence of a 9(a) relationship to prove it.

In the instant case, the record is barren of evidence in support of theUnion's majority status. Thus, I find, in applying the aforenoted *Deklewa* principle, that as the General Counsel had only established that the parties had an 8(f) relationship, the Respondent was free to repudiate the bargaining relationship when the relevant collective-bargaining agreement terminated. See also *Jack Welsh Co.*, 284 NLRB 378 (1987).

In sum, I find that as no 9(a) bargaining obligations have been established, that the Respondent's repudiation of the Union subsequent to the expiration date of the 1984–1986 AGC agreement was lawful and not in violation of Section 8(a)(5) of the Act.

2. Other issues

The Respondent has also raised variously that the charges are time-barred by Section 10(b) of the Act; that the Letter of Assent was a project-only agreement; that the alleged unit is not an appropriate one; that the Board should defer to the arbitration process; and, that there should be no retroactive application of the *Deklewa* principles.

Having found, for reasons discussed above, in favor of the Respondent on the central issue dealing with alleged renewal obligations and that the Respondent had not violated Section 8(a)(5) of the Act, I find it unnecessary to discuss at length the Respondent's other defenses. I find

[5] The General Counsel contends that the 1984–1986 AGC contract contains misprints and that no reliance should be placed on the dates set forth in art XIII. While there is unrebutted record testimony indicating that the printed execution date is in error, I find, contrary to the General Counsel, that without more, it does not follow that the May 31, 1985 date as it relates to individual employers is also in error. In this connection, it is noted that the 1986–1989 AGC contract provides the same relative option for individual employers to modify or terminate that agreement on the anniversary date (G C Exh 4)

[6] In crediting *Fortney* over *Moreno* on this point, it is noted, inter alia, that *Moreno's* testimony was at odds with his affidavit in certain key respects and at other times his testimony was inconsistent

however that Respondent's other defenses are without merit.

As for the timeliness of the charges, the record disclosed that there was no clear repudiation until Fortney's letter of repudiation dated December 15, 1987, and received by the Union on or about December 18, 1987. As the underlying charges were filed on June 15, 1988, and within 6 months of the date the Union learned of Respondent's repudiation, the charges were timely filed. See, e.g., *Meekins, Inc.*, 290 NLRB 126 fn. 1 (1988).

I also reject Respondent's contention that the parties had intended a "project-only" agreement. The record disclosed that such arrangements are rare in the industry and particularly within the jurisdiction of the Union and AGC. As testified by Hobbs, Respondent's own witness, a contractor signing an "assent form" is binding himself to the Master Agreement and not a project (Tr. 186). Even Fortney belatedly acknowledged that Moreno never told him that under the assent form the Union was going to supply labor only for the Foxmoor store (Tr. 320).

On the unit issue, I find contrary to Respondent that in the construction industry, a unit limited to employees (here carpenters) employed by the employer within the jurisdiction of the union is an appropriate unit for collective-bargaining purposes. See, e.g., *Hageman Underground Construction*, 253 NLRB 60, 63 (1980); *General Engineering* 283 NLRB No. 150 (May 18, 1987) (unpublished decision) It is also noted that Respondent's hard core employees normally work outside the Columbus, Ohio area (Union's jurisdiction) and may constitute a separate appropriate unit.

As for Respondent's deferral defense, it is noted that the Respondent not only objected to the arbitration process and refused to be bound by any decision rendered by the arbitration panel, it also threatened to file NLRB charges if the panel continued to pursue the subject in question. In any event, the panel was deadlocked and never reached a decision. In *Olin Corp.*, 268 NLRB 573 (1984), the Board held that it would defer to an arbitration award where the proceedings appear to have been fair and regular, all parties have agreed to be bound, the arbitrator has adequately considered the unfair labor practice issues, and the arbitrator's decision is not clearly repugnant to the Act. Here, applying *Olin*, deferral is inappropriate noting particularly that the Respondent refused to submit to the jurisdiction of the arbitration panel and that in any event the panel was deadlocked and unable to reach a definitive result on the substantive issue.

Finally, as the Board in *Deklewa* has instructed that retroactive application of the principles set forth therein is appropriate, I find that the Respondent's further defense is also without merit. *Deklewa*, supra at 40–41.

CONCLUSION OF LAW

The General Counsel has not established by a preponderance of the credible evidence that the Respondent has violated the Act as alleged in the complaint.

[Recommended Order omitted from publication.]