

International Association of Heat and Frost Insulators and Asbestos Workers Local Union No. 27, AFL-CIO and Master Insulators Association, Inc. Case 17-CB-2643

March 30, 1984

DECISION AND ORDER

**BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS**

On 24 January 1983 Administrative Law Judge Clifford H. Anderson issued the attached decision. The General Counsel and the Charging Party each filed exceptions and a supporting brief.

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,¹ and conclusions only to the extent consistent with this Decision and Order.

The judge concluded that the Respondent did not violate Section 8(b)(1)(B) and (3) of the Act by refusing to meet and bargain with the grievance handling representative selected by Master Insulators Association (the Association) because he found, in agreement with the Respondent, that the Association had waived its right to designate whomever it chose for that position. We agree with the General Counsel and the Charging Party, however, that there was no such waiver and that the Respondent's refusal to meet and bargain was unlawful.

The relevant facts, more fully set forth in the judge's decision, are summarized below.

The Association is a multiemployer organization composed of insulation employers in the construction industry, with a long history of bargaining with the Union.² In 1979 the Association designated a separate group, the Builder's Association, to represent it for collective bargaining and in 1980 the Association and the Union negotiated their most recent contract, extending from 14 October 1980 through 13 October 1983.³ Article V of the

¹ In the absence of exceptions thereto, we adopt, pro forma, the judge's refusal to defer this case under the grievance and arbitration provisions of the contract in accordance with procedures established in *Collyer Insulated Wire*, 192 NLRB 837 (1971).

² The unit involved includes member employers' mechanics, apprentices, and improvers engaged in cold and hot thermal insulation work.

³ The preamble of the contract reads as follows:

TRADE AGREEMENT

This AGREEMENT, made and entered into this 14th day of October, 1980 and effective through the 13th day of October, 1983, at 12:01 A.M., by and between the Master Insulators Association, Inc., of Kansas City, Missouri and vicinity (hereinafter called the "Asso-

ciation") on behalf of its members (hereinafter called "Employers") and the International Association of Heat and Frost Insulators and Asbestos Workers' Local No. 27 of Kansas City, Missouri (hereinafter called the "Union").

contract provides for a Trade Board comprised of "four members of the Association and four members of the Union" to handle disputes in the step of the grievance procedure which precedes arbitration. That article, in pertinent part, reads as follows:

ARTICLE V

TRADE BOARD

(DISPUTES AND GRIEVANCES)

There shall be a Trade Board consisting of four (4) members of the Association and four (4) members of the Union.⁴ Said Trade Board shall have the right to investigate labor operations of the parties to this Agreement within its prescribed limits so far as any of the Provisions of this Agreement are involved, in connection with which any question may arise, and for this purpose shall have the right to summon, question, and examine any party to this Agreement, or their representatives or agents.

Grievances of the Employer or the Union arising out of the interpretation and enforcement of this Agreement shall be settled between the Employer directly involved and the duly authorized representatives of the Union, if possible. An Employer may have an Association Representative present, to act as its representative. Grievances not settled as provided in this paragraph may be appealed by either party to the Trade Board.

Trade disputes or grievances shall be settled without cessation of work, and in the cases where the parties to this Agreement fail to agree, the matter in dispute shall be referred to the Joint Trade Board. In case any dispute arises, notice must be given in writing to the Secretary of the Trade Board by the aggrieved party or parties within ten (10) days.

The Trade Board shall be governed by the following By-Laws:

3. Six (6) shall constitute a quorum, three (3) from each side; neither shall cast more ballots than the other.

7. In the event the Trade Board is unable to agree as a majority on any matters which may arise, the matter in dispute shall be submitted

ciation") on behalf of its members (hereinafter called "Employers") and the International Association of Heat and Frost Insulators and Asbestos Workers' Local No. 27 of Kansas City, Missouri (hereinafter called the "Union").

⁴ This same language has appeared in Association-Union contracts since at least 1941.

to a neutral person chosen by four (4) or more of the Trade Board members.

At the same time that the Association selected the Builder's Association as its bargaining representative, Donald Wilkerson, a Builder's Association employee, was designated executive director of the Association and was appointed to serve on two Association-Union committees, the Joint Apprenticeship Committee⁵ and the Joint Trade Board. No Trade Board meetings were held in 1979 or 1980, however, and no dispute arose as to the designees.

On 11 May 1981 the first Trade Board meeting of that year was held to discuss grievances filed by the Union against Insulcon, Inc., one of the employer-members of the Association. The Union's business manager Ben T. Blair appeared as a union designee and was elected chairman of the Trade Board. Wilkerson was elected secretary. Another Association designee, Gene Dettmer, was present as an Insulcon representative, but as the grievances directly involved Dettmer, for the accused employer, and Blair, as the union representative who filed the charges, the remaining members, three for each side, a quorum, determined that neither of them would sit on the Trade Board while the Insulcon grievances were before it. The discussion, however, broke down over the issue of whether tape recording would be permitted, and the meeting ended with nothing resolved.

At the beginning of the 11 May meeting, Blair informed Wilkerson that because Wilkerson was not an Association employer-member the Union opposed his designation to sit on the Trade Board. On 27 May 1981 the Union filed a grievance alleging that Wilkerson's serving on the Trade Board violated article V of the contract on the ground that that language specifies that "members" of the Association shall represent management, and Wilkerson as an Association employee was not a "member." In the grievance letter the Union offered the Association the choice of proceeding directly to arbitration or processing the grievance in the normal course. The Association responded by letter 1 June, stating that, by the terms of the contract, Association designees could be employer agents or Association agents and suggesting that the grievance go directly to arbitration.

The next Trade Board meeting was held 24 July 1981 to discuss further the Insulcon charges. Once again Blair objected to the presence of Wilkerson, but stated the Union was willing to proceed

anyway. The talks again collapsed over the issue of tape recording the proceedings, and the meeting adjourned. Because the tape recording dispute continued into 1982, no Trade Board meetings were held until 13 April 1982. By that time Wilkerson was no longer sitting on the Trade Board, as he had not been reappointed in 1982.

The Trade Board next met 15 July 1982 with Dettmer, whose term had also expired, and Wilkerson serving in acting capacities due to the absence of two designated management representatives. One other management representative attended. According to Dettmer's and Wilkerson's credited testimony, Blair arrived at the meeting and, seeing the three management representatives, stated that he did not find a quorum present.⁶ Blair did not state a rationale for not finding a quorum and did not reply to Dettmer's assertion that Blair was objecting to Wilkerson's presence.

On 23 July 1982 Blair sent a letter to Wilkerson stating that the Union was still challenging Wilkerson's right to sit on the Trade Board, and therefore the Union would not agree to any Trade Board meetings as long as Wilkerson was an Association representative. The letter, in pertinent part, reads:

The Union has no objection to the Trade Board hearing *any* grievances or other matters as long as the Association does not insist upon the right to record them by use of a tape recorder or court stenographer. Likewise, I would not necessarily see any problem in having a Trade Board meeting to consider the Insulcon charges alone, if that is going to be the only way they can get to be heard. However, before the Union would agree to participate in any Trade Board hearing of this sort, we would like to be informed beforehand whether you will continue to attempt to sit as a member for the Association in any future Trade Board meetings, including the one you propose on the Insulcon charges. As you well know, the Union has had a pending grievance for over a year challenging your right to sit as a member of the Trade Board, and unfortunately this along with other pending grievances have been held up due to the NLRB litigation involving the use of tape recordings. Thus, it would be inconsistent for the Union to agree to meet in a Trade Board meeting on the Insulcon charges, even though you have agreed not to use any type of recording device, as long as you intend to try to participate as an Association member on the Trade

⁵ In 1980 the Union refused to meet with Wilkerson on the Joint Apprenticeship Committee because it objected to his appointment. The Board found this conduct violative of Sec. 8(b)(1)(B) and (3) of the Act. See *Asbestos Workers Local 27 (Master Insulators)*, 263 NLRB 922 (1982).

⁶ The Trade Board bylaws require three Trade Board designees from each side to make up a quorum, art. V, 3.

Board. Of course, the Union has offered to agree to process this particular grievance, involving your status on the Trade Board, in an expedited manner, but to date our offer has been rejected. Thus, it apparently will have to await the NLRB litigation as will all other pending grievances.

The judge found it was undisputed that, by Blair's letter of 23 July 1982, the Union refused to meet and bargain with the Association at Trade Board meetings as long as Wilkerson continued as an Association designee and thus concluded that the letter sustained the General Counsel's prima facie case that the Respondent's conduct was violative of Section 8(b)(1)(B) and (3) of the Act. The judge found it unnecessary to decide if Blair's actions at the 15 July 1982 meeting also violated the Act. But he stated in footnote 6 of his decision that, if a finding were required regarding the events of 15 July 1982, he would find that the evidence of Blair's conduct at that meeting was sufficient to sustain the General Counsel's contention that on that date the Respondent refused to bargain with the Association Trade Board designees because of the presence of Wilkerson. We agree with this alternative finding that the Respondent's initial refusal to bargain occurred 15 July 1982.

Although the judge found that the General Counsel had established a prima facie case of the Respondent's unlawful conduct, he concluded that the Respondent was correct in its contention that the Association had waived its right to appoint representatives of its own choosing to the Trade Board. Initially, the judge concluded that an employer may, through contract negotiations, waive its right to select any representative of its choosing for prearbitration grievance handling. The judge then found, in agreement with the Respondent, that the first sentence of article V of the contract, which limits Trade Board designees to "members" of the Association, could only be read to mean that designees must be individuals who are representatives of the employer-members of the Association, thus excluding employee staff of the Association or other designated representatives from Trade Board eligibility. To interpret this section otherwise, according to the judge, would be to render the language meaningless. The judge concluded that, because the Association waived its right freely to select its representatives on the Trade Board, the Respondent had no duty to meet and bargain at Trade Board meetings so long as Wilkerson served as a designee.

We disagree, and find merit in the General Counsel's and the Charging Party's contention that the word "members" in article V refers to mem-

bers of the Trade Board and not to individual employer-members of the Association, and that the collective-bargaining agreement merely provides that the Trade Board shall have eight members, four of whom shall represent the Union and four the Association. As noted by the General Counsel, the word "member" is used in section 7 of article V only to refer to Trade Board members. That section states:

7. In the event the Trade Board is unable to agree as a majority on any matters which may arise, the matter in dispute shall be submitted to a neutral person chosen by four (4) or more of the Trade Board members.

Additionally, the preamble to the contract, quoted in full in footnote 3 above, states that the companies which belong to the Association shall be "hereinafter called 'Employers.'" At the very least we find that the language "There shall be a Trade Board consisting of four (4) members of the Association and four (4) members of the Union" is ambiguous and thus does not meet the standard that the waiver of a right guaranteed under the Act must be clear and unmistakable.⁷ We therefore conclude that the Respondent's refusal to meet and bargain with the Association's representative violated Section 8(b)(1)(B) and (3) of the Act.⁸

CONCLUSIONS OF LAW

By refusing 15 July 1982, and thereafter, to meet and bargain with representatives designated by the Association or its employer-members to represent it on the Joint Trade Board established pursuant to article V of its collective-bargaining agreement with the Association for the purpose of handling disputes and grievances arising under the contract, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(B) and (3) and Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of Section 8(b)(1)(B) and (3) of the Act, we shall order that it cease and desist and take certain affirmative action designed to effectuate the policies

⁷ *Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746 (6th Cir. 1963), cert. denied 376 U.S. 971 (1964).

⁸ In view of our finding that the Association did not waive its statutory right freely to select its prearbitration grievance representatives, it is unnecessary to decide whether such a right may be waived.

Member Dennis agrees with the judge that both unions and employers may waive their right to select prearbitration grievance handling representatives.

of the Act. We shall, inter alia, order that the Respondent, on request, meet and bargain with representatives designated by Master Insulators Association, Inc. or its employer-members to represent it on the Joint Trade Board established pursuant to article V of its collective-bargaining agreement with the Association for the purpose of handling disputes and grievances arising under the contract.

ORDER

The National Labor Relations Board orders that the Respondent, International Association of Heat and Frost Insulators and Asbestos Workers Local Union No. 27, AFL-CIO, Raytown, Missouri, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing to meet and bargain with representatives designated by Master Insulators Association, Inc. or its employer-members to represent it on the Joint Trade Board established pursuant to article V of its collective-bargaining agreement with the Association for the purpose of handling disputes and grievances arising under the contract.

(b) Restraining and coercing Master Insulators Association, Inc. or its employer-members in the selection of its representatives to serve on the Joint Trade Board established pursuant to article V of its collective-bargaining agreement with the Association for the purpose of handling disputes and grievances arising under the contract.

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

(a) On request, meet and bargain with representatives designated by Master Insulators Association, Inc. or its employer-members to represent it on the Joint Trade Board established pursuant to article V of its collective-bargaining agreement with the Association for the purpose of handling disputes and grievances arising under the contract.

(b) Post at its offices and meeting halls copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 17, 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 members 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.

⁹ 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."

(c) Sign and return to the Regional Director sufficient copies of the notice for posting by Master Insulators Association, Inc. and its employer-members, if willing, at all locations where notices to employees are customarily posted.

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

APPENDIX

NOTICE TO EMPLOYEES AND MEMBERS
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 refuse to meet and bargain with representatives designated by Master Insulators Association, Inc. or its employer-members to represent it on the Joint Trade Board established pursuant to article V of our collective-bargaining agreement with the Association for the purpose of handling disputes and grievances arising under the contract.

WE WILL NOT restrain and coerce Master Insulators Association, Inc. or its employer-members in the selection of its representatives to serve on the Joint Trade Board.

WE WILL on request meet and bargain with representatives designated by Master Insulators Association, Inc. or its employer-members to represent it on the Joint Trade Board.

INTERNATIONAL ASSOCIATION OF
HEAT AND FROST INSULATORS AND
ASBESTOS WORKERS LOCAL UNION
No. 27, AFL-CIO

DECISION

STATEMENT OF THE CASE

CLIFFORD H. ANDERSON, Administrative Law Judge. This case was heard before me on December 9, 1982, in Kansas City, Kansas, pursuant to a complaint issued by the Regional Director for Region 17 of the National Labor Relations Board (Regional Director and Board, respectively) on August 27, 1982, an amendment to complaint issued by the Regional Director on September 10, 1982, and a notice of hearing issued by the Regional Director on October 19, 1982, all based on a charged filed on July 20, 1982, by Master Insulators Association, Inc. (the Charging Party or the Association) against International Association of Heat and Frost Insulators and Asbestos Workers Local Union No. 27, AFL-CIO (the Union or the Respondent).

The complaint alleges that the Union on July 15, 1982, refused to meet and negotiate with the Association's designated representative for purposes of handling disputes and grievances, thereby restraining and coercing the Association in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances in violation of Section 8(b)(1)(B) and (3) of the National Labor Relations Act (the Act).

The Respondent filed a timely answer and amended answer denying the conduct attributed to it, denying that the conduct alleged, even if found, violated the Act and, further, urging that the entire matter be deferred to the parties' contractual grievance/arbitration procedure.

All parties were given full opportunity to participate at the hearing, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file posthearing briefs. Upon the entire record herein, including helpful briefs from all parties, I make the following¹

FINDINGS OF FACT

I. JURISDICTION

The Association, a multiemployer association composed of insulation employers in the construction industry, exists for the purpose, inter alia, of representing employer-members in negotiating and administering collective-bargaining agreements with various labor organizations including the Union. In the course of their business operations, the employer-members of the Association located within the State of Missouri annually purchased goods and materials valued in excess of \$50,000 directly from sources outside the State and sell goods and services valued in excess of \$50,000 directly to customers outside the State.

II. LABOR ORGANIZATION STATUS

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background

The Association and the Union have had a long bargaining history regarding the Association's member-employers' mechanics, apprentices, and improvers engaged in cold and hot thermal insulation work. Their most recent contract is effective by its terms from October 14, 1980, through October 13, 1983. That contract contains the following article:

ARTICLE V TRADE BOARD (DISPUTES & GRIEVANCES)

There shall be a Trade Board consisting of four (4) members of the Association and four (4) mem-

bers of the Union. Said Trade Board shall have the right to investigate labor organizations of the parties to this Agreement within its prescribed limits so far as any of the Provisions of this Agreement are involved, in connection with which any question may arise, and for this purpose shall have the right to summon, question, and examine any party to this Agreement, or their representatives or agents.

Grievances of the Employer or the Union arising out of the interpretation and enforcement of this Agreement shall be settled between the Employer directly involved and the duly authorized representatives of the Union, if possible. An Employer may have an Association Representative present, to act as its representative. Grievances not settled as provided in this paragraph may be appealed by either party to the Trade Board.

Trade disputes or grievances shall be settled without cessation of work, and in the cases where the parties to this Agreement fail to agree, the matter in dispute shall be referred to the Joint Trade Board. In case any dispute arises, notice must be given in writing to the Secretary of the Trade Board by the aggrieved party or parties within ten (10) days.

The Trade Board shall be governed by the following By-Laws:

1. Regular meetings shall be held quarterly the first Monday in January, April, July, and October.

2. Special meetings shall be called within forty-eight (48) hours by the Chairman of the Trade Board on written request for either side stating object for which meeting is to be called, but no matter shall be discussed at special meetings except those designated in said written request.

3. Six (6) shall constitute a quorum, three (3) from each side; neither shall cast more ballots than the other.

4. The vote on all questions of violations of this AGREEMENT shall be by secret ballot.

5. It shall require a simple majority vote to carry any question.

6. The Trade Board shall have the power to impose fines, or other penalties where agreed by vote, as above provided for, when any of the Articles of this Agreement have been violated by either party to same.

Such fines or penalties shall be imposed against the party of the first part of the party of the second part, as the case may be, and the Trade Board shall see that any fines or penalties so imposed are satisfied and the charitable disposition of moneys so collected shall be decided by the Trade Board.

7. In the event the Trade Board is unable to agree as a majority on any matters which may arise, the matter in dispute shall be submitted to a neutral person chosen by four (4) or more of the Trade Board members.

If the Trade Board members are unable to agree upon the selection of a neutral person to determine the matter in question, then any Association Trade

¹ As a result of the exemplary efforts of counsel, few issues of fact remained at the conclusion of the hearing. Where not otherwise indicated, the following findings are based on uncontested pleadings or unchallenged credible testimonial or documentary evidence.

Board member upon five (5) days' written notice to the Union, or any Union Trade Board member upon five days' written notice to the Association may request the Director of the Federal Mediation and Conciliation Service to furnish a list of names from which a neutral person may be selected by the parties, each striking an equal number of names.

The decision of the Arbitrator shall be final and binding upon the Association, the Employer and the Union.

The arbitrator shall be paid by the parties hereto. The compensation and expenses of the arbitrator and the arbitration shall be divided equally provided that each party shall bear the expenses in respect to its own witnesses and that the cost of any report or transcript shall be divided equally if furnished by mutual consent.

The Trade Board is a venerable creature of the bargaining relationship. The exact language of the first paragraph of article V appeared at least as early as the 1941 Union-Association contract. Until the recent events discussed, *infra*, the Trade Board functioned somewhat informally, for example, not meeting quarterly as per the contract's terms but rather on an as-needed basis to deal with specific grievances. Insofar as the record reflects, again until recent events, Association designees to the Trade Board had always been employees of one or another of the employer-members of the Association.

B. Events Involving Don Wilkerson

In 1979 the Association selected a separate body, the Builders Association, to represent it in bargaining with the Union. Concomitantly, Donald Wilkerson, a representative and employee of the Builders Association, was designated executive director of the Association and was appointed to serve as an Association designee on various Association-Union committees for 1979 including the Joint Apprenticeship Committee and the Joint Trade Board. In 1980 the Union objected to Wilkerson sitting as an Association designee on the Joint Apprenticeship Committee. The Union's actions in this regard were held by the Board to violate Section 8(b)(1)(B) of the Act.²

There were no Trade Board meetings in 1979 and no disputes arose concerning the Association's Trade Board designees. Wilkerson was again appointed to the Trade Board in 1980 and the Union was so notified. Again, however, no Trade Board meetings were held in 1980 and no dispute arose as to Wilkerson. In January 1981 Wilkerson was again appointed to the Trade Board for 1981 and the Union was so notified.

The first Trade Board meeting in 1981 was held on May 11, 1981, to discuss grievances filed by the Union against an employer-member of the Association, Insulcon, Inc. Four individuals appeared for each side. Wilkerson attended as an Association Trade Board designee. Ben T. Blair, long-time business manager of the Union, appeared as a union designee. Blair was elected chairman, and Wilkerson secretary of the Trade Board. Also

present at the meeting as an Association designee was Gene Dettmer, an Insulcon representative. The Insulcon grievance involved Dettmer as a representative of the accused employer and Blair as the union official who had filed the charges. The Trade Board determined neither Blair nor Dettmer would sit on the Trade Board when it considered the Insulcon grievances. The Trade Board then determined to go forward with the remaining three representatives on each side. As the charges were discussed an issue arose regarding the propriety of tape recording the meeting. The meeting ended without resolution of the Insulcon charges or the tape dispute. A new meeting was planned to continue the discussions.

Blair testified that at the beginning of the May 11, 1981 meeting, but before the meeting officially started, he told Wilkerson that, although he did not have anything against Wilkerson personally, Wilkerson was not an Association employer-member and therefore the Union opposed his serving on the Trade Board. Blair recalled he further told Wilkerson that since the Trade Board meeting had been called by the Union, they would proceed despite their objection to Wilkerson.

Wilkerson testified that the subject of his status as a Trade Board member was not raised by Blair at the May 11, 1981 meeting. The General Counsel offered Wilkerson's minutes of the meeting taken as secretary of the Trade Board into evidence and argued that the absence of an entry in those minutes regarding Blair's claimed protestations supported Wilkerson's version of events. I withheld ruling on the admissibility of Wilkerson's minutes of this meeting and other minutes at trial. I now receive them over the Respondent's objections.³ Having considered the documents, I do not find that the absence of an entry regarding Blair's alleged remarks to Wilkerson at this meeting assists the General Counsel here. This is so because Blair's remarks, if made, occurred before the official proceeding commenced. Wilkerson would have been unlikely to record any remarks before the convention of the meeting, at which time he would not yet have been elected secretary. I find the remark occurred as Blair testified. First, Blair testified that he had a clear recollection of the conversation. His demeanor was sound and his testimony not incredible. Second, Wilkerson failed to recall similar remarks made by Blair at a later meeting, which remarks were corroborated by Wilkerson's minutes of that later meeting. Thus it is clear that a similar remark was made by Blair and forgotten by Wilkerson. I believe that in the informal conversation before the opening of the meeting, Wilkerson either forgot the comments or took Blair's remarks to refer to the then ongoing dispute concerning the Union's objec-

² See *Asbestos Workers Local 27 (Master Insulators)*, 263 NLRB 922 (1982).

³ The Fed.R.Evid. § 803(6) and (7) provide for the receipt and substantive use of records regularly conducted activity and the absence of an entry in those records as an exception to the hearsay rule. On May 11, 1981, Wilkerson was the newly appointed secretary of the Trade Board, which board had not met for several years. Wilkerson kept minutes of the meeting he attended. It was not unreasonable to expect his position as secretary included these duties. Under the broad interpretation of Rules 803(6) and (7) favored by the Advisory Committee's notes thereto and evidentiary commentators referred to therein, I find the minutes are receivable, not as conclusive but as relevant evidence concerning what occurred at the meeting.

tions to Wilkerson's sitting on the Joint Apprenticeship Committee.

Following this meeting Blair had the Union's counsel prepare and file a grievance dated May 27, 1981, which alleged that the Association was in violation of article V of the contract by designating Wilkerson as a Trade Board participant. In the grievance letter union counsel offered to proceed directly to arbitration on the Wilkerson-Trade Board issue and, in the alternative, indicated that if the Association did not agree the Union would process the grievance in the normal course. Association counsel relied by letter on June 1, 1981, asserting that the contract allowed Association designees to the Trade Board to be (1) employer agents or (2) agents of the Association such as Wilkerson. This response suggested the Association would agree that the Union's grievance go directly to arbitration by passing the Trade Board stage, if the Union would in turn agree to take the then pending Insulcon grievances to arbitration.

On Friday, July 24, 1981, the next Trade Board meeting was convened. Present for the Association were Dettmer, Wilkerson, and two others. Blair and three others represented the Union. Blair asserted that while he had nothing against Wilkerson personally, the Union still did not agree he was a proper management designee to the Trade Board. Blair indicated again however that the Union was willing to proceed on the Insulcon charges, irrespective of Wilkerson's contested status. A dispute then arose regarding tape recording of the proceedings, which dispute resulted in the meeting adjourning without further progress. The controversy regarding tape recording of Trade Board sessions continued without resolution into 1982 and as a consequence no Trade Board sessions were held. A special Trade Board meeting was conducted on April 13, 1982, which, by agreement, did not deal with the Insulcon charges. Wilkerson and Dettmer had not been named as Trade Board designees by the Association for 1982 and did not attend the meeting. The Wilkerson dispute was not raised.

The next Trade Board meeting was held July 15, 1982. Just before the meeting, however, Dettmer was appointed to serve in an acting capacity due to the necessary absence of another management representative. Wilkerson also was appointed on an ad hoc basis to substitute for a regular Association designee who could not attend. A third management individual present was Earl Marian. No other Association designee attended. The meeting had been scheduled to continue the Insulcon grievance consideration and to discuss unrelated grievances against other member-employers of the Association.

Blair testified that he and three Union Trade Board members arrived at the meeting and observed only the three management representatives noted. He said, "Where are the rest of your Trade Board?" and announced he did not find a quorum present.⁴ Blair recalled that Dettmer told Blair he was refusing to meet because of the presence of Wilkerson. Blair testified that he answered that it was because there was no quorum. He also recalled telling the assembled individuals that he

did not see how Dettmer could be counted toward a quorum when the charges were against his employer. Following brief colloquy regarding who should pay for the facility, the meeting ended.

Dettmer testified that Blair at not time explained his rationale for refusing to find a quorum present and he said nothing about Dettmer's or Wilkerson's status as a voting member. Rather, in Dettmer's memory, the discussion held was over Blair's lack of notice that management designees to the Trade Board had been changed. Wilkerson testified that Blair did not specifically state why no quorum was present and that Blair did not respond to Dettmer's assertion that it was Wilkerson's presence that underlay Blair's decision not to allow the meeting to proceed. No others testified to the circumstances of the meeting. I credit Dettmer and Wilkerson regarding what occurred at this meeting. I believe that Blair may have had in his mind the statements he recalled making about Dettmer as a party with a conflict in interest but that he either did not make them or, if he did so, they were not heard by the others.

Following this aborted meeting, the parties exchanged correspondence. Included was a letter from Blair to Wilkerson dated July 23, 1982, containing the following text:

This letter is in reply to your July 16, 1982, letter in which you inquired as to whether the Union would be interested in participating in a Trade Board hearing on the Union's charges against Insulcon, with the stipulation that the Association would relinquish its "right" to have the proceedings recorded by tape or court stenographer.

The Union has no objection to the Trade Board hearing *any* grievances or other matters as long as the Association does not insist upon the right to record them by use of a tape recorder or court stenographer. Likewise, I would not necessarily see any problem in having a Trade Board meeting to consider the Insulcon charges alone, if that is going to be the only way they can get to the heard. However, before the Union would agree to participate in any Trade Board hearing of this sort, we would like to be informed beforehand whether you will continue to attempt to sit as a member for the Association in any future Trade Board meetings, including the one you propose on the Insulcon charges. As you well know, the Union has had a pending grievance for over a year challenging your right to sit as a member of the Trade Board, and unfortunately this along with other pending grievances have been held up due to the NLRB litigation involving the use of tape recordings. Thus, it would be inconsistent for the Union to agree to meet in a Trade Board meeting on the Insulcon charges, even though you have agreed not to use any type of recording device, as long as you intend to try to participate as an Association member on the Trade Board. Of course, the Union has previously offered to agree to process this particular grievance, involving your status on the Trade Board, in an expedited manner, but to date our offer has been rejected. Thus, it apparently

⁴ As quoted, *supra*, Trade Board bylaws set three Trade Board designees from each side as a quorum.

will have to await the NLRB litigation as will all other pending grievances.

Insofar as the record reflects there has been no resolution of the impasse nor has the Trade Board considered the Union's Wilkerson-Trade Board grievance to date.

C. Positions of the Parties

The General Counsel and the Charging Party argue that the Respondent's action through Blair in frustrating the July 15, 1982, Trade Board meeting was because of the Union's unjustified opposition to the Association's designation of Wilkerson. Such an action, they argue, is without privilege in law and violates Section 8(b)(1)(B) and (3) of the Act.

The Respondent makes several arguments. First, it argues that the entire matter turns on a question of contract interpretation best decided under the grievance and arbitration provisions of the contract. Thus, the Respondent argues the case should be deferred in accordance with the Board's procedures established in *Collyer Insulated Wire*, 192 NLRB 837 (1971). Second, the Respondent argues that its agent, Blair, did not refuse to convene the July 15, 1982 Trade Board meeting because of the presence of Wilkerson but rather because of the presence and apparent voting status of Dettmer, an interested party in the Insulcon matter. If Dettmer was not eligible to serve, only two Association designees were present and no quorum was achieved. Third, argues the Respondent, in the event it is found that the Respondent refused to recognize Wilkerson as a Trade Board designee, this refusal was privileged under article V of the contract. The General Counsel and the Charging Party dispute each of the Respondent's defenses.

D. Analysis and Conclusions

1. The deferral issue

Assuming the case turns on an issue of contract interpretation, several recent cases have dealt with similar issues of deferral. In *Native Textiles*, 246 NLRB 228 (1979), the Board considered a deferral argument where a contract clause was in issue as a defense to an employer's refusal to deal with a particular grievance handler. The Board refused to defer, holding that the issue was not simply one of contract interpretation but also involved basic rights of employees under Section 7 and Section 8(a)(5) of the Act. The Respondent correctly points out that *Native Textiles* dealt with an alleged violation of Section 8(a)(1) and (5) of the Act, not the 8(b)(1)(B) and (3) allegations present here. It argues that Section 7 rights are therefore not in issue herein and, accordingly, the reason not to defer in 8(a)(5) cases involving employees' statutory rights, as *Native Textiles*, is not applicable. Irrespective of the correctness of the Respondent on this point, the Board has most recently held that 8(b)(1)(B) grievance handler allegations will not be deferred. See *New York Typographical Union No. 6 (New York Times)*, 237 NLRB 1241 (1978). I regard myself as bound by that holding. Therefore I shall not defer this case.

Even were the legal issues of contract interpretation herein deferrable under current Board law, this case would not be properly deferred. This is so because, as the General Counsel points out on brief, the parties have never reached agreement on a means to bring the issue to arbitration other than through the normal process which involves the Trade Board. The Trade Board process is in abeyance awaiting resolution of the instant dispute. Thus no arbitration may be foreseeably held to decide the Wilkerson grievance until the Wilkerson issue is resolved, a circularity which, without a specific agreement of the parties, absent here, prevents the grievance and arbitration process from resolving the issue. Accordingly, I also decline to defer this case because of the inability of the contract dispute resolution process, in its current state, to deal with the issue.

2. Has the Respondent refused to meet and bargain with the Association's designee to the Trade Board, thus frustrating the grievance process?

There is no dispute that, until July 15, 1982, the Respondent did no more than file a grievance regarding the Association's selection of Wilkerson. This conduct has not been alleged to violate the Act.⁵ It is clear that at the July 15, 1982 meeting the Union's agent Blair refused to acknowledge a quorum even though three Association Trade Board designees were present. There is a factual dispute regarding the actual and asserted bases for the Union's conduct on that occasion. There is no dispute that, by Blair's letter of July 23, 1982, the Union informed the Association that it would not participate in Trade Board meetings if Wilkerson sat as a Trade Board designee for the Association. There is no record evidence that the Union has withdrawn or modified this position.

The parties adduced substantial evidence and argued at length on brief regarding the motive of Blair in refusing to hold the July 15, 1982 Trade Board meeting. I find the matter of small import to the resolution of the case. This is so because the Union's letter of July 23, 1982, is a clear refusal to meet if Wilkerson sat as a Trade Board designee and is, thus, an undisputed, unequivocal action by the Union refusing to participate in the Trade Board process unless and until the Association abandoned Wilkerson as its designated representative. There is no dispute therefore that by July 23, 1982, the Union was refusing to go forward if Wilkerson participated. The dispute as to July 15, 1982, is therefore, not a dispute as to whether or not the Union has refused to meet with Wilkerson at all, rather it is a dispute as to whether the Union refused to meet with Wilkerson before July 23, 1982. The complaint which alleges July 15, 1982, as the operate date of the Union's refusal is, in my view, sufficiently broad on the facts of this case, to include the July

⁵ The Respondent on brief argues that its conduct in filing a grievance and protesting Wilkerson's presence, while simultaneously proceeding with Trade Board business, did not violate the Act. Were it necessary to decide I would agree. However, the General Counsel did not alleged misconduct before July 15, 1982, nor argue any theory of violation inconsistent with the Union's actions before July 15. Thus I do not regard this pre-July 15, 1982 conduct as violative of the Act.

23, 1982 letter. *Atlas Corp.*, 256 NLRB 91 (1981). Therefore I find the July 23, 1982 letter sustains the General Counsel's prima facie case irrespective of the July 15, 1982 events. Accordingly, I find it unnecessary to decide if the Respondent by its actions at the Trade Board meeting on July 15, 1982, also refused to proceed because of Wilkerson.⁶

Given the refusal found, unless the contract privileges the conduct, the Union's refusal to meet with Wilkerson violates Section 8(b)(1)(B) and (3) of the Act. *Asbestos Workers Local 27 (Master Insulators Assn.)*, 263 NLRB 922 (1982).

3. Does the contract permit the Respondent's conduct herein?

a. *May an employer limit by contract its right to select its own grievance handlers?*

The threshold question before turning to the specific contract language in the instant case is whether any contract, howsoever worded, may limit an employer's rights under Board law to select any representative it chooses to represent it in collective bargaining and/or grievance handling. While the Board in some cases have held a contract may not limit a party's rights to unlimited selection of collective-bargaining representatives, it has long allowed such limitation regarding prearbitration grievance handling. *Oliver Corp.*, 74 NLRB 483 (1947) (drawing distinction between types of bargaining representatives); *Brunswick Corp.*, 146 NLRB 1474 (1964); *Shell Oil Co.*, 93 NLRB 161 (1951). These cases address contractual waivers by unions of employees' Section 7 rights to the selection of bargaining representatives of their own choosing. I find there is no reason that the employer's rights to select its representatives, as guaranteed by Section 8(b)(1)(B) and (3) of the Act, should not be equally susceptible to contractual limitation. This proposition was implicitly adopted by the Board in *New York Typographical Union (New York Times)*, supra, 237 NLRB 1241 (1978). Accordingly, I find that an employer may contractually limit its right to select certain prearbitration grievance representatives. It is appropriate therefore to turn to the instant contract.

⁶ Reviewing authority may differ with my determination that the events of July 15, 1982, are immaterial in light of the Union's July 23, 1982 letter. Accordingly, I shall make the following alternative findings to avoid the necessity of a remand should such a circumstance occur. Were it necessary to decide, I would find that the evidence of Blair's conduct at the meeting on July 15, 1982, in the total context of events, was sufficient to sustain the General Counsel's contention that on that date the Respondent refused to bargain with the Association Trade Board designees because of the presence of Wilkerson. I make this alternative finding based on the credited testimony of events set forth, supra, and my view that the statements of Blair at the meeting were not clear as to the reason he was unwilling to recognize one or more of the management designees present. Many items were on the agenda for that day, including items for which Dettmer was undisputedly qualified to participate as a Trade Board designee. Therefore at least as to those items, Dettmer could sit and there was a quorum present, unless Wilkerson's was not qualified to sit as a member. Thus at least as to those items, Blair's refusal to acknowledge a quorum, without explanation, must have turned on Wilkerson's status. Such conduct was clearly an extension of previous union objection to Wilkerson and was also in anticipation of the consistent position taken by the Union in its July 23, 1982 letter.

b. *The instant contract*

The contract language at issue is quoted in full, supra. The most important phrasing for the instant case is:

There shall be a Trade Board consisting of four (4) members of the Association and four (4) members of the Union To constitute a waiver of statutory rights, as all parties agree, the contract must be clear and unmistakable.⁷

The Respondent argues that this contract language clearly limits Trade Board designees to the class of "members," as opposed to "representatives," or "appointees" of the Association. Thus the Union argues that Association Trade Board designees are limited to individuals who are representatives of the member-employers of the Association, i.e., representatives of the various employers of the Association as opposed to the employee staff of the Association who are not representatives of particular employers. Wilkerson as an employee and agent of the Association is not a representative of any particular member-employer and is not, in the Respondent's interpretation, within the permissible class of designees. Accordingly the Union could properly refuse to recognize Wilkerson as an Association Trade Board designee. The Respondent advances in support of this interpretation, the fact that the second paragraph of article V specifically states, as to other portions of the grievance procedure "An Employer may have an Association Representative present to act as its representatives." The Respondent argues that if Association representation were to be allowed on the Trade Board the contract would so state.

The General Counsel and the Charging Party argue that the quoted reference to "four (4) members of the Association" refers not to individual employers but rather to the members of the Trade Board. Thus they argue that the contract language determines the number of sitting Trade Board designees and does not limit the right of either side to select whom it wishes as its designees. The Charging Party also makes the argument that, because the employer-members of the Association are corporations and not individuals, employer-members must of necessity sit by means of a human agent. Wilkerson, the Charging Party argues, was a designated agent replacing an employer representative and therefore, even under the Union's interpretation of the contract, qualifies as an employer-member representative and not merely an Association representative.

⁷ While waiver may also be found based on the basis of oral evidence of precontract negotiations, e.g., *Brunswick Corp.*, supra, 146 NLRB 1474, 1476 fn. 2, and cases cited therein, there was no such evidence offered at the trial. This language of the current contract was apparently continued forward from previous contracts without discussion. There is no contention that the language of art. V of the contract was other than freely negotiated. From the Board's decision in the earlier case involving the parties, 263 NLRB 922 (1982), it is clear the new contract was signed after the dispute regarding the identity of the trustees of the training fund. As noted by the Board, the Union succeeded in putting new restrictive language in the contract, i.e., that the trustees be "industry related." Thus as to that portion of the contract, language restricting the identity of the Association's collective-bargaining representatives was discussed and negotiated.

I find that the Union's argument regarding the contract is the more plausible even given the "clear and unmistakable" standard which must be applied to the contract in order to find a waiver of statutory rights. The interpretation advanced by the Charging Party and the General Counsel is not a fair reading of the contract's language and would result in a finding that neither the Union nor the Association has limited the class from whom its Trade Board representative can be selected. The clause clearly, in my view, limits the Union to selection of union members and limits the Association to the selection of Association members. By members here, the reference is clearly to employer-members. The contract language at issue was first negotiated before 1951. In that year the Board noted in *Shell Oil Co.*, supra, 93 NLRB 161 (1951), at 164:

It is not an uncommon practice for unions to bargain about the composition of the committee or class to negotiate grievances, as witness the numerous contracts containing such clauses.

Not to read the instant contract clause as a specific limitation on the composition of the grievance handling Trade Board would render the quoted language meaningless. As the Respondent argues, if the contract means do more than the General Counsel and the Charging Party argue, there are simpler, clearer, and more efficient ways to so state.

As to the Charging Party's alternative argument that Association designee Wilkerson was but the alternate representative of an employer, I find that assertion is not supported by the facts. Wilkerson had been designated as a Trade Board representative without employer affiliation in 1979, 1980, and 1981. The letter he presented to Blair at the July 15, 1982 meeting which announced his designation merely identified him as an "alternate to the Board Trade meeting." The letter did not name him as a particular member-employer's representative. Thus the Union was not confronted with the facts as now advanced by the Charging Party. Rather the Union was only aware that the Association was trying to place Wilkerson, a full-time Association employee not associated with or employed by a particular employer-member of the Association, on the Trade Board. Given this fact, the Charging Party may not successfully advance its alternative theory.⁹

⁹ Further, though it is unnecessary to decide, I do not believe an Association representative, under cover of a fictional designation as agent of a particular employer-member of the Association, could avoid the implications of art. V of the contract. Equity requires that what is prohibited

Accordingly, I find that the Union acted consistent with the contract in declining to meet with Wilkerson as an Association Trade Board designee. I find further the contract constitutes a valid limitation and/or waiver of the Association's rights to select its full-time representatives as grievance handlers on the Trade Board. Thus I find that Union has not violated Section 8(b)(1)(B) and (3) of the Act. Accordingly I shall dismiss the complaint.

E. Summary

I have found that the Respondent failed and refused in July 1982 to meet and bargain with Wilkerson as a Trade Board designee. I have further found that the Union's refusal was in accordance with the limitations on the parties' rights to select Trade Board designees contained in article V of the contract. I have found that the contract is sufficient under Board law to constitute a clear, specific, and unmistakable waiver of the Association's rights under Section 8(b)(1)(B) and (3) of the Act to select its grievance handlers. Therefore I find that the Union has not violated the Act as alleged. Accordingly I shall dismiss the complaint.

On the foregoing findings of fact and on the record as a whole, I make the following

CONCLUSIONS OF LAW

1. The Association and its member-employers are and have been at all times material employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The Union has been at all times material a labor organization within the meaning of Section 2(5) of the Act.

3. The Union did not violate Section 8(b)(1)(B) and (3) of the Act by relying on the terms of its contract with the Association to refuse to recognize the Association's agent Wilkerson as a Trade Board designee.

[Recommended Order for dismissal omitted from publication.]

directly not be allowed through indirection. The contractual limitation that grievance handlers be employer representatives, as opposed to professional advocates or Association employees, is not unusual in the pre-arbitral stages of grievance handling. To allow a prohibited individual to participate through a fictional agency designation would defeat the clear intention of the contract and, in my view, not be easily allowed. One would hardly expect that the Union's attorney would be allowed to be a Trade Board designee through the device of admitting him into union membership and holding him out as no more than a union member thus qualified to serve under art. V.