

Sheet Metal Workers International Association, Local Union No. 9 and Concord Metal, Inc; Pueblo Sheet Metal Works, Inc; Triangle Sheet Metal Company. Cases 27-CB-2562-2, 27-CB-2563, and 27-CB-2564

January 15, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT AND OVIATT

On April 19, 1989, Administrative Law Judge Richard D. Taplitz issued the attached decision. The General Counsel and the Charging Parties filed exceptions and briefs. The Respondent filed cross-exceptions and a brief in opposition to the General Counsel's and the Charging Parties' exceptions. The General Counsel and the Charging Parties filed answering briefs to the Respondent's cross-exceptions. The General Counsel also filed a motion for expedited consideration.

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

The National Labor Relations Board has considered the decision and the record in light of the exceptions, cross-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 found that the Respondent did not violate Section 8(b)(1)(B) and (3) by insisting that the Charging Party contractors are bound to an interest arbitration clause for a successor agreement, by invoking the services of the National Joint Adjustment Board (Joint Board or NJAB) pursuant to that clause, and by pursuing enforcement of the NJAB awards through grieving the Charging Parties' failure to comply with the awards and through its assertion in Federal district court that the Employers are bound to interest arbitration. Since the issuance of the judge's decision, the Board has decided *Electrical Workers IBEW Local 113 (Collier Electric)*, 296 NLRB 1095 (1989). *Collier* sets forth the Board's analysis for determining whether a

¹The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent contends that the judge's credibility findings in favor of the witnesses presented by the General Counsel and the Charging Parties indicate his bias against the Respondent. The Respondent also asserts that the judge improperly refused to continue the hearing in order for the Respondent to present a "key witness," and that this refusal also shows clear and unmistakable bias against the Respondent. We agree with the judge's refusal to grant a continuance of the hearing in order to allow Leroy Gauthier to testify, particularly in light of the fact that the Respondent failed to subpoena Gauthier and gave no reason for its failure to do so. Further, we have carefully examined the judge's decision and the record, and we are satisfied that the Respondent's contentions with regard to bias on the part of the judge are without merit.

union violates the Act by submitting unresolved bargaining issues to interest arbitration.² Applying this analysis, we find that the Respondent, by the various actions noted above in pursuit of interest arbitration, violated Section 8(b)(1)(B) of the Act. For the reasons set forth below, we adopt the judge's conclusion that the Respondent did not violate Section 8(b)(3).

The Alleged Unfair Labor Practices

A. Background

1. The 1981-1983 agreement

The three contractors involved in the present case are all employers engaged primarily in the building and construction industry. All were members of the Sheet Metal and Air Conditioning Contractors National Association, Colorado Chapter (SMACNA-Colorado or the Association), and had established relationships with the Respondent.³

In 1981, the Association and the Respondent entered into a collective-bargaining agreement effective from May 1, 1981, through June 30, 1983. This agreement contained a clause, known as article 10, section 8 (art. 10-8), that provided for interest arbitration for a renewal contract. Article 10-8 provided that in the event negotiations for a new contract became deadlocked, a dispute resolution mechanism could be invoked that would culminate in the setting of new contract terms by the Joint Board. A unanimous decision of the Joint Board was to be final and binding on the parties, who

²*Collier* involved the additional fact that the union's submission of unresolved bargaining issues to interest arbitration was pursuant to a multiemployer contract after the employer had timely withdrawn from the multiemployer bargaining association that had negotiated that original contract. The analyses whether a union bargains in bad faith and whether an employer is restrained or coerced by a union in the selection of its bargaining representative by the pursuit of interest arbitration are equally applicable, however, in situations involving single-employer bargaining, as in the present case.

³The Association had a number of members who had not designated the Association as their collective-bargaining representative. Those members were not part of the multiemployer bargaining unit and became bound to the contracts between the Association and the Respondent only by signing "me too" contracts or negotiating on an individual basis with the Respondent. At one point, the Respondent accepted a "conditional appointment of bargaining rights" from contractors, which gave the Association's labor committee the right to bargain on their behalf, but gave the contractor the right to refuse to sign the resulting agreement. Such a conditional appointment was executed by Charging Party Triangle on March 21, 1984 and again on January 7, 1987. The Respondent, however, refused to accept the conditional appointment of bargaining rights for the 1987 negotiations. By letter dated March 16, 1987, the Association's labor committee informed the Respondent that several contractors, including Charging Parties Triangle and Pueblo, wished to be represented by the labor committee on an individual basis and not as a part of the multiemployer group for the 1987 negotiations. By letter dated June 30, 1987, Triangle informed the Respondent that it was terminating its conditional appointment of bargaining rights to the Association's labor committee, and stated that any further negotiations would be conducted on an individual basis. Although there is no evidence in this record that Charging Parties Concord or Pueblo ever assigned their bargaining rights to the Association, Pueblo sent a letter to the Respondent, identical in content to that sent by Triangle but dated July 1, 1987, terminating the conditional appointment of bargaining rights. Concord also sent the Respondent a letter, dated January 6, 1987, "revoing and cancelling any and all prior assignment of bargaining rights to the SMACNA Labor Committee," and stating that it would negotiate on an individual basis.

were to reduce the award to writing and sign it. The contract further provided that there was to be no strike or lockout unless the Joint Board failed to reach a unanimous decision. Concord, Triangle, and Pueblo were each bound to the 1981–1983 agreement.

2. The 1983–1986 agreement

In early 1983, before the 1981–1983 contract expired, the Association and the Respondent engaged in bargaining for a new contract. During these negotiations, the Association took the position that interest arbitration was a nonmandatory subject of bargaining, and refused to negotiate about it. The Association and the Respondent were unable to reach an agreement, and the Respondent submitted the dispute to the NJAB under article 10–8 of the 1981–1983 contract.

The Joint Board issued its decision on June 15, 1983. The award directed implementation of the A–3–83 standard form of the union agreement, “with the exception of Article 10, Section 8.” Despite this statement, however, near the end of the decision there was a provision that certain economic packages were to be put into effect at the expiration of the agreement unless the matters were resolved by interest arbitration. The award also provided for a reopener for economic issues on July 1, 1984, and July 1, 1985.

From the time that the award was received, the Association took the position that article 10–8 had been eliminated in its entirety, and that its members were not bound by interest arbitration. The Respondent argued that interest arbitration still applied, but only to the wage reopeners scheduled for 1984 and 1985. A clarification was requested of the NJAB on several occasions. On August 10, 1983, the Joint Board issued a clarification of its July 15, 1983 award, stating that its intention was that the A–3–83 standard form union agreement would be implemented in its entirety, with the exception of article 10–8, and that no other changes in the existing agreement were directed except those agreed on locally. The Respondent and the Association executed a new agreement effective July 1, 1983, through June 30, 1986, to which the Joint Board award and clarification were annexed. The agreement deleted article 10–8 in its entirety.

3. The 1985 extension of the contract

In 1985, the 1983–1986 agreement was extended by the Respondent and the Association through June 30, 1987, and a revised contract (the green book) for 1983–1987 was printed. The green book contained changes in certain economic conditions and in the expiration date. There is no contention that the 1983–1986 contract or its 1983–1987 extension contained any interest arbitration provision applicable to a renewal agreement.

The 1983–1987 contract contained a “preferential clause” (favored nations clause) as had predecessor agreements. That clause provided that if the Respondent gave any other employer in the sheet metal industry better terms or conditions than those set forth in the current agreement, those terms or conditions would be made available to the signatory employer for all jobs in Colorado. It also provided that the Respondent would immediately notify the signatory employer of any such concessions.

4. The expiration of the 1983–1987 agreement

The 1983–1987 agreement expired on June 30, 1987. On June 2, 1987, the Respondent sent a telegram to the NJAB requesting the services of the Joint Board with respect to certain contractors, including Concord, Triangle, and Pueblo. The telegram further stated that the Respondent would continue to negotiate in good faith. On July 10, 1987, the Respondent wrote the Joint Board, again requesting its services with respect to certain contractors, including Concord, Triangle, and Pueblo. The letter also stated that each contractor would be notified by registered mail of the request and would be sent a copy of the material affecting it.

On July 20, 1987, the law firm representing a number of the independent contractors, including Concord, Triangle, and Pueblo, wrote to the Respondent and the Joint Board. The letter stated that the Joint Board had no authority or jurisdiction to issue an award, that the Respondent had fraudulently sought to secure the jurisdiction of the Joint Board, and that for a number of reasons the contractors were not bound by article 10–8, therefore, any award issued by the Joint Board under that provision would be void. The letter also stated that the contractors were considering a suit in the Federal district court to seek an injunction.

On November 12, 1987, the Joint Board issued three decisions. Those decisions, without any statement of reasons, found that Concord, Triangle, and Pueblo were bound to the interest arbitration procedures. All three decisions required that the contractors execute a collective-bargaining agreement with the Respondent. None of the Charging Parties did so.

Thereafter, the Respondent filed and prosecuted grievances against the three contractors on the grounds that those employers had failed to comply with the Joint Board’s awards. The Joint Board heard the grievances, and found in favor of the Respondent. Concord, Triangle, and Pueblo were ordered to begin complying with the union agreement and were assessed penalties of \$5000 each for violations. These penalties were to be suspended provided that all arrearages due employees and fringe benefits were paid within 30 days. The decisions were sent to Pueblo on December 15, 1987, and to Concord and Triangle on January 28, 1988.

Sometime later, Concord, Triangle, and Pueblo, along with other individual contractors, brought suit in the Federal District Court for the District of Colorado (Civil Action No. 87-C-1074), to set aside the Joint Board award. The Respondent filed an answer and a counterclaim. The Respondent also filed a motion to confirm all of the arbitration awards.

B. *The Parties' Bargaining Histories*

1. The 1983-1986 agreement

Concord, Triangle, and Pueblo each received a letter from the Respondent dated August 25, 1983, addressed to all contractors signatory with the Union.⁴ The letter stated that the Respondent was presenting for the contractors' signature a new contract "which contains the changes agreed to with Colorado SMAC, the changes ordered by the NJAB and remaining unchanged provisions from the 1981-1983 agreement." The letter explained that there were differences between the Respondent and the Association over the meaning of certain provisions in the NJAB award, and that the enclosed contract contained the Respondent's version of those disputed issues. The letter further stated that if any differences with the Association were resolved in the Association's favor, the contractors would be entitled to implement those changes under the "favored nation" clause in the agreement.

Enclosed with the letter was the "Standard form of Union Agreement (A-3-83)," as well as the Joint Board award and its clarification. In the standard agreement was a truncated version of article 10-8. This section provided that "any controversy or dispute arising out of the failure of the parties to negotiate the wage reopener this agreement [sic] shall be settled as hereinafter provided: (a) Should the negotiations for reopening of this Agreement become deadlocked" the parties would proceed through certain steps. The contract language referred to a procedure for resolving the dispute without going before the National Joint Adjustment Board, but ended abruptly in midsentence without delineating any steps for appearing before the NJAB.

On November 14, 1983, the 1983-1986 contract was signed by SMACNA-Colorado and the Respondent. This agreement deleted article 10-8 in its entirety. The Respondent then sent a letter dated November 15, 1983, to "All Union Sheet Metal Contractors Whose Bargaining Rights are *not* held by SMACNA-Colorado," stating that the contract had been signed and that the Respondent would be approaching contractors "to sign the same agreement on an individual basis that was negotiated with SMACNA-Colorado."

⁴It appears that, at this point none of the three Charging Parties here were part of the multiemployer bargaining group.

a. *Concord*

A few days after the November 14 letter was received by Concord, one of the Respondent's business representatives, Ronald Halvorson, left a union contract with Rudy Tezak, Concord's president, that contained an article 10-8 provision relating to the "wage reopener." This was the same article that had appeared in the contract Concord had received in August 1983. Tezak wrote "out" next to article 10-8. Sometime later, Halvorson returned to pick up the contract and they discussed it. Halvorson asked Tezak why he had written "out" next to article 10-8. Tezak replied that there was no article 10-8 in the agreement. Halvorson stated that the provision related only to the wage reopener. Tezak responded "fine," and signed two copies of the agreement. Tezak kept the contract with the notation "out" next to article 10-8, and Halvorson took with him the other "clean" copy of the agreement. As stated above, the article 10-8 provision on its face was clearly limited to wage reopeners and made no mention of a renewal agreement.

b. *Triangle*

Sometime in August 1983, prior to receiving the August 25 letter, Triangle had received a proposed contract containing the full article 10-8 clause, which referred to interest arbitration for a renewal agreement. As noted above, the contract Triangle received with the August 25 letter contained only the truncated version of article 10-8, referring to wage reopeners. In November 1983, Triangle received the November 14 letter requesting Triangle to sign on an individual basis the same contract to which the Association had agreed. On about December 12, 1983, Thomas Kulas, the president of Triangle, had a conversation with Respondent Business Representative Leroy Gauthier in which they discussed the two different contracts that Triangle had received. Gauthier told Kulas that the contract with the attachments was the correct one. Kulas wrote "void" on the contract containing the full article 10-8 clause and then signed the other contract containing the truncated version of article 10-8, referring only to wage reopeners.

c. *Pueblo*

On September 13, 1983, the Respondent's representative, Ed Eason, went to the Pueblo shop and spoke to Pueblo's secretary-treasurer Darrell Haun. Haun did not ordinarily deal with labor relations for that Company. Eason said that he had to have the contract signed right away, and spoke of pulling the men if it was not signed. There was no discussion of the terms of the contract, and Haun did not compare the contract that Eason brought with him to the contract the Company had received with the August 25 letter. Haun signed two copies of the contract that Eason had

brought with him. Eason took one of the contracts with him and left the other at Pueblo. Unlike the contract received by Pueblo with the August 25 letter, the contract Haun signed contained a full article 10-8 clause which bound the parties to interest arbitration for a renewal agreement at the expiration of the contract.

2. The 1985 extension

In 1985, the Respondent and the Association reopened the 1983-1986 agreement for the purpose of bargaining over certain economic terms. Agreement was reached on those terms and on a new expiration date of June 30, 1987. After this agreement was reached, the Respondent sent a copy of the new agreement and a cover letter to all the sheet metal contractors, including Concord, Triangle, and Pueblo, asking them to sign the new agreement by July 1, 1985. The cover letter made clear that the contractors, by signing the extension agreement, would be agreeing to an extension of the terms of the Union-Association agreement. The letter further stated that a new collective-bargaining agreement, complete with all language and wages, would be forthcoming in the near future. Concord signed the extension agreement on June 18, 1985. Triangle signed the agreement on June 19, 1985. Pueblo also signed this agreement at that time. The Respondent then sent Concord, Triangle, and Pueblo a copy of the green book, which contained the terms of the 1983-1987 agreement. As noted above, the green book did not contain any references to article 10-8, or interest arbitration.

3. The expiration of the 1983-1987 agreement

a. *Concord*

Representatives of Concord met with the Respondent on June 5 and 19, 1987, for individual negotiations. At the June 19 meeting, the Respondent asserted that Concord was bound by article 10-8 of the original contract. Tezak denied the Company was so bound and later sent the union representative a copy of the agreement he had signed. On July 1, 1987, Concord sent the Respondent a letter stating that its contract with the Respondent had expired on June 30, 1987; that notice of contract termination had been timely served; that the Respondent had never been certified by the Board; and that the Company had never voluntarily recognized the Respondent pursuant to Section 9(a) of the Act as the majority representative of its employees. The letter went on to state that

pursuant to *John Deklewa & Sons*, 282 NLRB No. 184 (1987), our company has no obligation to bargain for a successor agreement or otherwise engage in collective bargaining with your labor

organization. Any bargaining obligation which may have existed prior to the termination of our collective bargaining agreement is hereby repudiated.

In August 1987, the Respondent filed a petition for an election. The election was held and the Respondent was certified as the collective-bargaining representative for Concord's employees on September 10, 1987. After the Respondent was certified, it engaged in bargaining with Concord, but no agreement was reached.

b. *Triangle and Pueblo*

In March 1987, the Association's labor committee informed the Respondent that a number of contractors, including Triangle and Pueblo, desired the labor committee to represent them in negotiations on an individual basis. In the early part of June, the Respondent informed Steve Larson, who represented the individual contractors, that the Respondent would be taking some of the contractors to the Joint Board via article 10-8. By letter dated June 12, 1987, the Association's labor committee, on behalf of the individual contractors, rejected the Respondent's claim that some of the employers were bound to interest arbitration by article 10-8. The letter stated that the individual contractors were asserting their rights under the preferential clause to adopt the grievance procedure in the Association's contract, which deleted article 10-8. The letter also stated that the contractors specifically rejected and refused to adopt any form of interest arbitration. The Respondent responded by a letter dated June 15, 1987, stating that the contractors had a right to invoke the preferential clause as of June 12, 1987, but that the Respondent had invoked article 10-8 on June 2, 1987, at which time interest arbitration was put into effect.

On July 1, 1987, Triangle repudiated its 8(f) bargaining relationship with the Respondent. The text of the letter was identical to the one that Concord had sent to the Respondent. The Respondent thereafter petitioned for an election. The election was held and on August 26, 1987, the Board certified the Respondent as the bargaining representative for Triangle's unit employees. Thereafter, Triangle and the Respondent engaged in bargaining, but no agreement was reached.

On July 15, 1987 Pueblo sent the Respondent the same letter the Respondent had received from Concord and Triangle, repudiating its 8(f) bargaining relationship with the Respondent. From that time, Pueblo has operated nonunion and has not recognized the Respondent as the representative of its employees. There have been no negotiations between Pueblo and the Respondent since July 15, 1987.

C. Analysis and Conclusions

1. The 8(b)(1)(B) allegation

In *Electrical Workers IBEW Local 113 (Collier Electric)*,⁵ the Board found that a union is free to seek enforcement of its contractual rights by submitting unresolved bargaining issues to interest arbitration and by pursuing court enforcement of an arbitration award only if the parties' collective bargaining agreement at least arguably binds the employer to interest arbitration. If the contract does not even arguably bind the employer to interest arbitration, then the union's submission of the unresolved bargaining issues to interest arbitration constitutes coercion of the employer in the selection of its bargaining representative in violation of Section 8(b)(1)(B) of the Act.⁶ The Board in *Collier* found support for its position in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983). *Bill Johnson's* sets forth a two-part test for determining whether the Board can properly enjoin a pending court action. Under this test, the Board must determine whether the suit has a reasonable basis and whether there is a retaliatory motive in the filing of the lawsuit.

Here, the judge concluded, and we agree, that none of the Charging Parties were bound by interest arbitration at the expiration of the 1983–1987 contract. In 1985, each of the Charging Parties signed the 1985 extension agreement negotiated by the Association and the Respondent. The cover letter sent by the Respondent to the Charging Parties with the extension agreement stated that a new collective-bargaining agreement, complete with all language and wages, would be forthcoming in the future. Thereafter, the Charging Parties were sent the 1983–1987 contract, and became bound by its terms. This contract contained no reference to article 10–8 or interest arbitration.

Further, neither Concord's nor Triangle's original 1983–1986 contracts had, on their face, any reference to interest arbitration for a renewal agreement. With respect to Pueblo, although its 1983–1986 contract did contain a full article 10–8 clause, we agree with the judge that whatever the legal significance of that agreement, it was later supplanted by the 1983–1987 green book, which contained no reference to interest arbitration whatsoever. Pueblo, along with Concord and Triangle, was offered and signed the 1985 extension agreement and became bound by the terms of the 1983–1987 green book. In these circumstances, we find that Pueblo was not bound by the interest arbitration provisions in its 1983–1986 agreement with the Respondent. Given the fact that the contract the Charging Parties were bound to in 1987 did not contain an interest arbitration clause, we conclude that there is no reasonable basis for the Respondent's 1987 submission

of unresolved bargaining issues to the Joint Board for interest arbitration or for its action in district court.

Having found no reasonable basis for the Respondent's claim that the Charging Parties were bound to interest arbitration for a successor agreement in 1987, we then examine whether the Respondent's pursuit of interest arbitration and its counterclaim in Federal court reflect an improper motivation. We conclude that they do.

In the absence of an interest arbitration clause, the Charging Parties, as well as the Respondent, had the right under the Act to repudiate the collective-bargaining relationship.⁷ The Respondent's actions in pursuing interest arbitration here is in derogation of the Charging Parties' exercise of their statutory right to repudiate their bargaining relationship with the Union after their 8(f) contracts with the Union expired. In essence, the Respondent is seeking through its Federal court suit to bind each of the Charging Parties to the limited 9(a) relationship described in *Deklewa*,⁸ and to prevent the Charging Parties from repudiating their 8(f) bargaining relationship with the Respondent, as they are legally entitled to do in the absence of a binding agreement. In these circumstances, the Respondent, by seeking the services of the NJAB, by pursuing its position through the grievance procedure, and by asserting in Federal district court that Concord, Triangle, and Pueblo are bound to interest arbitration for a successor agreement has restrained and coerced the Charging Parties in the choice of their bargaining representative in violation of Section 8(b)(1)(B) of the Act.⁹

2. The 8(b)(3) allegation

The General Counsel asserts that the Respondent has violated Section 8(b)(3) of the Act by invoking the NJAB procedures on June 2, 1987, because at that time, it had a duty to bargain with the Charging Parties. The General Counsel further asserts that the Respondent violated Section 8(b)(3) when it continued to pursue interest arbitration even after the Respondent became the certified bargaining representative of the employees at Concord and Triangle.

At first glance, *Collier* would seem to support this argument. In *Collier*, the Board stated that if a contract does not even arguably bind an employer to interest arbitration, then a union's submission of unresolved bargaining issues to interest arbitration constitutes bad-faith bargaining in violation of Section 8(b)(3) of the Act.¹⁰ *Collier*, however, involved a union and em-

⁷ *John Deklewa & Sons*, 282 NLRB 1375 at 1386 (1987).

⁸ 282 NLRB at 1387.

⁹ Chairman Stephens agrees that, for the reasons stated above, the Respondent violated Sec. 8(b)(1)(B) of the Act. He would, in any event, find a violation under the theory set out in his dissent in *Collier Electric*, supra.

Assuming for argument's sake that the majority's reasoning in *Collier Electric*, supra, is correct, Member Oviatt agrees that the Respondent has violated Sec. 8(b)(1)(B) under either of the views expressed in *Collier Electric*.

¹⁰ Id. at 10–11.

⁵ 296 NLRB 1095 (1989).

⁶ Id. at 10–11.

ployer who had been parties to a 9(a) agreement. In contrast, the present case involves a union and employers who have been parties to an 8(f) agreement.

Deklewa does impose a limited 9(a) status on the parties to an 8(f) agreement, including a duty to bargain about certain changes in terms and conditions of employment during the life of the contract.¹¹ *Deklewa* also makes clear, however, that in an 8(f) relationship, a union does not enjoy a presumption of majority status and, at the expiration of the contract, either party can repudiate the relationship.¹² Accordingly, we find that where the parties are bound to an 8(f) agreement and the union is not a 9(a) representative, there is no duty to bargain for a successor agreement, and there can thus be no violation of Section 8(b)(3) of the Act.

On August 26 and September 10, 1987, the Respondent became the certified 9(a) representative of the unit employees of Triangle and Concord, respectively. The question then becomes whether the Respondent violated Section 8(b)(3) by its continued pursuit of interest arbitration in violation of Section 8(b)(1)(B) after its certification in these units where there was no reasonable basis for its initial submission to the NJAB. We find that, in the circumstances here, it did not.

The Respondent met its duty to bargain collectively with both Triangle and Concord after its certification as the 9(a) representative in those units. On several occasions during the postcertification period, the Respondent met and negotiated separately with the designated bargaining representatives of these employers.¹³ Although it is true that the Respondent continued to pursue interest arbitration during the postcertification period even as it was negotiating with Triangle and Concord, the General Counsel does not allege and the evidence fails to establish that the Respondent did not “enter into negotiations with an open mind”¹⁴ There is no indication that the Respondent would have failed to execute and abide by an agreement had one been reached. Accordingly, in these circumstances, we find that the Respondent did not violate Section 8(b)(3), either at the time of its submission to the NJAB when it was in an 8(f) relationship with the Charging Parties, or later during the

postcertification period when it enjoyed a 9(a) relationship with Triangle and Concord.

ORDER

The National Labor Relations Board orders that the Respondent, Sheet Metal Workers International Association, Local Union No. 9, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Restraining or coercing Concord Metal, Inc., Pueblo Sheet Metal Works, Inc., and Triangle Sheet Metal Company in the selection of their representative for the purpose of collective bargaining and the adjustment of grievances by insisting they are bound to an interest arbitration clause for a successor agreement, by invoking the services of the National Joint Adjustment Board pursuant to that clause, and by pursuing the enforcement of the NJAB awards through grieving the Charging Parties’ failure to comply with the awards and through its continued assertion in Federal district court that Concord, Triangle, and Pueblo are bound to interest arbitration for a successor agreement.

(b) In any like or related manner restraining or coercing Concord Metal, Inc., Pueblo Sheet Metal Works, Inc., and Triangle Sheet Metal Company in the selection of their bargaining representatives for the purpose of collective bargaining or the adjustment of grievances.

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

(a) Request dismissal of its counterclaim filed in the civil case in the United States Federal District Court for the District of Colorado, Civil Action No. 87–C–1074, to reform the 1983–1987 collective-bargaining agreements with Concord Metal, Inc. and Triangle Sheet Metal Company, and cease asserting in Federal district court that Concord Metal, Inc., Pueblo Sheet Metal Works, Inc., and Triangle Sheet Metal Company are bound to interest arbitration for a successor agreement.

(b) Make whole the Charging Parties for losses they may have sustained as a result of the Respondent’s unlawful actions, including all legal expenses incurred in defense of the Respondent’s charge that they were bound to interest arbitration, with interest computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Post at the Respondent Union’s offices and meeting halls copies of the attached notice marked “Appendix.”¹⁵ Copies of the notice, on forms provided by the Regional Director for Region 27, after being signed by the Respondent’s authorized representative, shall be

¹¹ 282 NLRB at 1386.

¹² *Deklewa*, 282 NLRB at 1386.

¹³ The record in this case provides few details of the parties’ conduct during the postcertification period other than to indicate that they met and bargained. The Board’s decision in *Concord Metal*, 298 NLRB 1076 (1990), however, presents some information as to the postcertification bargaining between the Respondent and Concord. In that case, the administrative law judge set forth the events between the date of the Respondent’s certification and the economic strike that the Respondent engaged in on December 9, 1987. During that time, the parties met and negotiated on three occasions. *Concord*, supra. Nowhere in that decision is there any suggestion that the Respondent did not meet its duty to bargain collectively with the Employer.

¹⁴ *Teamsters Local 418 (Seigle’s Express)*, 254 NLRB 953 at 957 (1981). See also *Teamsters Local 301 (Merchants Moving)*, 210 NLRB 783 (1974). In particular, there is no evidence that the Respondent was treating its submissions on various subjects to the NJAB as a constraint on positions it was willing to take in bargaining with Triangle and Concord.

¹⁵ 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.”

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.

(d) Sign and mail sufficient copies of that notice to the Regional Director for Region 27 for posting by Concord Metal, Inc., Pueblo Sheet Metal Works, Inc., and Triangle Sheet Metal Company, if they are willing, at all locations where notices to employees are customarily posted.

(e) 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 MEMBERS AND 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 restrain or coerce Concord Metal, Inc., Pueblo Sheet Metal Works, Inc., and Triangle Sheet Metal Company in the selection of their representative for the purpose of collective bargaining and the adjustment of grievances by insisting they are bound to an interest arbitration clause for a successor agreement, invoking the services of the National Joint Adjustment Board pursuant to that clause, and pursuing the enforcement of the NJAB awards through grieving their failure to comply with the awards and through our continued assertion in Federal district court that Concord, Triangle, and Pueblo are bound to interest arbitration for a successor agreement.

WE WILL NOT in any like or related manner restrain or coerce Concord Metal, Inc., Pueblo Sheet Metal Works, Inc., and Triangle Sheet Metal Company in the selection of their bargaining representatives for the purpose of collective bargaining or the adjustment of grievances.

WE WILL request dismissal of our counterclaim filed in the civil case in the United States Federal District Court for the District of Colorado, Civil Action No. 87-C-1074, to reform our 1983-1987 collective-bargaining agreements with Concord Metal, Inc. and Triangle Sheet Metal Company, and WE WILL cease asserting in Federal district court that Concord Metal, Inc., Pueblo Sheet Metal Works, Inc., and Triangle Sheet Metal Company are bound to an interest arbitration clause for a successor agreement.

WE WILL make whole Concord Metal, Inc., Pueblo Sheet Metal Works, Inc., and Triangle Sheet Metal

Company for losses they may have sustained as a result of our unlawful actions, including all legal expenses incurred in defense of the our charge that they were bound to interest arbitration, plus interest.

SHEET METAL WORKERS INTER-
NATIONAL ASSOCIATION, LOCAL UNION
No. 9

Daniel C. Ferguson, Esq., for the General Counsel.
Walter C. Brauer III, Esq (Brauer & Buescher, P.C.), of Denver, Colorado, for the Respondent Union.
Robert Miller and Cynthia Hanley, Esqs (Stettner, Miller & Cohn, P.C.), of Denver, Colorado, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

RICHARD D. TAPLITZ, Administrative Law Judge. This case was tried in Denver, Colorado, on February 2 and 3, 1989. The charges in Cases 27-CB-2562-2, 27-CB-2563, and 27-CB-2564 were filed on December 21, 1987, respectively by Concord Metal, Inc. (Concord), Pueblo Sheet Metal Works, Inc. (Pueblo), and Triangle Sheet Metal Company (Triangle). An order consolidating cases and a complaint issued on November 15, 1988, and an amended complaint issued on December 12, 1988. The complaint as amended alleges that Sheet Metal Workers International Association, Local Union No. 9 (the Union) violated Section 8(b)(1)(B) and (3) of the National Labor Relations Act.

Issue

The Union interpreted certain collective-bargaining agreements with the Charging Parties (Triangle, Concord, and Pueblo) to include an "interest arbitration" clause so as to give an industry joint board power to set the terms of new contracts with those employers. The ultimate issue in this case is whether the Union refused to bargain in violation of Section 8(b)(3) and restrained or coerced the Charging Parties in the selection of their bargaining representatives in violation of Section 8(b)(1)(B) of the Act by obtaining an award setting forth a new collective-bargaining agreement from the Joint Board, by grieving the failure of the Charging Parties to obey that award, and by counterclaiming in a Federal district court action to reform the prior contract. A preliminary question is whether any of the Charging Parties had agreed to the "interest arbitration."

All parties were given full opportunity to participate, to introduce evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Briefs, which have been carefully considered, were filed on behalf of the General Counsel, the Charging Parties, and the Union.

On the entire record of the case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Concord, a corporation with an office and place of business in Aurora, Colorado, is engaged in the purchase, fab-

rication, installation, and selling of services in connection with various sheet metal products. It annually receives goods and services valued in excess of \$50,000 directly from points outside the State of Colorado and it annually sells and ships goods and services valued in excess of \$50,000 directly to other enterprises within Colorado which are directly engaged in interstate commerce. Pueblo, a corporation with an office and place of business in Pueblo, Colorado, is engaged in sheet metal construction. It annually purchases and receives goods and services valued in excess of \$50,000 directly from points outside the State of Colorado and annually sells and ships goods and services valued in excess of \$50,000 directly to other enterprises within Colorado which are directly engaged in interstate commerce. Triangle, a corporation with an office and place of business in Arvado, Colorado, is also engaged in sheet metal construction. It annually purchases and receives goods and services valued in excess of \$50,000 directly from outside the State of Colorado and annually sells and ships goods and services valued in excess of \$50,000 directly to other enterprises within Colorado which are directly engaged in interstate commerce. Concord, Pueblo, and Triangle are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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

The Charging Parties are employers engaged primarily in the building and construction industry and the Union is a labor organization in which building and construction employees are members within the meaning of Section 8(f) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background and the Associations' Dealings with the Union*

The Sheet Metal and Air Conditioning Contractors National Association, Colorado Chapter (SMACNA, Colorado, or the Association) is an organization composed of various employers. It exists in part for the purpose of representing those of its employer-members, who have designated it to do so, in negotiating and administering collective-bargaining agreements with various labor organizations including the Union. The Association has a number of members who have not designated the Association as their collective-bargaining representative. Those members are not part of a multiemployer collective-bargaining unit and they can be bound by union contracts only by their signing of "me too" contracts or by individual bargaining. As it set forth in more detail below, at the critical times herein, the Charging Parties had not authorized the Association to bargain for them in the multiemployer bargaining unit and they were not bound by any agreement in such a unit. However it is necessary to follow the course of Association bargaining in order to understand how the Charging Parties fit into the picture.

The relevant history began in 1981 when the Association and the Union entered into a May 1, 1981–June 30, 1983 collective-bargaining agreement. That agreement contained a clause known as article 10, section 8 which provided for interest arbitration. It provided that in the event that negotiations for renewal of the agreement became deadlocked, a dispute resolution mechanism was to be invoked which culminated in the setting of new contract terms by a national

joint adjustment board (Joint Board or the NJAB). A unanimous decision of that board was to be final and binding on the parties, who were to reduce the award to writing and sign it. The contract provided that there was to be no strike or lockout unless and until the board failed to reach a unanimous decision. Under the procedural rules of the Joint Board a quorum required an equal number of management and union members.

In early 1983, before the 1981–1983 contract expired, the Association and the Union were bargaining for a new contract. During those negotiations the Association took the position that interest arbitration was a nonmandatory subject of bargaining. On that basis, the Association refused to discuss interest arbitration and notified the Union that it would not accept any new contract that contained the provisions of article 10, section 8. The parties did not reach agreement on a new contract and the Union submitted the dispute for interest arbitration to the Joint Board under article 10, section 8 of the 1981–1983 agreement.

In an award dated July 15, 1983, the Joint Board directed the parties to enter into a 3-year agreement, effective July 1, 1983, containing certain changes in wages and other conditions of employment. The parties were directed to implement the A-3-83 standard form of union agreement "with the exception of Article 10, Section 8." The award provided for a reopener for economic issues on July 1, 1984, and July 1, 1985. However, near the end of the award there was a provision that certain economic packages were to be put into effect at the expiration date of the agreement unless the matters were resolved by negotiations or by the Joint Board under article 10, section 8. From the time the award was received the Association took the position that article 10, section 8 was eliminated and that there was no interest arbitration. Shortly after the award issued, the Union's business manager, William Stephens, agreed with one of the Association's negotiators, Steve Larson, that article 10, section 8 was not part of the new contract. However over the next few months Stephens changed his position and argued that article 10, section 8 still applied but only to the wage reopener that was scheduled for 1984 and 1985. The Association and the Union were in disagreement as to a number of the provisions of the award, and clarification was asked from the Joint Board on several occasions. On August 10, 1983, the Joint Board issued a clarification of its July 15, 1983 award. The clarification stated that it was the intention of the Joint Board that the A-3-83 standard form union agreement would be implemented in its entirety with the exception of section 8, article 10, and that no other changes in the existing agreement except for those agreed on locally were directed.

The Union and the Association executed a July 1, 1983–June 30, 1986 agreement to which the Joint Board awards were annexed. That agreement deleted article 10, section 8 in its entirety.

Though the Union claimed at one time that article 10, section 8 still applied to the 1984–1985 wage reopeners, there is no contention by anyone that the Union-Association contract which was to expire in 1986 and which was extended through part of 1987 contained any interest arbitration provision that would apply to a new contract in 1987. Even the Union's contention that article 10, section 8 did apply to the 1984–1985 reopener is moot because the Association and the

Union worked out their differences in 1984 and 1985 and no interest arbitration was called for.

On May 3, 1985, the Union and the Association, pursuant to the reopener for economic issues, executed an agreement under which certain economic conditions of the 1983–1986 contract were changed and that contract was extended for one full year so as to expire June 30, 1987. Subsequently, a revised contract (the green book) for July 1, 1983–June 30, 1987, was printed. It contained all the agreed-upon terms. As indicated, it did not contain any provision for interest arbitration.

The 1983–1987 contract contained a “preferential clause” as had the predecessor agreements. That clause provided that the Union agreed, with exceptions not applicable here, that if it gave any other employer in the sheet metal industry better terms or conditions than set forth in the Union-Association agreement, such terms or conditions would be made available to the employer for all jobs in Colorado and that the Union would immediately notify the employer of any such concessions.

B. *Concord's Bargaining History*

Concord was a member of the Association but had not authorized the Association to bargain for it. Concord was not part of the multiemployer bargaining unit. It did however sign a letter of understanding under which it became bound by the terms of the 1981–1983 agreement. Concord did not assign bargaining rights to anyone in 1983 and the Union never contacted Concord in 1983 to open negotiations for a new contract.

On about August 25, 1983, Concord received a letter from the Union which was addressed to all contractors signatory with the Union. The letter stated that the Union was presenting for Concord's signature a new contract “which contains the changes agreed to with Colorado SMAC, the changes ordered by the NJAB and remaining unchanged provisions from the 1981–1983 agreement.” The letter also stated that there were differences between the Union's and the Association's interpretation of the Joint Board award and that the enclosed contract contained the Union's interpretation of those disputed issues. The letter went on to state that if any differences with the Association were resolved in the contractors' favor, Concord would be entitled to implement them under the favored nations clause of the agreement. Annexed to the letter was the “Standard Form of Union Agreement (A-3-83),” as well as the Joint Board award and its clarification. A truncated version of article 10, section 8 appeared in the contract which the Union was asking Concord to sign. It provided “any controversy or dispute arising out of the failure of the parties to negotiate the wage reopener this agreement shall be settled as herein provided.” The agreement went on to provide for negotiations for “reopening of this agreement.” However the contract language ended abruptly so as to become meaningless with regard to “interest arbitration.”

As is set forth above the Union and the Association signed the 1983–1986 agreement which deleted article 10, section 8 in its entirety. On November 15, 1983 Union Business Manager William Stephens wrote to “All Union Sheet Metal Contractors Whose Bargaining Rights are *not* held by SMACNA-Colorado,” including Concord. The letter stated that on November 14, the contract was signed between the

Union and the Association, that bargaining rights for Concord were not held by the Association and that “Local No. 9 will be approaching you to sign the same agreement on an individual basis that was negotiated with SMACNA-Colorado.”

A few days after the November 15, 1983 letter was received by Concord, Union Business Representative Ronald Halvorson left a union contract with Rudy Tezak, the president of Concord. In reading the contract, Tezak saw that it contained an article 10-8 provision relating to “the wage reopener” and the same language as the contract he received on August 25, 1983. He wrote “out” next to article 10, section 8. Sometime later Halvorson came by to pick up the contract and they discussed it. Halvorson asked why Tezak had written “out” on article 10, section 8 and Tezak replied that he did so because there was no article 10, section 8 in the contract. Halvorson replied that the contract provision related only to the wage reopener. Tezak said “fine” and signed two copies of the contract. The one he kept in his possession had “out” written on article 10, section 8. The other, which Halvorson brought with him and the Union kept, did not have the “out” notation, but as Halvorson stated to Tezak, it was clearly limited to wage reopeners. On its face, it had no application to a new contract at the expiration of the old one.

The findings with regard to the conversation between Halvorson and Tezak are based on the credited testimony of Tezak. Halvorson's version of the conversation was totally unbelievable. He averred that he told Tezak that he (Halvorson) had brought the article 10, section 8 contract and it was the same one that Tezak had been living with for the last few years without any problems. Halvorson averred that Tezak then signed the contract. Halvorson acknowledged in his testimony that he had read the contract he was proposing to Tezak and that that contract contained the reopener language. He also acknowledged that he knew that the Union had taken the position that the interest arbitration affected only the wage reopener. He testified that to him the wage reopener language included renegotiation of the entire contract at its conclusion, and that there were two contracts being circulated, one that spoke of the wage reopener and the other that eliminated article 10, section 8 in its entirety. His testimony was so internally inconsistent and his testimonial demeanor was so unconvincing that I am unable to credit any of his testimony.

William Stephens, the Union's business manager, testified that in late August 1983, when he decided to start signing up the contractors who would not give an authorization to the Association, he instructed Business Representative Leroy Gauthier to put together a contract for the independents that contained the same language as the Association agreement except that article 10, section 8 was to be included. He averred that he told Gauthier to include article 10, section 8 so as to cover wage reopeners as well as renewal of the agreements. He further averred that he never checked back to see whether Gauthier had followed his instructions until a problem arose at a later time. Even if those instructions had been given to Gauthier, the contractors would not be bound by them when the contract they signed either eliminated article 10, section 8 or limited it to wage reopeners. However I do not believe that Stephens was a credible witness and I am unable to give any weight to his testimony.

Stephens was the same man who wrote to “All Union Sheet Metal Contractors Whose Bargaining Rights are *not* held by SMACNA-Colorado” to tell them that they would be approached to sign the same agreement on an individual basis that had been negotiated with SMACNA-Colorado. That contract did not contain any article 10, section 8 provision and the Union never even claimed that such an article could apply to anything but a wage reopener. Yet Stephens asked us to believe that he told his business agent to draft a contract for the independents containing a full article 10, section 8 clause. He was not credible. The 1983–1986 contract that Concord signed did not have any interest arbitration provision that would be applicable at the end of the contract and neither Concord nor the Union intended that it should have.

After the Union and the Association reached agreement on the 1985 contract reopener, which changed some of the economic terms of the contract and extended it to June 30, 1987, Union Business Manager Stephens sent that agreement together with a covering letter to all the sheet metal contractors including Concord asking them to sign. The covering letter stated that a new collective-bargaining agreement complete with all languages and wages would be forthcoming in the near future. Concord signed the extension agreement on June 18, 1985. Subsequently the Union sent Concord the green book, which contained all the terms of the July 1, 1983–June 30, 1987 agreement. As noted above the green book did not contain any provision for interest arbitration. Article 10, section 8 had been deleted in its entirety.

By letter dated January 6, 1987, Concord confirmed the fact that the Association did not have any authority to bargain for it, by sending a letter to the Association and a copy to the Union stating that Concord would bargain on an individual basis and not as part of any multiemployer group.

Representatives of Concord met with the Union on June 5 and 19, 1987, for individual negotiations. At the June 19 meeting Union Representative Dale Swartz said that Concord was bound by article 10, section 8 of the original contract. Rudy Tezak, Concord’s president, denied that the Company was so bound and he sent Swartz a copy of the agreement that he had signed. As noted above, one copy of that 1983–1986 agreement had a notation that article 10, section 8 was out and the other copy had a truncated version which was specifically limited to wage reopeners and had no application to a new agreement at the expiration of the contract.

On July 1, 1987, Concord sent the Union a letter stating that its contract with the Union expired on June 30, 1987; that notice of the contract termination was timely served; that the Union was never certified by the Board; and that the Company never voluntarily recognized the Union pursuant to Section 9(a) of the Act as representing a majority of its employees. The letter went on to state: “pursuant to *John Deklawa & Sons*, 282 NLRB No. 184 (1987), our company has no obligation to bargain for a successor agreement or otherwise engage in collective bargaining with your labor organization. Any bargaining obligation which may have existed prior to the termination of our collective-bargaining agreement is hereby repudiated.”

In August 1987 the Union filed a petition for an election. The election was held and the Union was certified on September 10, 1987, as the exclusive collective-bargaining representative of Concord’s shop and field employees. After the

Union was certified, it had four or five bargaining sessions with Concord but no agreement was reached.

C. Triangle’s Bargaining History

Triangle’s bargaining experiences with the Union were very similar to those of Concord. Triangle was a party to the 1981–1983 contract on an individual basis. Though it was a member of the Association, Triangle did not assign bargaining rights to the Association in 1983 nor did it sign an interim agreement agreeing to be bound by future contracts.¹

Some time before late August 1983, the Union delivered to the Triangle office a proposed contract that contained a full article 10, section 8 clause.

In late August or early September 1983, the Union delivered another proposed contract to Triangle. It contained the truncated article 10, section 8 language and limited the application of that clause to wage reopeners. It was the same language that had been proposed to Concord. Accompanying this proposed contract was the August 25, 1983 letter to “all contractors” which stated that those contractors were being asked to sign a new contract which contained the changes agreed to with the Association, the changes ordered by the Joint Board and remaining unchanged provisions from the 1981–1983 agreement. There was also reference to the most-favored-nations clause in the event that any disagreements were resolved in favor of the Association. Attached to the letter and contracts were copies of the Joint Board awards.

The Union sent Triangle the November 15, 1983 letter which said that the Association contract was signed on November 14, 1983; that the Association did not hold Triangle’s bargaining rights; and that the Union would be approaching Triangle to sign the same agreement on an individual basis that was negotiated with the Association.

On about December 12, 1983, Thomas Kulas, the president of Triangle, had a conversation with Union Business Representative Leroy Gauthier in which they discussed the two different contracts. Gauthier told Kulas that the contract with the attachments was the correct one, that is the one with the truncated article 10, section 8 and the reference to wage reopener. Kulas wrote “void” on the proposed contract that contained the full article 10, section 8 clause and then signed the other contract. There is nothing in the 1983–1986 contract that Triangle signed that would bind Triangle to interest arbitration at the end of that contract. The evidence clearly establishes that the parties did not intend article 10, section 8 to apply to such a situation.

On March 21, 1984, Triangle executed a conditional appointment of bargaining rights for the 1984–1985 wage reopener which arguably put Triangle in the multiemployer unit. However, under that appointment Triangle retained the right to refuse to be bound by any contract the Association negotiated. At the time, the Union accepted the conditional appointment. However, the contract extension that Triangle signed was the same as the one signed by Concord and

¹ Steve Larson, who was chief spokesman for the Association in the 1983 negotiations, testified that the Association had an assignment of bargaining rights from Triangle in 1983 but that he could not produce it. However, Thomas Kulas, the president of Triangle, testified that Triangle did not assign bargaining rights to the Association in 1983. Kulas’ recollection was more likely to be accurate than Larson’s, particularly where, as here, Kulas’ testimony was against his own interest. If he had been part of the multiemployer bargaining unit in 1983, he clearly would have been bound by the Association contract that eliminated art. 10, sec. 8.

Pueblo, both of whom were clearly in individual bargaining units. Thereafter the Union rejected all conditional assignments and still later, as indicated in a January 1987 letter to the Association and the Union, Triangle withdrew the conditional agreement. If Triangle left the single employer unit to become part of the multiemployer unit, it returned to the single employer unit well before the Union sought to institute the 1987 Joint Board procedures described below.

After the Association and the Union agreed to the changes in economic benefits and the contract extension in 1985, Triangle received the letter sent to all contractors asking them to execute the new agreement. That letter stated that a new collective-bargaining agreement complete with all language and wages would be forthcoming in the near future. Triangle signed the agreement on June 19, 1985, and subsequently the Union sent Triangle a copy of the green book, the complete July 1, 1983–June 30, 1987 contract. That contract did not contain article 10, section 8 and had no provision for interest arbitration.

On March 16, 1987, the Association's labor committee wrote to the Union stating that a number of contractors desired the labor committee to represent them on an individual basis.² Triangle was one of the contractors who bargained individually through the Association's labor committee as its agent. The same was true for Pueblo. In the early part of June 1987 Union Business Manager Stephens told Steve Larson, who was representing the individual contractors, that the Union would be taking a group of contractors to the Joint Board via article 10, section 8. By letter dated June 12, 1987, the Association's labor committee on behalf of the individual contractors including Triangle and Pueblo, rejected the Union's claim that some of the employers were bound by article 10, section 8. The letter stated that the contractors were exercising their right under the preferential clause to adopt the grievance procedure in the Association contract which deleted article 10, section 8. The letter also stated that the employers specifically rejected any form of interest arbitration and specifically refused to adopt any form of interest arbitration. The Union responded with a letter dated June 15, 1987. That letter acknowledged that the contractors had the right to invoke the preferential clause and institute a new grievance procedure as of the date the Union received the June 12, 1987 letter. The letter went on to state that the Union invoked article 10, section 8 on June 2, 1987, at which time article 10, section 8 was put into effect. The Union also stated that it intended to follow through with the interest arbitration provision of the contract.

By letter dated July 1, 1987, Triangle repudiated its 8(f) bargaining relationship with the Union. The text of the letter was the same as the one that Concord had sent to the Union.

The Union filed a petition for an election, the election was held and on August 26, 1987, the Board certified the Union as the exclusive collective-bargaining representative of the shop and field employees of Triangle. Thereafter bargaining sessions were held but no agreement was reached.

²Prior to that time some contractors had signed a conditional grant of bargaining rights that was somewhat confusing and which allowed the individual employer to reject any agreement. The Union refused to accept that conditional designation for the 1987 negotiations. Bargaining from that point on was on an individual basis even though the Association's labor committee represented many of those individuals.

D. Pueblo's Bargaining History

Like Concord and Triangle, Pueblo was bound by the 1981–1983 contract on an individual basis. On August 25, 1983, after the Union and the Association had reached agreement on the 1983–1986 agreement, Pueblo received from the Union the same letter the other contractors did which stated in part: "We are presenting for your signature a new contract which contains the changes agreed to with Colorado SMAC, the changes ordered by NJAB and remaining unchanged provisions from the 1981–1983 agreement." The letter noted that there were differences of opinion between the Association and the Union and if the contractors' interpretation was sustained, Pueblo would be entitled to implement the changes under the most-favored-nations clause. The Joint Board awards and the proposed contract accompanied the letter. The proposed contract contained the truncated article 10, section 8 provision which was limited to the wage reopener. It is the same contract that Triangle signed. It incorporated the Union's position that the Joint Board award permitted interest arbitration for the 1984–1985 wage reopener but for nothing else.

That contract was received by Pueblo on about August 25, 1983. On September 13, 1983, Union Business Representative Ed Easom went to the Pueblo shop and spoke to Darrell Haun who was secretary-treasurer of Pueblo. Darrell Haun did not ordinarily deal with labor relations for that Company. Eason said that he was there making the rounds of the town and he had to have the contract signed right away. He spoke of pulling the men if it was not signed. There was no discussion about the terms of the contract and Haun did not compare the contract that Eason brought with him with the one that the Company had been given on August 25. Haun signed two copies of the contract that Eason had with him and Eason took one away. That contract was substantially different than the one that the Union had sent Pueblo on August 25. The contract that Haun signed contained a full article 10, section 8 clause which bound the parties to interest arbitration at the expiration of the contract.³

It is apparent that the Union was either perpetrating a fraud or was making a mistake when it obtained Haun's signature on the 1983–1986 contract. A short time before, the Union had offered Pueblo the same contract that the Union had agreed to with the Association. The Joint Board award, which was incorporated in that agreement, made it clear that there would be no interest arbitration at the expiration of the 1986 contract. The Union sent Pueblo a copy of a proposed contract which gave the Union's interpretation of the Joint Board award to the effect that interest arbitration did apply to the wage reopener. The term "wage reopener" was written into the proposed contract. A short time later a union representative spoke of pulling the men and fast-talked a company representative who was inexperienced in labor relations into signing a contract which the company representative had every reason to believe was the same as the one that had been previously sent to the company by the Union. As I am reluctant to find any improper motives, I will simply

³The above findings are based on the credited testimony of Darrell Haun. To the extent that Eason's testimony differed from that of Haun, I do not credit Eason. His testimony that he did not know until the day of the trial that there were any contracts in which "wage reopener" was written into art. 10, sec. 8 was completely incredible.

assume that Easom did not know what he was doing and made a mistake.⁴ However that mistake was corrected by the subsequent actions of the parties.

After the Union and the Association reached agreement on the wage reopener in 1985, Union Business Manager Stephens sent a copy of that extension agreement to Pueblo and the other independent contractors. The agreement was accompanied by a covering letter which solicited the contractors to sign the extension agreement. The letter made it clear that the contractors, by signing the extension agreement, would be agreeing to an extension of the terms of the Union-Association agreement. If there was any doubt, it was resolved by the last paragraph of the letter which stated "A new Collective Bargaining Agreement complete with all language & wages will be forth-coming from this office in the near future." That new collective-bargaining agreement was forthcoming. It was the green book which was the July 1, 1983-June 30, 1987 Union-Association agreement. A copy was sent to Pueblo. That was the contract that the Union offered Pueblo in 1985 and the contract that Pueblo accepted by signing the extension agreement in 1985. In effect the sloppy handling of the 1983-1986 contract by the Union was corrected in 1985 when the parties made it clear that Pueblo was bound by the terms of the 1983-1987 agreement between the Union and the Association. That agreement did not contain article 10, section 8 nor did it contain any provision that would bind the parties to interest arbitration. At the very least, from 1985 on, Pueblo had no obligation to accept interest arbitration.

As noted in the discussion relating to Triangle, Pueblo authorized the Association to act as its agent in individual bargaining with the Union; the Union informed the Association that it was about to invoke article 10, section 8 with regard to some contractors; the Union invoked the most-favored-nations clause of the contract; and the Union took the position that the Association was too late because the Joint Board provisions had already been invoked.

By letter dated January 15, 1987 Pueblo notified the Association and the Union that Pueblo canceled any assignment of bargaining rights to the Association and intended to bargain on an individual basis and not as part of any multiemployer group.

On July 16, 1987, Pueblo sent the Union a letter repudiating its 8(f) bargaining relationship under *John Deklawa & Sons*, 282 NLRB 1375 (1987). From that time Pueblo has operated nonunion and has not recognized the Union as the representative of its employees. There have been no negotiations since July 16, 1987, and, unlike the situation with Concord and Triangle, the Board has not certified the Union as the representative of Pueblo's employees.

⁴The mistake appears to be similar to the one made with Triangle. There, the Union left a proposed contract containing the full art. 10, sec. 8 but thereafter Union Business Representative Gauthier told Triangle that that first proposed contract was wrong and a new one was substituted for it. The new one contained the truncated art. 10, sec. 8 provision limited to wage reopeners. Another independent contractor, Frontier Heating, had a similar experience. In 1983 Union Business Representative Gauthier left a proposed contract with Frontier that included a full art. 10, sec. 8. Frontier signed the contract. Some time later, Gauthier came back and said that he had another contract with him and they were to void the first contract. The second contract had the truncated article 10, section 8 clause which was limited to the wage reopener. Gauthier wrote "void" on the first contract and said that article 10, section 8 was out.

E. The Union's Attempts to Enforce the Interest Arbitration Provisions

On June 2, 1987, the Union sent a telegram to a number of independent contractors including Concord, Triangle, and Pueblo stating that the Union was requesting the services of the Joint Board.

On July 10, 1987, the Union wrote the Joint Board claiming that contractors including Concord, Triangle, and Pueblo were bound by article 10, section 8 and requesting the Joint Board's services.

On July 20, 1987, Stettner, Miller & Cohn, P.C., a law firm representing a number of independent contractors including Concord, Triangle, and Pueblo, wrote to the Union and to the Joint Board. The letter stated that the Joint Board had no authority or jurisdiction to issue an award; that the Union had fraudulently sought to secure the jurisdiction of the Joint Board; and that for a number of reasons the contractors were not bound by article 10, section 8 and that any award by the Joint Board under that provision would be void. The letter also stated that the contractors were considering a suit in the Federal district court to seek an injunction.

On November 12, 1987, the Joint Board issued three decisions. Those decisions found that Concord, Triangle, and Pueblo were bound to the interest arbitration procedures. The three decisions all said:

The parties shall execute a collective bargaining agreement identical to that referred to in the home area as "X-10" with the exception that Article X, Section 8 will be deleted.

It is not the intent of the NJAB to impose any non-mandatory subjects of bargaining upon an unwilling party. In the event the National Labor Relations Board or any court having jurisdiction over the matter determines that any provision of the agreement imposed by the NJAB herein is a non-mandatory subject of bargaining to which a party objected, that provision will be deleted, and the parties, in that event are directed to enter into negotiations to replace the deleted provision with one that is a mandatory subject of bargaining. In the event the parties cannot agree on a replacement for the non-mandatory provision, the NJAB retains jurisdiction to resolve that issue.

None of the Charging Parties executed a collective-bargaining agreement as called for by the Joint Board award.

Thereafter the Union filed and prosecuted grievances against Concord, Triangle, and Pueblo on the grounds that those employers had failed to comply with the Joint Board award. The Joint Board, who heard the grievances, found in favor of the Union. Concord, Triangle, and Pueblo were ordered to begin complying with the union agreement and were assessed \$5000 each as penalties for violations. The awards provided that the \$5000 penalties were suspended provided all arrearages due employees and fringe benefits were paid within 30 days. The decisions were sent to Pueblo on December 15, 1987, and to Concord and Triangle on January 28, 1988.

Thereafter Concord, Triangle, and Pueblo along with other contractors brought suit in the Federal District Court for the District of Colorado (Civil Action 87-C-1074), to set aside the Joint Board award. The Union counterclaimed with re-

gard to Concord and Triangle, and prayed for judgment against Concord and Triangle to reform their 1983–1987 collective-bargaining agreements to include the interest arbitration procedure of article 10, section 8. The Union also filed a motion to confirm all the arbitration awards.⁵

F. Analysis and Conclusions

As is set forth in detail above, none of the Charging Parties agreed that they would be bound by interest arbitration at the expiration of the 1983–1987 contract. As interest arbitration is consensual in nature, and there was no consent in this case, the Joint Board had no jurisdiction or authority to bind the Charging Parties to a new contract. The Joint Board awards were nullities.⁶ Obviously I disagree with the Union's interpretation of the 1983–1987 contract. However the ultimate question for me is whether the Union violated Section 8(b)(1)(B) and 8(b)(3) of the National Labor Relations Act by seeking to put into effect its interpretation of the contract through the interest arbitration procedure before the Joint Board, the grievance procedure, and its district court counterclaim.⁷ For the reasons set forth below, I am unprepared to find that the Union violated the Act by its use of the Joint Board, grievance, and court proceedings.

The General Counsel contends that the Union's use of the Joint Board, grievance procedure and court proceedings constitutes an attempt to force the Charging Parties to accept the Joint Board as its bargaining agent in violation of Section 8(b)(1)(B) of the Act and that by its actions the Union refused to bargain in violation of Section 8(b)(3) of the Act.

Interest arbitration is a nonmandatory subject of bargaining and a union may not insist to the point of impasse on interest arbitration in a new contract or use an interest arbitration clause in an existing contract to perpetuate that clause in a new contract (a self-perpetuating interest arbitration system). *Sheet Metal Workers Local 263 (Sheet Metal Contractors)*, 272 NLRB 43 (1984); *Sheet Metal Workers Local 59*, 227 NLRB 520 (1976). However it does not follow that the enforcement of an interest arbitration provision contained in an old contract, as to mandatory subjects of bargaining, constitutes a violation of the Act where the interest arbitration provision is not carried over into the new contract. In *Sheet Metal Workers Local 263*, supra, the Board considered the same article 10, section 8 clause as is present in the instant

case. The Board adopted the decision of the administrative law judge which held:

Interest arbitration generally, and the clause involved here specifically, have been held a nonmandatory subject of bargaining. However, parties may agree to interest arbitration and within limit, such is enforceable. That limit is the subject matter which the parties agree to arbitrate. Thus in *NLRB v. Sheet Metal Workers, Local 38*, 575 F.2d 394 (2d Cir. 1978), enfg. 231 NLRB 699 (1977), insistence to impasse on a clause substantially identical to the one here was violative of Section 8(b)(1)(B) and (3). The court, went on to note that while interest arbitration of mandatory subjects is permissible, although not itself a mandatory subject of bargaining, interest arbitration as to nonmandatory subjects "is void as contrary to public policy."

And in *Sheet Metal Workers Local 14 v. Aldrich Air Conditioning*, 717 F.2d 456 (8th Cir. 1983), the court held that interest arbitration may not itself be the subject of arbitration lest the bargaining system be self-perpetuating. "[A]n interest arbitration clause is unenforceable insofar as it applies to the inclusion of a similar clause in the new collective bargaining agreement." 717 F.2d at 459.

To summarize, interest arbitration is a nonmandatory subject of bargaining which, even if agreed to, is unenforceable insofar as it purports to resolve the inclusion of an interest arbitration in a successor collective-bargaining agreement. Parties may agree to arbitrate disputes arising during the course of negotiations but those agreements are binding and enforceable only to the extent that mandatory subjects are resolved. While the parties may arbitrate nonmandatory subjects, for such does not appear unlawful, either party may, with impunity, withdraw from the proceeding at any time.

Thus here, article X, section 8 of the expiring collective-bargaining agreement was valid and enforceable only as to mandatory subjects of bargaining. The Union could not enforce this clause against the Council as to nonmandatory subjects including the Council's refusal to include it in a successor collective-bargaining agreement.

Here the Joint Board awards specifically excluded the interest arbitration clause from the new contract and stated that it was not the intent of the Joint Board to impose any nonmandatory subjects of bargaining on an unwilling party. A procedure was set forth for deleting parts of the new agreement that dealt with nonmandatory subjects. The new contract as a whole dealt with wages, hours, and other conditions of employment. Key matters such as an interest arbitration clause were omitted and nonmandatory subjects such as the industry promotion fund were merely incidental. Such provisions cannot prevent enforcement of the remainder of the contract. The nonmandatory matters "do not involve issues so fundamental to the new agreement that the entire contract must be voided." *Sheet Metal Workers Local 206 v. R. K. Burner Sheet Metal*, 859 F.2d 759, 761 (9th Cir. 1988). In that case the Ninth Circuit considered the question of the enforceability of a Joint Board award under circumstances that were very similar to the ones in the instant

⁵The pleadings before the district court were not introduced in evidence in this case. The Union admitted in its answer that it sought to reform Concord's and Triangle's collective-bargaining agreements and the attorney for the Union acknowledged on the record that the Union filed a motion to confirm the arbitration awards.

⁶The Union's contention that the Board should defer to the Joint Board award is without merit. Even if the other criteria set forth in *Olin Corp.*, 268 NLRB 573 (1984), are met, the Board will not defer in the absence of a binding arbitration procedure. "The Board's policy of deferral to arbitration is predicated upon the availability of contractual arbitration procedures." *Atlas Tack Corp.*, 226 NLRB 222, 228 (1976), enfg. 559 F.2d 1201 (1st Cir. 1977).

⁷With regard to the district court action, the complaint in the instant case is limited to alleging a violation of the Act through the Union's attempt to reform the 1983–1987 collective-bargaining agreement to include the interest arbitration procedure of art. 10, sec. 8. However that attempt to reform the contract is meaningful only in connection with the parallel attempt in the district court to enforce the arbitration award. If the General Counsel succeeds in preventing the Union from making its argument before the district court with regard to the contract reformation issue, in large measure the General Counsel will also be preventing the Union from meaningfully arguing the arbitration award confirmation issue before the district court.

case, except for the one major difference that in the instant case the Charging Parties never agreed to any interest arbitration provision in the expiring contract. The court found that where an employer, on an individual basis, signed a contract containing an interest arbitration provision, it was bound by a Joint Board award based on that provision even though the Joint Board arbitrator selection process could be disadvantageous to employers outside of the Association. The Court also held that the interest arbitration clause survived the expiration of a collective-bargaining agreement.

The Union cannot insist to impasse on a nonmandatory subject of bargaining such as interest arbitration.⁸ A party may not insist to impasse that a third party make final decisions with regard to new contract negotiations. *Electrical Workers IBEW Local 135 (La Crosse Electrical)*, 271 NLRB 250 (1984). However in the instant case the Charging Parties and the Union had not agreed on any wages, hours, or other terms or conditions of employment at the expiration of the 1987 contract. The Union did not insist to the point of impasse on an interest arbitration provision in the new contract and the new contract put forth by the Joint Board did not contain any such provision.

The Union may not lawfully attempt to force an employer into or out of an association so as to include it or exclude it from a multiemployer bargaining unit. That is not an issue in this case. There is no indication that the Union has put pressure on any of the Charging Parties to join a multiemployer bargaining unit. The General Counsel argues that a union violates the Act when it takes action to enforce an interest arbitration provision, contained in a multiemployer bargaining unit contract, against an individual employer after that employer has withdrawn from the multiemployer bargaining unit. However that is not the situation in the instant case.⁹ Concord and Pueblo were individual employers in individual bargaining units. They were never part of any multiemployer bargaining unit. Triangle also was never a part of the multiemployer unit, except arguably for some period of

time after the 1985 extension and before that company withdrew from the Association. When it executed the contract, when the contract expired and when the Joint Board proceedings were taking place, Triangle was clearly in a single employer bargaining unit.

The parties to a contract are free to rescind any nonmandatory term of that contract at any time without violating the refusal to bargain sections of the Act. *Allied Chemical & Alkali Workers v. Pittsburgh Glass*, 404 U.S. 157 (1971). It does not follow however that a union violates 8(b)(3) or 8(b)(1)(B) of the Act when it seeks to enforce that nonmandatory provision through non-Board litigation. Indeed in *Pittsburgh Glass*, supra, the Supreme Court indicated that such non-Board enforcement was quite proper. In that case the company rescinded benefits of retired employees. The high court held that such matters involved nonmandatory subjects of bargaining and that the employer had not violated Section 8(a)(5) of the Act. The Court then went on to say (at p. 181): "The retiree, moreover, would have a Federal remedy under Section 301 of the Labor Management Relations Act for breach of contract if his benefits are unilaterally changed." At another point the high Court stated (at p. 188) that the Act does not require:

continued adherence to permissive as well as mandatory terms. The remedy for unilateral mid-term modification to a permissive term lies in an action for breach of contract . . . not in an unfair-labor-practice proceeding.

Consistent with the Supreme Court case the Board has held that contract clauses containing nonmandatory subjects can be breached without violation of Section 8(a)(5) of the Act even though court action can properly be sought to enforce them. In *Tampa Sheet Metal Co.*, 288 NLRB 322, 325 (1988), the Board applied that logic to a situation that involved the same interest arbitration clause that is present in the instant case. The Board held:

A. Refusal to Abide by NJAB Award

The issue is whether the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to abide by the collective-bargaining agreement imposed by the NJAB pursuant to the expiring agreement's interest arbitration provision. We agree with the judge that the Respondent did not violate the Act as alleged.

It is well settled that interest arbitration clauses are nonmandatory subjects of bargaining. In *Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157 (1971), the Supreme Court held that a unilateral modification of a contract term is "a prohibited unfair labor practice only when it changes a term that is a mandatory rather than a permissive subject of bargaining." 404 U.S. 185. The Court further held that the "remedy for a unilateral mid-term modification to a permissive term lies in an action for breach of contract . . . not in an unfair-labor-practice proceeding." 404 U.S. at 188.

Because interest arbitration is a nonmandatory subject of bargaining, the Respondent's refusal to abide by the contract imposed by the NJAB amounted to a repudiation of a nonmandatory term in the expiring collec-

⁸In *NLRB v. Sheet Metal Workers Local 38 (Elmsford)*, 575 F.2d 394, 400 (2d Cir. 1978), enfg. 231 NLRB 699 (1977), the court held the same Joint Board that is involved in the instant case was a situs of negotiations rather than an impartial adjudicative body; that interest arbitration was a nonmandatory subject of bargaining; and that the Union could not take to impasse the question of whether interest arbitration should be carried into the next contract.

⁹The General Counsel's contention finds some support in *Electrical Workers IBEW Local 194 (Cahn Electric)*, 285 NLRB 328 (1987). However in that case the Board pointed out that exceptions were not filed as to any substantive legal issues. The Board decision was therefore pro forma and the equivalent of an adoption in the absence of exceptions with regard to the substantive legal issues. As such it has no binding precedential value. As the instant case does not involve an attempt to apply the interest arbitration provision of a contract in a multiemployer bargaining unit (which is applicable only to employers in that bargaining unit) to an employer in an individual bargaining unit, there is no need to resolve this issue. Here, whatever contracts were reached with the Charging Parties were in individual bargaining units. There might however be some reason to question the General Counsel's underlying assumption that there is something in interest arbitration that is antithetical to the policies of the Act or that when an employer leaves a multiemployer bargaining unit but carries with him the terms of the multiemployer contract the interest arbitration provisions of that contract are automatically canceled. The courts as well as the Board have long expressed preference for arbitration over economic force in the resolution of labor disputes. A serious argument could be made to the effect that interest arbitration that is voluntarily agreed to should be actively encouraged rather than shackled by the Board. Industrial peace, which is one of the objects of the Act, is certainly enhanced when the parties agree on dispute resolving mechanisms, whether those mechanisms are geared to contract interpretation during the life of the contract or to the resolution of disputes as to what a future contract should contain.

tive-bargaining agreement. Under *Pittsburgh Glass*, supra, such conduct is not a violation of Section 8(a)(5) and (1) of the Act. The remedy for such a repudiation lies not with the Board, but with the courts in a breach of contract proceeding. Indeed, the Union and the trust funds here have already obtained court decisions ordering remedies for the Respondent's conduct. Accordingly, we conclude that the Respondent did not violate Section 8(a)(5) and (1) of the Act by refusing to abide by the contract imposed by the NJAB.

In that case the Board held that the remedy for the company's repudiation of the contract imposed by the Joint Board lay with the courts in a breach of contract proceeding. Yet in the instant case the General Counsel is contending that the Union violated the Act by seeking such a remedy. It could be argued that access to the courts should have greater protection than access to arbitration. However where the court action is to enforce an arbitration award, the two are inseparably connected. If access to the arbitration procedure is precluded, then Court action to enforce an arbitration award is effectively barred because there can be no award to enforce. I believe that the logic of that case requires that the complaint in the instant case be dismissed.

Moreover, as a general proposition, the Board exercised extreme caution in limiting access to grievance and court proceedings. The Board has limited access to grievance and court proceedings where it was found necessary to protect access to its own processes; where it was necessary to preserve the integrity of its bargaining unit determinations; and in situations where the claimant sought to compel an act which was directly and in itself unlawful. *Hanford Atomic Metal Trades Council (Rockwell International)*, 291 NLRB 418 (1988). None of those situations are present in the instant case. Here the Union seeks to enforce its interpretation of the contract through the grievance procedure and the courts. The Union was not seeking to compel an act which was directly and in itself unlawful.¹⁰

Two other recent Board cases also indicated the Board's reluctance to interfere with access to grievance procedures and the courts. In *Teamsters Local 483 (Ida Cal)*, 289 NLRB 924 (1988), the issue was whether a union was unlawfully attempting to force owner-operators, who were independent contractors, to join the union under the provisions of a union-security clause. Though the owner-operators were found by the Board to be independent contractors, it was held that the union's filing of the grievance and lawsuit did not constitute a violation of Section 8(b)(4)(ii)(A) of the Act. Though it could have been argued that the union pursued the grievance and lawsuit for the unlawful object of forcing independent contractors to join the union, the Board found that the union's actions were consistent with the goal of obtaining an adjudication, through arbitration or court action, of the status of the owner-operators. In addition the Board noted that the union did not strike or picket and that the union's contention that owner-operators were statutory employees

¹⁰ For examples of situations where the Board will find violations, see *Hanford Atomic Metal Trades (Rockwell International)*, supra. See also *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983).

was not unreasonable. A similar result was reached in *Electrical Workers IBEW Local 532 (Brink Construction)*, 291 NLRB 437 (1988). The Board held "that Congress intended the judiciary to be the appropriate forum for resolving contractual disputes." The issue presented in that case was whether a union violated Section 8(b)(1)(B) of the Act by suing in district court to compel a company to comply with the grievance and arbitration provision in a collective-bargaining agreement. The administrative law judge had held that the union violated Section 8(b)(1)(B) of the Act by filing the lawsuit because the lawsuit was groundless and was an unlawful attempt to force the company to select an association as its representative for the purpose of collective bargaining. The Board reversed, holding that the union did nothing more than invoke its right to file an action in federal court to resolve a bona fide dispute as to whether a contract continued to exist. The Board further held that the union's "conduct was in harmony with Congress' decision to leave the enforcement of collective bargaining agreements to the courts in accordance with the usual processes of the law." *Charles Dowd Box [Co. v. Courtney]*, 368 U.S. [502], 511 [1962]"

As found above the Charging Parties did not agree to be bound by interest arbitration at the expiration of the 1983-1987 contract and the Joint Board awards were therefore nullities. The evidence in this unfair labor practice proceedings clearly establishes that there is no valid collective-bargaining agreement to which Concord, Triangle, or Pueblo are bound. That issue has been fully litigated before me and it is unfortunate that the parties as well as the court may have to be subjected to multiple, redundant litigation on the same subject. However the ultimate issue before me is whether the Union violated the Act by litigating its contention that a contract did in fact exist. In the light of the above cited cases I must hold that such litigation before the Joint Board, the grievance tribunal and the District Court did not violate the Act as alleged in the complaint. I shall therefore recommend that the complaint be dismissed.¹¹

CONCLUSION OF LAW

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

[Recommended Order for dismissal omitted from publication.]

¹¹ The General Counsel's case is beset by a number of other problems. Pueblo withdrew recognition from the Union at the expiration of the 1983-1987 contract as did Concord and Triangle. All three were construction industry employers and the General Counsel does not contest the fact that they could lawfully withdraw recognition at that time. Pueblo has had no dealings with the Union since then and the other two employers continued their non-recognition of the Union for some time until the Union was certified as the bargaining representative of their employees. Apparently the General Counsel has taken the position that the Union violated Sec. 8(b)(3) of the Act by refusing to bargain with the employers even during times when the employers had no duty to bargain with the Union because they had lawfully withdrawn recognition from the Union. That position is difficult to maintain in light of Sec. 8(d) of the Act which defines the duty to bargain in terms of the mutual obligation of the employer and the labor organization. However, as the complaint is being dismissed on other grounds, that issue need not be reached.