

**A & L Underground and Plumbers Local Union
No. 8 of the United Association of Journeymen
and Apprentices of the Plumbing and Pipe-
fitting Industry of the USA and Canada, AFL-
CIO. Case 17-CA-13525**

April 10, 1991

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
CRACRAFT, DEVANEY, AND OVIATT

On June 29, 1988, Administrative Law Judge Michael D. Stevenson issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,¹ findings, and conclusions only to the extent consistent with this Decision and Order.

The facts, as more fully set forth in the judge's decision, are as follows. The Respondent is a corporation that installs pipelines. On June 3, 1985, the Respondent signed a bargaining agreement consisting of two documents: a 1981-1984 collective-bargaining agreement and an "Interim Agreement." The Interim Agreement consisted of a one-page document with two attachments. The document stated that the attachments "set forth the changes and additions recently negotiated by" an employer association and the Union to the 1981-1984 collective-bargaining agreement and that they "comprise the new 1985-1988 master agreement" between those parties. The document further stated that the Respondent agreed to be bound by the terms of that agreement and that it would later, on completion of the printing of the new agreement, execute a copy of it. The Respondent asserted to the Union, however, that it believed that the agreement it signed applied only to a single project. Sometime after June 3, the Respondent determined not to "sign another project agreement" and ceased complying with the terms of the agreement. In mid-July 1985, it received a copy of the new collective-bargaining agreement with instructions to sign and return a copy to the Union, but it did not do so. The judge found that the Union first learned of the Respondent's noncompliance with the agreement in early 1986, and took no action to compel enforcement for most of that year.

¹In her answering brief, counsel for the General Counsel contends that the judge incorrectly found that the General Counsel's brief to the judge was untimely filed. The General Counsel correctly notes that the judge misquotes Sec. 102.114(b) of the Board's Rules and Regulations and that Sec. 102.111(b) rather than Sec. 102.114(b) is directly applicable. Pursuant to Sec. 102.111(b), with certain specified exceptions not relevant here, the Board will accept as timely filed any document that, as here, is postmarked earlier than the due date. The General Counsel does not claim, however, nor do we find in light of all the circumstances, that the General Counsel has been prejudiced by this error.

The parties stipulated that the Union had actual notice of the Respondent's repudiation of any contractual agreement not later than December 4, 1986. On that date, the Respondent notified the Union by letter that it was repudiating any agreements with the Union.² The letter provided that the Respondent believed that any agreements that it might have executed with the Union had "long since been terminated" and that the Respondent "repudiate[d] any and all Section 8(f) pre-hire agreements" with the Union "effective immediately." On July 31, 1987, the Union's attorney sent the Respondent a letter stating the Union's position that the Respondent became bound to the collective-bargaining agreement by virtue of executing the Interim Agreement and indicating the Union's intention to file an unfair labor practice charge based on the Respondent's repudiation of that agreement. On August 24, 1987, the Union filed an unfair labor practice charge. In the complaint that issued pursuant to that charge, the General Counsel alleged that "the Respondent has repudiated the contract" and "has withdrawn recognition from the Union during the term of the Section 8(f) contract."

The judge rejected the Respondent's defense that the charge was filed outside the 6-month limitation period set forth in Section 10(b) of the Act. Relying on the continuing violation theory articulated in *Al Bryant, Inc.*,³ the judge found that Section 10(b) did not bar the complaint allegation even though the charge was not filed within 6 months of the Respondent's initial unequivocal repudiation of the contract. Under that continuing violation theory, although statutory relief will not reach back to periods before the 10(b) cutoff date, the fact that an initial clear repudiation of an agreement occurred before that date will not bar an unfair labor practice charge predicated on a respondent's continuing failure within the 10(b) period, on demand, to abide by the agreement.⁴ Thus, despite the Respondent's earlier clear and unequivocal repudiation of the contract outside the 10(b) period on December 4, 1986, the judge concluded that the Union's July 31, 1987 letter to the Respondent demanding that the Respondent comply with the Interim Agreement was sufficient to bring the case within the 10(b) period. The judge found, accordingly, that the Respondent violated Section 8(a)(5) and (1) of the Act by repudiating the contract and by withdrawing recognition from the Union.

²The Union had previously notified the Respondent by letter that it was aware of the Respondent's intention not to abide by the parties' collective-bargaining agreement, and that the Union believed the Respondent to be bound by the agreement for its duration.

³260 NLRB 128, 135 (1982), *enfd.* 711 F.2d 543 (3d Cir. 1983), *cert. denied* 464 U.S. 1039 (1984).

⁴*Al Bryant*, *supra*, 260 NLRB at 135, citing *Torrington Construction Co.*, 235 NLRB 1540 (1978). Under this approach, when a complaint alleges that a respondent has violated the Act by repudiating or failing to comply with a collective-bargaining agreement, the complaint is not time-barred as long as a charge is filed during the term of the agreement.

For the reasons set forth below, we have concluded that the continuing violation theory as defined and applied in *Al Bryant* cannot properly apply to a clear and total contract repudiation.⁵ We find that the policies underlying Section 10(b) are best effectuated by requiring a party, in order to avoid the time-bar, to file an unfair labor practice charge within 6 months of its receipt of clear and unequivocal notice of total contract repudiation.⁶

Section 10(b) provides that “no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board” The fundamental policies underlying the 10(b) limitation period are well established. In *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411, 419 (1960), the leading case on this statutory provision, the Supreme Court observed that “these policies are to bar litigation over ‘past events after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused,’ H.R. Rep. No. 245, 80th Cong., 1st Sess., p. 40, and of course to stabilize existing bargaining relationships.” The Court’s decision in *Bryan* and the legislative history it cited require “strict adherence” to the 10(b) limitation. *Chambersburg County Market*, 293 NLRB 654 (1989).

As in *Chambersburg County Market*, in which we overruled the application of the continuing violation theory to charges based on a refusal to execute a contract,⁷ we find that this theory, when applied to the total repudiation of a contract, undermines the important policy goals underlying Section 10(b). In particular, by deeming a charge alleging total contract repudiation to be timely filed at any time during the term of

the contract or 6 months thereafter, notwithstanding a clear and unequivocal repudiation more than 6 months—and possibly several years—earlier, we permit dilatory conduct by the injured party which can result in two distinct types of harm. It does injury to the stability of collective-bargaining relationships, and it impairs the process for adjudicating those charges.

First, rather than promoting stable bargaining relationships and “holding the parties to the terms of their bargaining agreement” (as our dissenting colleague claims), the continuing violation theory leaves the status of the entire agreement and the parties’ obligations under it an open question for an extended period. It is hardly in the real interest of the party desiring continued enforcement of the contract to allow the repudiating party to ignore the agreement indefinitely without being brought to book. During such an interval, it is of little moment that the parties’ contractual rights and responsibilities are clearly defined in the contract, because, as a practical matter, they exist only on the pages of the contract and have no effect at all on the relationship of the parties in the real world.

We also cannot totally ignore the interest of the repudiating party, because the potentially lengthy period of uncertainty permitted by the rule favored by our dissenting colleague affects those whose repudiation is lawful as well as those who violated the Act. A party who has explicitly repudiated a collective-bargaining agreement should have the right to conclude after the 6-month limitation period has passed without charges being filed that it is free to negotiate a new agreement or, as in the instant case, where the repudiation is accompanied by a withdrawal of recognition, to recognize and bargain with a different majority representative or to change employment conditions. As the Board noted in *Chemung Contracting Corp.*, 291 NLRB 773 (1988), “The intended purpose of [Section 10(b)] is that, in the absence of a properly served charge on file, a party is assured that on any given day its liability under the Act is extinguished for any activities occurring more than 6 months before.” See also *Koppers Co.*, 163 NLRB 517 (1967). In sum, by tolerating delay of charge filing, the rule fails to foster a climate in which both parties to a collective-bargaining relationship are able to assess their obligations to each other expeditiously and with reasonable certainty, and it thereby impairs the statutory goal of stabilizing collective-bargaining relationships.

Second, the continuing violation theory impairs the adjudication process because it permits litigation of distant events. The legality of a party’s contract repudiation necessarily depends on the circumstances as they existed at the time of its repudiation—the moment at which it clearly and totally sundered the contractual relationship. As the Supreme Court pointed out in *Bryan Mfg.*, supra, 362 U.S. at 419, a respondent’s

⁵To the extent *Twin Cities Electric*, 296 NLRB 1014 (1989), is inconsistent with our decision today, we also overrule it. However, we note that in that case the Board relied on an independent ground for finding the complaint was not time-barred, i.e., the respondent waived its right to raise a 10(b) affirmative defense by not timely raising it.

⁶Our dissenting colleague notes that the Respondent did not unequivocally withdraw recognition from the Union and thus he would not find the complaint to be time-barred on that issue. The judge specifically found that the Union had constructive notice of the Respondent’s total repudiation of the contract as of July 1985. No party excepts to this finding. In finding that the Union had constructive notice of the repudiation, the judge noted that in July 1985, the Union was specifically advised that the Respondent was operating “nonunion.” Thus, in this case, the alleged withdrawal of recognition was part and parcel of the same event, i.e., the repudiation of the entire 8(f) agreement. Accordingly, because the charge alleging an unlawful withdrawal of recognition was filed 8 months after the Union’s actual notice of the Respondent’s repudiation, the entire complaint is barred by Sec. 10(b). Further, we note that no party disputes that the Respondent withdrew recognition from the Union. The Respondent’s primary argument in its exceptions is that the charges are barred by Sec. 10(b), not that the contract and the relationship were not repudiated.

⁷*Chambersburg* overruled *Torrington Construction Co.*, supra. In overruling *Torrington*, and holding that a party is required, in order to avoid the time-bar, to file an unfair labor practice charge within 6 months of a respondent’s clear and allegedly unlawful refusal to execute a contract, the Board relied on most of the same reasons that we rely on here. As noted above (fn. 4), *Torrington* served as the analytical basis for *Al Bryant*. In view of the demise of *Torrington*, we see no viable basis for our dissenting colleague’s extensive reliance on *Al Bryant*.

ability to prepare a defense is increasingly prejudiced as those circumstances become more distant in time and pertinent evidence grows increasingly stale. Accord: *Chambersburg County Market*, supra. The ability of a decisionmaker to render an accurate decision, as well, is made correspondingly more difficult.⁸ Thus, the interest of ensuring fairness and just results in our adjudications warrants our rejection of the continuing violation approach in cases of this kind.

We, of course, retain an important protection for the victims of unlawful contract repudiations, as in the case of those injured by any unfair labor practice. We adhere to the Board's long-settled rule that the 10(b) period commences only when a party has clear and unequivocal notice of a violation of the Act. *Desks, Inc.*, 295 NLRB 1 (1989); *Teamsters Local 43 v. NLRB*, 825 F.2d 608, 616 (1st Cir. 1987); *ACF Industries*, 234 NLRB 1063 (1978), enfd. as modified 596 F.2d 1334, 1351–1352 (8th Cir. 1979). Further, as is the case with the 10(b) defense generally, the burden of showing that the charging party was on clear and unequivocal notice of the violation rests on the respondent. Thus, by requiring that a party promptly file a contract repudiation charge, we are not placing any hardship on the party challenging the repudiation. The only parties against whom the bar might be a hardship—those whose delay in filing is a consequence of conflicting signals or otherwise ambiguous conduct by the other party—are not barred by our holding.

Once a party has notice of a clear and unequivocal contract repudiation, however, a dispute is clearly drawn. Indeed, it is at the moment of that repudiation that the unfair labor practice—the refusal to bargain—fundamentally occurs; and the legality of the repudiating party's refusal depends on the evidence that the parties muster as to the repudiator's right to take that action at that time. Thus, we do not agree with our dissenting colleague's contention that this case fits within the "first category" of cases referred to in *Bryan Mfg.*, in which Section 10(b) would not be a bar—those in which "occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices." 362 U.S. at 416–417. Cases falling into that category would include cases in which a respondent has not given clear notice of a total contract repudiation outside the 10(b) period, but has simply breached provisions of the collective-bargaining agreement to a degree that rises to the level of an unlawful unilateral change in contrac-

⁸For example, the Respondent contended in this case that the Interim Agreement applied only to a single project. The Respondent's ability to present this defense is significantly diminished with the passage of time. In fact, the judge in this case was considerably troubled by having to interpret the Union's course of conduct from early 1986, when the Union first learned of the Respondent's noncompliance, until August 4, 1987, when it finally filed a charge, because that conduct was seemingly consistent with the Respondent's argument that the Interim Agreement was indeed limited to a single project. See ALJD sec. III,B,(b) pars. 4–6.

tual terms and conditions of employment. The violation consists simply in the accumulation of breaches. That the respondent might, for example, have failed to make some contractually required payments in the past is immaterial, because those occurring within the limitations period form self-contained unfair labor practices and bear no real relation to the past breaches. Here, however, the Respondent sent a letter that severed the bargaining relationship in one stroke, and its failure to apply the contract thereafter is little more than the effect or result of that action.⁹

Farmingdale Iron Works, 249 NLRB 98 (1980), enfd. mem. 661 F.2d 910 (2d Cir. 1981), on which our dissenting colleague in part relies, illustrates our point. The Board held that the violations there which were based on failures to make trust fund payments were "separate and distinct" violations that could be litigated even though there had been similar failures to make payments in the past. *Id.* at 99. But the Board in that case also expressly adopted and relied on the administrative law judge's finding that the respondent "did not convey a clear and unequivocal intention to repudiate [the collective-bargaining agreement]" until a date that was within 6 months of the filing of the unfair labor practice charge. *Id.* at 98–99, 105–106. Had the Board applied the rule urged by our dissenting colleague, it would not have been concerned with the question of when the union had notice of the contract repudiation. By continuing to adhere to the requirement implicit in *Farmingdale's* distinction between material breach violations and a total repudiation violation, we are following a rule that promotes stable collective-bargaining relationships by precluding extended periods of uncertainty regarding the validity of the agreement and the parties' contractual obligations.

Our dissenting colleague suggests that our analysis is novel and will spawn extensive litigation. We believe that our adherence to the Board's traditional rule that Section 10(b) is triggered on clear and unequivocal notice of a violation is well-trodden legal ground on which litigants, and the Board, may comfortably rely.¹⁰ We do not believe, however, that employers

⁹Contrary to our dissenting colleague's allegation, we do not view the Respondent's letter of December 4, 1986, as merely a statement of intent to commit an unfair labor practice in the future. The very act of repudiation constituted an unfair labor practice without regard to the Respondent's subsequent conduct in conformity with it. See *Capitol Roof & Supply Co.*, 217 NLRB 1004, 1006 (1975) (letter announcing rescission of collective-bargaining agreement found as an independent unfair labor practice). In *Howard Electrical & Mechanical*, 293 NLRB 472 (1989), cited by our colleague, there was no contract in effect, and the statement in question was a declaration of intent to implement proposals at some later unspecified date. The act that was found to be unlawful was implementing the proposals in the absence of mutual assent. The Board found that the 10(b) period accordingly began on the date of implementation. Thus, as here, the act that was controlling was the act that constituted the alleged unfair labor practice.

¹⁰Although our dissenting colleague argues that parties will indeed be encouraged to expressly repudiate agreements, he paradoxically cautions that extensive litigation will result since "it is doubtful that the Board will find many

Continued

who would otherwise be disinclined to violate the Act will be propelled to engage in unlawful contract repudiation based on our ruling today, as the dissent contends. Far from rewarding a party that *does* unlawfully repudiate its agreement, as the dissent contends, we seek in our ruling today to encourage a prompt response to that unlawful action, and put both unions and employers on notice that the Board seeks to fulfill its statutory mission by requiring consistent, faithful adherence to collective-bargaining obligations. We believe that our application of the traditional clear and unequivocal notice rule best achieves the Board's fundamental procedural objective of promoting prompt filing of ripe charges while not precipitating premature filing concerning contractual disputes which arise from misunderstandings or temporary incapacity within the context of collective bargaining.

Accordingly, when a party, as in this case, has clearly and unequivocally given notice that it is totally repudiating its collective-bargaining agreement, we shall require that an unfair labor practice charge be filed within 6 months of the date of that total contract repudiation if the 10(b) time-bar is to be avoided. Because the unfair labor practice charge in this proceeding was filed on August 24, 1987, and it is undisputed that the Union had clear and unequivocal notice that the Respondent had repudiated "any Section 8(f) pre-hire agreement that may have existed" not later than December 4, 1986, the Union's charge was untimely filed. Therefore, we shall dismiss the complaint.

ORDER

The complaint is dismissed.

MEMBER DEVANEY, dissenting.

I do not agree with my colleagues that Section 10(b) mandates the dismissal of the complaint in this case. In dismissing the complaint, the majority fashions a new approach to 10(b) contract repudiation cases. This approach departs from the fundamental principles underlying that section, as well as established precedent. Furthermore, the majority's holding today will needlessly complicate our administration of the Act and increase the burden and expense of litigation in this area.

In contrast to the majority approach, I would adhere to established precedent which holds that each failure to comply with a current bargaining agreement constitutes a separate violation of the Act. Thus, a complaint alleging the unlawful repudiation or failure to comply with a current bargaining agreement will not be time-barred as long as the charge is filed during the term of the agreement or within 6 months of its expiration.

cases where the unlawful repudiation is conveyed in such a clear manner as it was in this case."

As I understand the majority's new view of Section 10(b), an unfair labor practice charge alleging the unlawful repudiation of a bargaining agreement or the unlawful withdrawal of recognition from the Union will be time-barred unless the charge is filed within 6 months of the Union's "clear and unequivocal" notice of the Respondent's actions. I view this new approach as flawed. First, it is contrary to both Board and Court precedent. Second, it undermines the basic policies behind Section 10(b) and our administration of the Act.

The majority implicitly acknowledges that Board precedent does not require the result reached today. However, the majority purports to distinguish this case from *Farmingdale Iron Works*, 249 NLRB 98 (1980), enfd. mem. 661 F.2d 910 (2d Cir. 1981). Contrary to my colleagues, I find our precedent supports the conclusion that this complaint is not time-barred.

Section 10(b) provides, in relevant part:

[N]o complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board.

The leading court decision regarding Section 10(b) is the Supreme Court's decision in *Machinists Local 1424 (Bryan Mfg.) v. NLRB*, 362 U.S. 411 (1960). In that case, the respondent union was charged with violating the Act by its maintenance of a bargaining agreement containing a union-security clause executed at a time the union did not represent a majority of the unit employees. Although the unfair labor practice charge was filed 10 months after the bargaining agreement was signed, the Board contended that the continued enforcement of the agreement was a continuing violation of the Act and, thus, not barred by Section 10(b). The union argued that the complaint was time-barred because enforcement of the bargaining agreement (which was lawful on its face) could only be shown to be illegal by establishing that the union did not represent a majority of the unit at the time the agreement was signed (an event which occurred prior to the 10(b) period).

The Supreme Court agreed with the union's contention and, in doing so, distinguished between two wholly different types of cases:

The first one is where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose 10(b) ordinarily does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier

unfair labor practice is not merely “evidentiary,” since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful.

Id. at 416–417 (footnote omitted).

In *Bryan Mfg.*, the Supreme Court found that the complaint was barred by Section 10(b) because, in order to establish the unfair labor practice, the General Counsel had to establish that the bargaining agreement was executed at a time when the union lacked majority status, an event which occurred prior to the 10(b) period. Significantly, the Court found that the “entire foundation” of the unfair labor practice was the union’s minority status at the time the agreement was signed. Id. at 417. Absent that salient fact, the Court stressed, enforcement of the agreement was otherwise “wholly benign” and “lawful on the face of things.” Id. at 417, 419.

Since *Bryan Mfg.*, the Board has treated each refusal by an employer to make benefit fund contributions as a “separate and distinct” violation for purposes of Section 10(b). In *Farmingdale Iron Works*, 249 NLRB 98 (1980), enfd. mem. 661 F.2d 910 (2d Cir. 1981), the Board found that Section 10(b) did not bar a finding that the respondent unlawfully refused to pay benefit fund contributions required by a bargaining agreement even though the charge was filed more than 6 months after the union learned the respondent had stopped making the required payments. The judge found that the respondent did not communicate an unequivocal repudiation of the contract until September 1977, thus making the January 1978 charge timely. The Board agreed with the judge, except with respect to the respondent’s failure to make benefit fund contributions. The Board found that the union knew of the respondent’s failure to make these contributions prior to the 10(b) period, but nevertheless found the complaint timely because each failure to make benefit payments constituted a separate violation of the Act. The Board limited its remedy to the 6-month period preceding the charge.

The same rationale can be seen in *Al Bryant, Inc.*, 260 NLRB 128 (1982), which my colleagues overrule today, in which the Board found that the respondent’s repudiation of a bargaining agreement was not barred by Section 10(b). The employer, which had a bargaining agreement with the union, established a nonunion alter ego. The judge concluded that, prior to the 10(b) period, the union had actual notice that the employer had repudiated the agreement by operating a nonunion alter ego. Nevertheless, the judge found that the complaint was not time-barred, as the failure to abide by the agreement within the 10(b) period was a continuing violation of the Act even though the initial repudiation of the agreement occurred prior to the 10(b) period.

The Board adopted the judge’s decision but limited the judge’s recommended remedy to the applicable 10(b) period, “our normal remedy.” Id. at 128 fn. 3.

Both *Farmingdale Iron Works* and *Al Bryant* comply with the standard set by the Court in *Bryan Mfg.*, in that in both cases the General Counsel can prove the unfair labor practice solely by relying on evidence within the 10(b) period. In both cases, the respondents’ pre-10(b) conduct, as well as the union’s actual knowledge of that conduct, was simply not relevant to the 10(b) issue. Moreover, if there was any doubt about the thrust of the Board’s decisions in this regard, it was eliminated by *Chemung Contracting Corp.*, 291 NLRB 773 (1988), and *American Commercial Lines*, 291 NLRB 1066 (1988).¹

In both decisions, the Board held that the *Farmingdale Iron Works* rule did not apply to an employer’s refusal to contribute to fringe benefit funds when the obligation to make those contributions survived the expiration of the bargaining agreements. The Board found that both complaints were barred by Section 10(b) because the charges were not filed within 6 months of the expiration of the bargaining agreements. The Board distinguished *Farmingdale Iron Works*, saying:

[a] key to the *Farmingdale* “separate violation” holding is that the charge addressed a failure to make benefit payments while the contract was still running. Thus, in order to make out a prima facie case of an 8(a)(5) violation, the General Counsel did not need to reach beyond the 10(b) period for evidence; the employer’s benefit obligation (i.e., the rates specified in the existing contract) and its breaches of that obligation were all apparent from documentary and testimonial evidence within that period.

Chemung Contracting, above. See also *American Commercial*, above. Thus, it was only *because* the bargaining agreements were no longer in effect that distinguished those cases from *Farmingdale Iron Works*.

In the instant case, as the General Counsel and the Charging Party are simply attempting to enforce a current bargaining agreement, the case fits within the “first category” discussed in *Bryan Mfg.*, above. The General Counsel can establish a prima facie case by showing that the Respondent’s actions are different from those required under the current bargaining agreement. The General Counsel need not rely on evidence of pre-10(b) events because each failure by the Respondent to comply with the agreement, “in and of [itself] . . . may constitute, as a substantive matter, [an] unfair labor [practice].” Pre-10(b) events do not serve “to cloak with illegality that which was otherwise law-

¹ I did not participate in either decision and express no view on the result reached in those cases.

ful,” contrary to the Court’s mandate. *Bryan Mfg.*, 362 U.S. at 416–417. To the contrary, the General Counsel could have litigated this case without any mention of the Respondent’s December 4, 1986 letter.

Contrary to my colleagues, I believe that the Respondent’s communication of its decision to repudiate the contract does not fundamentally alter the nature of the violation in this case. While it may be true that the Respondent’s failure to apply the contractual terms and conditions of employment is the result of that decision, this would be true whether or not the decision was communicated to the Union in terms sufficiently clear to satisfy my colleagues’ clear and unequivocal repudiation standard.

I am not willing to attribute the decisive importance to the communication of a decision that my colleagues ascribe to it in this case. The Board’s treatment of statements evidencing an intent to commit an unfair labor practice in other contexts supports my view. See, e.g., *Howard Electrical & Mechanical*, 293 NLRB 472 (1989) (announcement that respondent would implement change in scope of unit; 10(b) period did not start to run until changes implemented). As my colleagues recognize, *Howard Electrical & Mechanical* emphasizes the importance of focusing on the act which constitutes the alleged unfair labor practice for 10(b) purposes.² In this case, the complaint allegation that the Respondent repudiated its contract fairly encompasses both the act of repudiation and the subsequent noncompliance. I believe that these are separate unfair labor practices, and that the part of the charge that relates to failure by the Respondent to comply with the contract within the preceding 6 months is not barred by Section 10(b).

Moreover, there are undoubtedly circumstances in which it is not altogether clear whether a statement by a party may be categorized as merely an announcement of an intent to repudiate a contract, which may not even be actionable, or is instead an announcement of a “fait accompli,” which a party must immediately challenge in order to avoid losing the right to challenge future contract violations in an unfair labor practice proceeding. The test established by our prior precedent, to which I adhere, avoids this problem.

²My colleagues appear to construe my discussion of *Howard Electrical & Mechanical* as a suggestion that the Respondent’s letter was merely an announcement of an intent to commit an unfair labor practice itself. In view of the Respondent’s failure here to observe the parties’ agreement both before and after the letter was sent, the communication of the repudiation of a valid agreement clearly would be an unfair labor practice. Thus, there is no occasion here to decide whether an announced contract repudiation would inevitably be an unfair labor practice without regard to prior or subsequent events. In this regard, in *Capitol Roof & Supply Co.*, 217 NLRB 1004 (1975), cited by my colleagues, the Respondent also failed to comply with the parties’ agreement, both before and after its unlawful “rescission” of the agreement, in conformity with that notice, and the judge additionally carefully determined that the Respondent’s subsequent effort to withdraw the notice of rescission was ineffective.

I fail to see the logic under *Bryan Mfg.* of my colleagues continuing to adhere to *Farmingdale Iron Works* at the same time they discard *Al Bryant*. Moreover, the Board has consistently adhered to its decisions in *Farmingdale Iron Works* and *Al Bryant*.³ The judge here applied this precedent and found that the complaint was not time-barred. The majority, however, has decided that it is now time to distinguish and overrule our precedent and adopt a whole new approach to Section 10(b) in contract repudiation cases.

The only policy justification advanced by the majority to support the result reached today is that the prompt filing of unfair labor practice charges will promote the stability of bargaining relationships. Slip op. at 5–6. Unfortunately, the majority’s approach ultimately will have precisely the opposite effect.

In my view, the majority’s approach destabilizes existing bargaining relationships by inadvertently encouraging parties to repudiate their bargaining agreements.⁴ Additionally, the majority’s new standard will result in an increase in unfair labor practice charges filed with the Board. Until the Board has an opportunity to develop a body of precedent interpreting this nebulous “objective” standard, the parties will have a difficult time determining whether an attempted unlawful repudiation triggers the 10(b) clock. Prudence will require that, when in doubt, a charging party file a charge and commence litigation. It is doubtful that the Board will find many cases where the unlawful repudiation is conveyed in such a clear manner as it was in this case. Rather, I envision extensive litigation involving allegations concerning what the respondent said to the charging party.

When an attempted contract repudiation is conveyed to the charging party in a written document, then the Board will have the task of determining whether the words used in the written document are sufficiently clear and unequivocal to meet the Board’s new standard. When a party’s repudiation of an agreement is conveyed orally, however, then the resolution of the issue is greatly complicated by the recollection of the

³See *Abbey Medical/Abbey Rents*, 264 NLRB 969 (1982) (although the respondent expressly notified the union 7 months prior to filing of the charge that it claimed the bargaining agreement did not apply to strike replacements, the complaint was not time-barred as each failure to comply with the agreement was a separate violation); *M. J. Santulli Mail Services*, 281 NLRB 1288 (1986) (periodic health and welfare benefit payments); and *Otten Truck Line*, 282 NLRB 494 (1986) (same). See also cases subsequent to *Chemung Contracting*, above, *Twin Cities Electric*, 296 NLRB 1014 (1989), and *WPX, Inc.*, 293 NLRB 10 (1989), enfd. 906 F.2d 898 (2d Cir. 1990).

⁴For example, in the 8(f) context, where bargaining agreements may cover many different projects at many different locations, an employer unable to meet its bargaining agreement obligations can either cease to comply with some or all of the agreement’s provisions or “repudiate” it. The employer’s actions are equally unlawful. However, when the employer refuses to apply the agreement to a subsequent construction project, the legal consequences of the employer’s actions are very different. A charge filed more than 6 months after the employer fails to comply with the agreement will be timely (so long as the agreement is still in force). A charge filed more than 6 months after the employer “expressly” repudiates the agreement will be time-barred. This is so notwithstanding any possible hiatus between construction projects.

witnesses regarding who said what to whom.⁵ Because the majority's standard provides little guidance for the General Counsel and the parties, it will inevitably lead to an increase in the number of complaints and unfair labor practice hearings.

Furthermore, the majority's new approach to Section 10(b) creates an artificial distinction between two indistinguishable types of cases. It distinguishes between cases where the respondent has committed a midterm breach or repudiation of a bargaining agreement, and cases where the respondent has repudiated the bargaining agreement in a manner which is "clear and unequivocal." I find no support for this distinction, nor do I understand its necessity.⁶

The approach I favor is a straightforward one which follows Board precedent. As explained above, when a complaint alleges that a respondent has violated the Act by repudiating or failing to comply with the terms of a current bargaining agreement, then the complaint will not be time-barred as long as the charge is filed during the term or within 6 months of the expiration of the agreement. Our precedent further provides that the "normal remedy" in such cases will be limited to the 6-month period preceding the charge.

This approach to Section 10(b) promotes the twin goals of bargaining stability and predictability. It promotes stability by holding the parties to the terms of their bargaining agreement and clearly defines the parties' respective rights and responsibilities. It promotes predictability and, as a secondary effect, conserves the parties' and the Board's resources, by maintaining an easy to apply "bright line" test for determining whether a complaint is timely. Unlike the majority's approach, application of existing precedent does not reward a party for abrogating its bargaining obligations or draw arbitrary distinctions based on whether the respondent uses the "magic words" sufficient to trigger the commencement of the 10(b) period.

⁵Given that (in terms of a substantive violation) the legal consequences of an employer's "clear and unequivocal express" repudiation are the same as the consequences of a repudiation which is "implied," "contingent," and "ambiguous," I see no reason to tie the commencement of the 10(b) period to an inquiry whether the respondent used the correct "magic words."

⁶Contrary to my colleagues, I find no evidence in this case that the Respondent's ability to present a defense on the merits was "significantly diminished with the passage of time" before a charge was filed, and note that the Respondent did not claim in its brief that its defense was prejudiced in any way. My colleagues note that the judge was "considerably troubled" by the fact that the Union's actions after it first learned of the Respondent's non-compliance were assertedly inconsistent with the Union's position. However, the judge did not find prejudice to the Respondent on this or any other basis and my colleagues do not explain why the statement is cited for that proposition. I note that the Respondent's December 4, 1986 letter did not expressly repudiate the parties' bargaining relationship, but rather only repudiated the bargaining agreements. The majority equates the parties' bargaining agreements with the parties' entire bargaining relationship. I do not support this view under Board precedent. Thus, even applying the majority's approach, I would not find that the Respondent made a clear and unequivocal repudiation of the bargaining relationship and would find that allegation of the complaint not time-barred.

Applying existing Board precedent to this case, I note that the bargaining agreement by its own terms was effective for the period June 1, 1985, through May 31, 1988. The charge in this case was filed on August 14, 1987, during the term of the current bargaining agreement. Accordingly, as the charge was filed during the term of the bargaining agreement, I believe the complaint is not barred by Section 10(b) and would consider the case on its merits. On such consideration, in keeping with established precedent were I to find a violation, I would limit the remedy to the 6-month period preceding the filing of the charge.

Stephen E. Wamer, Esq., for the General Counsel.

Earl J. Engle, Esq. (Stinson, Mag & Fizzell), of Kansas City, Missouri, for the Respondent.

John P. Hurley, Esq. (Jolley, Walsh, Hager, & Gordon), of Kansas City, Missouri, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at Kansas City, Kansas, on February 8, 1988,¹ pursuant to a complaint issued by the Regional Director for the National Labor Relations Board for Region 17 on December 21, 1987, and which is based on charges filed by Plumbers Local Union No. 8 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the USA and Canada, AFL-CIO (the Union) on August 24 (original) and December 18, 1987 (amended). The complaint alleges that A & L Underground (the Respondent) has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

Issues

Whether this case should be dismissed pursuant to Section 10(b) of the Act because the charges were filed too late; if not,

Whether Respondent and the Union entered into a valid agreement under Section 8(f) of the Act; if so,

Whether Respondent repudiated the agreement during its effective term in violation of Section 8(a)(1) and (5) of the Act.

All parties were given full opportunity to participate, to introduce relevant 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 General Counsel,² Charging Party, and Respondent.

¹ All dates herein refer to 1985 unless otherwise indicated.

² Briefs in this case were due on or before March 14, 1988. General Counsel's brief was received in the Office of Division of Judges, San Francisco, on March 22, 1988. On May 13, 1988, I issued an Order to Show Cause why General Counsel's brief should not be stricken from the record. In response, General Counsel asserted that his brief was mailed on March 11, 1988. As proof of this assertion, General Counsel submitted a list of certified mail showing that on March 11 the brief was mailed to counsel for the Union and for Respondent. No direct proof of when the brief was mailed to the Division of Judges has been submitted. I note that March 11 was a Friday. It is possible that the brief was deposited after the final mail pickup for that day so that

Continued

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. RESPONDENT'S BUSINESS

Respondent admits that it is a corporation which operates a business installing natural gas pipelines and other pipelines and has an office and place of business located in Gardner, Kansas. It further admits that during the calendar year of January 1 through December 31, 1987, and in all relevant preceding calendar years, in the course and conduct of its business, it annually purchased and received products, goods, and materials valued in excess of \$50,000 directly from points outside the State of Kansas. During the calendar year of January 1 through December 31, 1987, and in all relevant preceding calendar years, Respondent, in the course and conduct of its business operations described above, performed services valued in excess of \$50,000 in States other than the State of Kansas. Accordingly, it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admits, and I find, that Plumbers Local Union No. 8 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the USA and Canada, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

In 1977, Respondent began operations. Its president then as now is George Lowe, a lengthy witness at hearing. Called by Respondent, Lowe explained that his jobs occur both in Kansas and Missouri, and to a lesser extent in Nebraska and on occasion, even in Oklahoma. The jobs generally last a few days or weeks, but an occasional job could take several months. Duration depends on several factors including terrain, obstacles, and weather conditions. As president of Respondent, Lowe is familiar with all aspects of the business including the acquiring of new jobs. In some or most cases, new jobs are secured by bid. In computing the bid, Lowe must be able to estimate labor costs which will vary considerably depending on whether the job is to be union or non-union. Since beginning his business, Lowe has always operated on a nonunion basis, until the job in issue here and a short subsequent project in St. Louis, Missouri.

the brief was not removed for processing until the following Monday, March 14. The envelope in which the brief was mailed is not available. In any event, this issue is not determined by Sec. 102.111(b) of the Board's Rules and Regulations cited by the General Counsel. Rather, it is determined by Sec. 102.114(b) which, in relevant part, reads as follows:

When the act or any of these rules require the filing of a motion, brief, exception, or other paper in any proceeding, such document must be received by the Board or the officer or agent designated to receive such matter before the close of business of the last day of the time limit, if any, for such filing or extension of time that may have been granted.

In light of this authority, I hereby strike General Counsel's brief from the record of these proceedings.

With respect to the instant case, Lowe was told before preparing his bid for a job to lay pipe in downtown Leavenworth, Kansas, that the work would have to be performed by union labor. The reason for this condition was that the contracting officials for the Kansas Power & Light Co. (KPL) were under the impression that their preexisting labor agreements with in-house labor unions required it. As will be noted more fully below, the KPL officials apparently were mistaken in this belief. In any event, Lowe prepared his bid and in due course was awarded the job. The work lasted about a month from on or about June 3 to late June or early July.

To comply with the stipulation that he supply union employees on the Leavenworth project, Lowe contacted Anthony Vidovich, a business representative for the Union. After a brief telephone conversation, the two men agreed to meet at a restaurant in Overland Park, Kansas, on June 3. The two men did meet for about 15 minutes on that day. However, as noted below, there is conflict about what was said at the meeting. Both men agree that Lowe signed a document which reads as follows:

INTERIM AGREEMENT

The undersigned contractor, having read attachments "A" and "B" hereto which set forth the changes and additions recently negotiated by the Mechanical Contractors Association and Plumbers Local Union No. 8 to the 1981-1984 master and supplemental agreements and which comprise the new 1985-1988 master agreement between those parties, does hereby agree to be bound to the terms of said agreement in their entirety. Upon the completion of the printing of the formal agreement and its presentation to the undersigned, we will execute a copy thereof.

A & L Underground
239 W. Park
Gardner, KS 66030
By /s/ G. A. Lowe, Pres.

Plumbers Local Union No. 8
/s/James L. Corless, Jr.
Business Manager
[Jt. Exh. 1.]

Attachments A and B, referred to in this document, contain journeyman and apprentice wage rates and are part of the record (G.C. Exhs. 2 and 3). At the same time and place, Lowe also signed a second document, a collective-bargaining agreement previously negotiated in June 1981 by the Union and the Mechanical Contractors Association (Jt. Exh. 2). Respondent had never been a member of this or any other contractor's organization. As of June 3, the labor agreement had been replaced by a new agreement between the same parties which had not yet been printed (Jt. Exh. 4).

Respondent claims that certain oral agreements and understandings modified the signed written agreements referred to above. According to Lowe, when presented with Joint Exhibits 1 and 2, he told Vidovich that he was signing them with the understanding that they applied only to a single KPL project in Leavenworth. Further, Lowe allegedly wanted this condition clearly noted on the contract, "the way it's normally done on project agreements" (R. pp. 56, 73). After

Vidovich allegedly assured Lowe that writing on the documents was unnecessary because in order to terminate the agreement, it was only necessary to give a few days notice to the Union when the project was finished. On receipt of the notice, Lowe testified he was told, it would be “no problem” to end the agreement.

In stark contrast to Lowe’s version, Vidovich testified that before signing the two agreements, Lowe asked if the Union had a job or project agreement, as Lowe stated he had used these before. Vidovich further testified that he told Lowe those agreements were not used by his union. On offering Joint Exhibits 1 and 2 to Lowe, Vidovich also testified that he advised Lowe to review them with an attorney, but Lowe said before signing the documents, that an attorney’s review was unnecessary. For his part, Lowe denied that anyone mentioned consulting with an attorney, and on cross-examination added:

You understand, my father is an attorney and if anything outside of the scope of normalcy—if he would have said to me, if you want to take this to an attorney and have it examined because you’re going to be hooked on it for the next three years, period. I certainly would have taken it to my father, an attorney, and have it examined. That certainly did not take place. [R. p. 78.]

There is substantial agreement in testimony that before the two men ended the meeting, Vidovich reviewed the union wage rates with Lowe and also explained how to file certain monthly reporting forms for fringe benefits required by the agreement. Lowe did not think it peculiar that Vidovich was discussing these matters for a job expected to last only 1 month (R. p. 86). Indeed, Lowe cannot recall even discussing the expected length of the job with Vidovich (R. p. 86). As matters turned out, Respondent continued to file the reporting forms after the first Leavenworth job was completed, but without any wages being reported (Jt. Exh. 10). According to Lowe, the filing was due to clerical error.

As of the June 3 meeting, Lowe expected but did not discuss a second job in Leavenworth, following the first, of approximately the same duration, and with the same stipulation requiring union labor. Lowe was correct in all particulars save one. Sometime after June 3, KPL officials discovered that their in-house contracts did not require the contract with Respondent necessarily to be union. On receiving this news, Lowe testified, he said, apparently to the KPL official who told Lowe of the development: “Great, we won’t sign another project agreement.” In fact, Lowe did not comply. Witness the uncontradicted testimony of Respondent’s witness Ellsworth Good, which I credit. A 5-year Respondent employee, Good testified that on the second Leavenworth project, he was the job superintendent. In late July, Vidovich came to the jobsite. Vidovich complained to Good that a welder had responded to an inquiry made by Vidovich with an obscenity. Then Good overheard an argument between Vidovich and the welder whose name is Cliff Walton. Vidovich threatened to file charges and pull his card because Walton had not paid his dues. Walton told Vidovich he was working nonunion and to go get screwed. Then both men left the immediate area.

Vidovich’s immediate superior was James Corless, business manager of the Union, and witness for General Counsel. Corless received the new collective-bargaining agreement from the printer about mid-July 1985. In accord with his usual practice, Corless caused a copy of the new agreement to be mailed to all union contractors within the Union’s jurisdiction. On a list of the contractors received into evidence (G.C. Exh. 5), the name of A & L Underground is first. With the copies of the new contract was sent a cover letter which reads as follows:

July 25, 1985

Dear Sir:

Enclosed you will find two copies of the recently negotiated contract between Plumbers Local Union #8 and the Plumbing Contractors of the Kansas City area (whose area of jurisdiction are those counties assigned to Local #8-Article I, Para. 1). This contract became effective, June 1, 1985 and runs through May 31, 1988.

To continue our contractual relations, you must sign both copies, retain one for your files, and mail the other back to:

Plumbers Local Union #8
8600 Hillcrest Road - Suite 11
Kansas City, Missouri 64138

Needless to say, we are anxious to receive these contracts back and signed, so that we can start the printing of our brochure of union contractors. Please give this your immediate attention, and if you have any questions, please call me at: 363-8888.

I am

Sincerely yours,
/s/James L. Corless, Jr.
James L. Corless, Jr.
Business Manager
Plumbers Local Union #8

[G.C. Exh. 6.]

Lowe did not deny receiving this letter, but there is no evidence that he replied to this letter or took any other action based on its receipt.

Notwithstanding the irregularities in Respondent’s reporting forms, Respondent’s failure to sign and return copies of the new collective-bargaining agreement, and Respondent’s apparent return to nonunion status on the second Leavenworth job, the Union took no action during the remaining months of 1985 to enforce its alleged agreement with Respondent. According to Corless, it was early 1986 when he first learned of Respondent’s noncompliance with Vidovich. Then for most of 1986, the Union still took no action to enforce its alleged agreement. Note the testimony of Corless, on cross-examination:

Q. Is there some reason why the union waited from March of ’86 to November of ’86 to take some action against A & L Underground for not complying with the contract?

A. I would say probably too busy, you know, how everybody is. You just put things off and had other

problems and other jobs, large jobs, going at the time. [R. pp. 46-47.]

Curiously, Vidovich who allegedly notified Corless in March 1986 of Respondent's noncompliance testified he could not recall if he ever had any conversations with Corless about Respondent being delinquent or not paying the benefit funds on a timely basis (R. pp. 27-28). Vidovich also testified that Doris Wilson, administrator of the fringe benefits fund office, would normally notify the Union when a contractor was delinquent (R. p. 27). Although Wilson did not testify, the record shows a single delinquency notice to Respondent, dated June 18, 1986, for missing fringe benefit payments for May (Jt. Exhs. 8 and 9). There is no evidence that additional notices were sent, or that Respondent responded to the June 18 notice. It is clear, however, that no officer or agent of the Union ever asked whether Respondent was paying its fringe benefit payments (R. p. 26). Contrary to Corless, Vidovich testified he became aware of Respondent's noncompliance with the labor agreement about September or October 1986, some 2 or 3 months before contacting the Union's attorney about the noncompliance (R. p. 24).

Respondent alleges noncompliance was discovered through a series of visits to various jobsites conducted by Vidovich, who is responsible for half of the Union's jurisdiction. To perform this job, Vidovich reviews a publication called the Dodge Report, published by the construction industry and listing sites of construction projects within the Union's jurisdiction. Vidovich also frequently receives verbal reports from members who want him to check various jobsites to see whether union members are working on a job, and if not, whether they should be. With these sources of information and Vidovich's 5 years' experience, he conceded he has a pretty good idea of the construction projects within his jurisdiction (R. p. 23). All of this is of interest because of Respondent's evidence (R. Exh. 2), showing approximately 22 projects between July and December 1986, within the Union's jurisdiction in which it operated with employees who were not members of the Union, and who presumably were not receiving the wage scale specified in General Counsel's Exhibits 2 and 3, and for whom Respondent was not making the required fringe benefit payments. With one exception to be noted below, Respondent's operation went unchallenged by the Union.

In rebuttal, Vidovich was called back to explain that he was unaware of these jobs because they were primarily rural and short-term, were not listed on the Dodge Reports and in any event, Vidovich was busy during most of 1986 and 1987 policing the construction of a large General Motors plant. Both Vidovich and Lowe agree that in October or November 1986, Lowe was present at a respondent project in Overland Park, when Vidovich appeared. However, the conversation between the men is sharply disputed. According to Lowe, Vidovich asked him if he would consider doing the work on a union basis. Lowe answered that he would not. Then Vidovich asked for permission to enter the project and speak to the welders, many of whom were members of a union local from Tulsa, Oklahoma. Again Lowe refused permission. Then Vidovich left only to return one or more weeks later with a business agent from the Tulsa local. The Tulsa agent pulled his welders off the job, but Lowe completed it using welders who were not members of any union.

In rebuttal, Vidovich recalled that he visited the project, after receiving a telephone complaint from a member. Allegedly, Vidovich asked Lowe if he intended to live up to the agreement he had signed. Lowe said he was not. When Vidovich threatened to enter the project to check welders' identification, Lowe refused him access. Somehow, Vidovich and another business agent did check the identifications of the welders, and found that three or four out of seven welders were members of a Tulsa local. About a week later, Vidovich returned with the business agent from Tulsa and pulled the Tulsa members off the job. Neither the other business agent who first helped Vidovich to check welders' identification cards and may have heard Lowe's alleged admission nor the Tulsa business agent were named nor called as witnesses.

According to Vidovich, after his experience with Lowe at the Overland Park project, he complained to the Union's attorney about Respondent's noncompliance, "a couple of days after that . . . that was the primary job that prompted me to call Mr. Hurley" (R. p. 114). This testimony should be compared to Vidovich's testimony on the same subject given in General Counsel's case-in-chief, only 2 to 3 hours prior to the rebuttal testimony:

Q. (By Mr. Engle) As of December, 1986, weren't you aware that A & L Underground was not complying with this June 3, 1985 agreement?

A. At a certain point, yes.

Q. When did you become aware that they were not complying with it?

A. Just prior to '86 when I contacted our local's attorney.

Q. And when just prior to '86? Approximately when are we talking about?

A. I would say two to three months probably prior.

JUDGE STEVENSON: Two to three months prior to what, though, I'm not sure.

THE WITNESS: The '86, is that what you're referring to?

JUDGE STEVENSON: Of December '86?

Q. (By Mr. Engle) I'm trying to find out when you think you first became aware that A & L Underground was not complying with this June 3 agreement.

A. If you're looking for an exact date, I can't give you an exact date.

Q. No, I'm not. Maybe I can help you some.

Joint Exhibit 3 is a copy of a November 5 letter that your attorney, Mr. Hurley, wrote to A & L Underground. From that point of reference, approximately when do you believe you first became aware that A & L Underground was not complying with the June 3, 1985 contract?

A. Approximatley two months.

Q. Two months before November 5, 1986?

How did you become aware of the fact that they weren't complying?

A. Through my general course of duties out in the area checking jobs.

Q. Had you been out on some of their jobs and found out they were working nonunion?

A. Just prior to this, yes.

Q. Do you recall which job it was?

A. No, I don't.

[R. pp. 24-26.]

Turning from the testimony to documents in the record, I note first a letter prepared by the Union's attorney to Lowe. It reads as follows:

November 5, 1986

A & L Underground
239 West Park
Gardner, Kansas 66030

Attn: Alex Lowe

Re: Plumbers Local 8 Collective Bargaining Agreement

Dear Mr. Lowe:

Our firm represents Plumbers Local 8 in labor relation matters, and the Local has asked us to correspond with you regarding the above-captioned matter. The Local informs us that, even though your company is a signatory to the new 1985-1988 Master Agreement between the Mechanical Contractors Association and Plumbers Local No. 8, you have recently informed the Union that your Company does not intend to abide by that Agreement on any of its current jobs, including the one brought to our attention involving the laying of gas lines along Metcalf Avenue. You apparently contend that your signing of the Master Agreement was supposed to have been for only one project rather than it applying during the entire three-year term of that Agreement.

Based upon our understanding of the facts which have been provided to us by representatives of Local 8, your Company is bound to this agreement just as any other signatory contractor for its entire duration rather than being limited to one or more specific projects. Indeed, the Union's representatives vehemently deny that there was ever any understanding along the lines which you apparently suggest. As such, your Company is legally obligated to comply with all of the terms of this Agreement with respect to any of your employees who perform work as described by that Agreement, and this obligation cannot simply be terminated at will. For a company to attempt to do so would constitute not only an unlawful breach of the Agreement, but it would also be an unfair labor practice and a violation of ERISA which is the federal law governing employee benefit plans.

Accordingly, if it is indeed your company's intention to attempt to repudiate your obligations under the Agreement, you will leave Local 8 with no other choice than to institute legal proceedings against your company for breach of contract and to seek collection of all delinquent fringe benefit contributions, any other delinquent contractual payments and attorneys' fees and other collection costs involved.

I would appreciate hearing from either you or your attorney by no later than Wednesday, November 12, 1986 regarding your intentions as to this matter.

Very truly yours,
/s/John P. Hurley
John P. Hurley
[Jt. Exh. 3.]

This letter was answered by counsel for Respondent:

December 4, 1986

Mr. John P. Hurley
Jolley, Moran, Walsh, Hager & Gordon
1300 Bank of Kansas City Building
1125 Grand Avenue
Kansas City, Missouri 64106

Re: A & L Underground, Inc.

Dear Jack:

The Company has received your recent letter stating that the Company is a signatory to the new 1985-1988 Master Agreement between the Mechanical Contractors Association and Plumbers Local Union No. 8.

Please be advised that it is the Company's position that any agreements which may have been executed by the Company with Plumbers Local Union No. 8 have long since been terminated. However, and without prejudice to any allegations we make in this or any other action, be further advised that the Company hereby cancels, abrogates, terminates, and repudiates any and all Section 8(f) pre hire agreements with Plumbers Local Union No. 8. The repudiation herein shall be effective immediately.

Very truly yours,
STINSON, MAG & FIZZELL
/s/Earl J. Engle
By Earl J. Engle
[Jt. Exh. 4.]

After this exchange of letters, about 7 months elapsed. According to Vidovich, he used the time to meet with the trustees for the pension fund and the trustees for the health and welfare fund to discuss how to proceed. Finally, it was decided that the Union should handle the matter, so Union counsel was instructed to write a second letter to Respondent:

July 31, 1987

Earl Engle, Esq.
Stinson, Mag & Fizzell
2100 Boatmen's Center
920 Main Street
P.O. Box 19251
Kansas City, Missouri 64141-2251

Re: A & L Underground

Dear Earl:

Confirming our telephone conversation yesterday, please be advised that Plumbers Local 8 has asked me to renew efforts to secure full compliance by A & L Underground with the collective bargaining agreement currently in effect between the Mechanical Contractors Association and Plumbers Local 8.

As you will recall in our earlier discussions on this matter, it is the Union's position that the Company is bound to the 1985-88 master agreement negotiated by the Association and the Union by virtue of Alex Lowe having executed the "Interim Agreement," a copy of which I have attached hereto. The Union has further reported to me that the Company has not been applying

the terms of this contract to any of the jobs on which they have unit employees working. Accordingly, the Union will probably be filing an unfair labor practice charge under the theory that this Employer has repudiated its collective bargaining relationship during the term of an existing collective bargaining agreement, in violation of Section 8(a)(5) of the Act.

Please let me know if you have any further questions or comments on these matters.

Very truly yours,
/s/ John P. Hurley
John P. Hurley
[Jt. Exh. 5.]

On August 5, 1987, the above letter was acknowledged, but due to the temporary absence of Respondent's attorney, no substantive reply was sent (Jt. Exh. 6). Lowe testified that on his lawyer's return, it was decided not to respond at all to the prior letter. However, after the original and amended charges were filed with the Board, and after a complaint was issued, Respondent did write a letter to the Union:

December 29, 1987

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Plumbers Local Union No. 8 of the
United Association of Journeymen
and Apprentices of the Plumbing and
Pipefitting Industry of the USA and
Canada, AFL-CIO
8600 Hillcrest Road, Suite 2
Kansas City, Missouri 64138

Re: A & L Underground, Inc.

Gentlemen:

Please be advised that we represent A & L Underground, Inc. and that we are writing on its behalf.

Representatives of the Plumbers Local Union No. 8 have in the past claimed that A & L Underground is bound by the collective bargaining agreement between the Mechanical Contractors Association and Plumbers Local Union No. 8. The NLRB also has made such a claim. This claim is apparently based upon some type of an agreement or contract stipulation that was allegedly signed on June 3, 1985, by A & L Underground. Although A & L Underground does not believe it ever entered into any agreement with Plumbers Local Union No. 8, and, in fact, denies that it has any current agreement with Plumbers Local Union No. 8, you are hereby advised that any agreement or contract stipulation mentioned above will not automatically be renewed and that any such agreement will terminate in accordance with its own terms. Consequently, any such agreements that the Plumbers Local Union No. 8 and the NLRB allege to be currently in effect is hereby terminated, will not be renewed, and will become void and unenforceable on the expiration date of the agreement, which we believe to be June 1, 1988.

Also, A & L Underground will not be bound by the terms and conditions of any labor agreement between the Mechanical Contractors Association and Plumbers Local Union No. 8 and hereby gives notice that if cur-

rently bound by such agreement, which it denies, that such agreement shall terminate when it expires on June 1, 1988, and that it shall not be automatically renewed and that it shall become null and void on the above-mentioned date.

Very truly yours,
STINSON, MAG & FIZZELL
By Earl J. Engle
[Jt. Exh. 7.]

B. Analysis and Conclusions

1. Is this case barred by the statute of limitations?

Under Section 10(b) of the Act, the Board may not issue a complaint based on conduct occurring more than 6 months before filing and service of the charge. The 6-month limitation period may be tolled where the charging party does not have actual or constructive knowledge of the unfair labor practice, or where the unlawful conduct is of a continuing nature. *II Morris, Developing Labor Law*, 1616-1617 (2d Ed. 1983).

The charge in this case was filed on August 24, 1987. The parties stipulated that the Union had actual notice not later than December 4, 1986, that Respondent had repudiated any 8(f) prehire agreement that may have existed. The Union concedes (Br. p. 4) that as early as July 1986, the Union began to suspect that the Respondent was not living up to the contract. I find however that as early as July, the Union had constructive notice that Respondent had repudiated any 8(f) agreement that may have been in effect. This finding is based on the conversation between Vidovich and welder Cliff Walton as recited above by reference to the testimony of Good.

However, if General Counsel and the Union are correct in their contention that the violation alleged is a continuing violation, then it becomes unnecessary to resolve conflicting points of view or to identify with precision the dates of actual or constructive knowledge. The case of *Al Bryant, Inc.*, 260 NLRB 128 (1982), p. 135 of JD, is helpful on this point. There the administrative law judge wrote in a Board-approved decision that the general abnegation of obligations by an employer or labor organization under a collective-bargaining agreement constitutes a continuing violation for purposes of Section 10(b). Under this approach, statutory relief will not extend beyond the 10(b) cutoff date. Nevertheless, the fact that initial repudiation of the agreement occurred prior thereto, does not absolve a respondent from the unfair labor practices which inure from its continuing failure within the 10(b) period, on demand, to execute or formally abide by such agreement. Compare *NLRB v. MacMillan Ring-Free Oil Co.*, 394 F.2d 26, 31-33 (9th Cir. 1968). Under *Al Bryant*, the July 31, 1987 letter of Attorney Hurley (Jt. Exh. 5), published in the "Facts" above, is sufficient to bring this case within the 10(b) period.

I have reviewed the two cases cited by Respondent, *Arvin Automotive*, 285 NLRB 753 (1987), and *Consolidation Coal Co.*, 277 NLRB 545 (1985), and find they do not apply to the present case, because the 10(b) issues presented there are different from those existing here. Accordingly, pursuant to the authority of *Al Bryant*, supra, the instant case is not

barred by the statute of limitations, but any remedy will be modified accordingly.

2. What, if anything, did the parties agree to on June 3?

At hearing, the parties stipulated that if any agreement was reached on June 3, between Respondent and the Union, it was an 8(f) agreement within the meaning of the Act;³ that the Union has never achieved 9(a) status, and has never enjoyed majority support in an appropriate unit of any of Respondent's employees; and that Respondent has never had a permanent and stable work force, but has hired plumbers within the Union's jurisdiction on a project-by-project basis (R. p. 11).

a. Does this case present an issue involving the parol evidence rule?

As noted in the facts, Lowe signed two agreements (Jt. Exhs. 1 and 2) which constitute a collective-bargaining agreement. I am asked to consider certain alleged oral representations made by Vidovich at the time of signing which, if credited, would constitute modifications of the collective-bargaining agreement. In this regard, no party has raised the issue of the parol evidence rule.

Unquestionably, the Board has authority to interpret collective-bargaining agreements in order to determine whether unfair labor practices have been committed. *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 428-430 (1967). However, where the language in the agreement is unambiguous, as it appears to be in the instant case, the Board need not consider extrinsic evidence. Parol evidence is therefore not only unnecessary, but irrelevant.⁴ *NLRB v. Electrical Workers IBEW Local 11 (Lovall)*, 772 F.2d 571 (9th Cir. 1985). See also *Lewis v. Seanor Coal Co.*, 382 F.2d 437, 441-443 (3d Cir. 1967), cert. denied 390 U.S. 947 (1968). (Compare *Inter-Lakes Engineering Co.*, 217 NLRB 148, 149 (1975), where the Board permitted evidence in order to ascertain the meaning of the agreement, not to vary its terms.)

Even misrepresentations, whether innocent or fraudulent, cannot be relied on to alter the obligations of a written col-

lective-bargaining agreement. See *NDK Corp.*, 278 NLRB 1035 (1986).

Notwithstanding the above brief discussion, because the issue regarding the application of the parol evidence rule to an 8(f) contract was never raised, litigated, briefed or argued, I decline to make any finding on this point. Accordingly, I will decide only those issues raised by the pleadings and litigated at hearing.

b. What version of events with respect to June 3 is more credible?

I find that Respondent, through its official Lowe, entered into an agreement with the Union and the agreement was not limited to the first Leavenworth project but ran from 1985 through 1988. In resolving this issue, I note that Lowe was not an unsophisticated and uneducated owner who worked up through the ranks. Instead, he was a graduate of Drake University, an experienced and skillful businessman who was able to present his testimony adroitly. Because of this impression he created, I find his testimony that he failed to write on the agreement which he signed, that it was limited to a single project, because Vidovich said it was unnecessary, nothing short of preposterous. Common sense dictates that all terms and conditions would be incorporated into the agreement and I find that all were. Not only was Lowe knowledgeable in the area of entering into agreements, but he even admitted that it was common practice to specify on a labor agreement when it was limited to a single project. At one point he was asked how he learned of this common practice: "Well, I don't know that I learned—how I learned that it was the custom—it just makes good sense to make it as clear as possible. I have to admit that" (R. pp. 100-101).

I note it made good sense on or about April 23, when Lowe signed an agreement with the Operating Engineers and the Laborers to perform work on the first Leavenworth project. In that agreement, it was clearly specified that the terms and conditions contained therein applied to a single project only (R. Exh. 1).⁵

Other evidence also supports my finding. For example, Vidovich carefully explained to Lowe how to file monthly reports on fringe benefit payments. Such effort would have been unnecessary for a single project of about 1 month's duration. I also note Corless' mailing a copy of the new agreement to all union contractors on the Union's list (G.C. Exh. 5).

In resolving the credibility issue presented, I must confess that the decision was a difficult one. At first blush, the evidence in this case shows a course of conduct by the Union, consistent with Lowe's version of the June 3 meeting. Cf. *Vin James Plastering Co.*, 226 NLRB 125 (1976), and *F.M.L. Supply*, 258 NLRB 604 (1981). For example, early in this case, the Union acquiesced in various irregularities on Respondent's fringe benefit reporting forms, in Respondent's failure to sign and return copies of the new collective-bar-

³ Sec. 8(f) of the Act reads as follows:

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).

⁴Note discussion of rule in *Kal Kan Foods*, 288 NLRB 590 (1988).

⁵In arguing for the admission of R. Exh. 1, Respondent's attorney argued that because Lowe signed a project agreement with the other two unions, "it strengthens his testimony . . . about his understanding and agreement with the plumbers about having a project agreement with them" (R. p. 54). I admitted the document into evidence. But in evaluating its weight, I turn Respondent's argument over, to find that R. Exh. 1 was clearly limited by its written terms to a single project, and Jt. Exhs. 1 and 2 were not, therefore it is more likely than not that Jt. Exhs. 1 and 2 were never intended to be limited to a single project.

gaining agreement, and in Respondent's return to nonunion status on the second Leavenworth project, and on several succeeding projects. More importantly, as detailed in the "Facts" above, the Union waited from early 1986 when Corless received direct notice from Vidovich of Respondent's noncompliance to November 1986 to first demand compliance (Jt. Exh. 3).⁶ When that attempt proved unavailing, Respondent waited 7 more months before contacting Respondent still one more time on July 31, 1987 (Jt. Exh. 5). Thereafter Respondent finally filed a charge with the Board.

All the delay must be evaluated in a context where Respondent operated above-board and without deception, virtually challenging the Union to do something about its noncompliance. Compare *Mr. Clean of Nevada*, 288 NLRB 895 fn. 4 (1988).

In reviewing the Union's acts and omissions in this case and the various conflicts in testimony between the union witnesses and between Vidovich's own testimony, I conclude that union officials lacked diligence in policing the contract, as Corless conceded in his testimony. I also conclude that union officials were reacting to Respondent's noncompliance consistent with the law prior to its change in the decision of *John Deklewa & Sons*, 282 NLRB 1375 (1987). This case will be further discussed below. For now, it suffices to say that under prior law, a prehire agreement could be unilaterally repudiated at will. *R. J. Smith Construction Co.*, 191 NLRB 693 (1971), enf. denied sub nom. *Operating Engineers Local 150 v. NLRB*, 480 F.2d 1186 (D.C. Cir. 1973).

In sum, I find that the Union and Respondent are parties to a valid, enforceable 8(f) contract entered into as of June 3.

b. *What is the effect, if any, of the Board's decision in John Deklewa & Sons on the present case?*

All parties appear to agree that the remaining issues in this case will be determined by proper application of the Board's decision in *John Deklewa & Sons*, 282 NLRB 1375 (1987), affd. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988). A later case, *City Electric*, 288 NLRB 443 (1988), explains *Deklewa & Sons* in relevant context:

In *John Deklewa & Sons*, 282 NLRB No. 184 (Feb. 20, 1987), the Board overruled *R. J. Smith Construction Co.*, 191 NLRB 693 (1971), enf. denied sub nom. *Operating Engineers Local 150 v. NLRB*, 480 F.2d 1186 (D.C. Cir. 1973), abandoned the conversion doctrine, and modified unit scope rules in 8(f) cases. As set forth more fully in *Deklewa*, supra, slip op. at 8, the Board decided to apply the following principles in 8(f) cases:

- (1) a collective-bargaining agreement permitted by Section 8(f) shall be enforceable through the mechanisms of Section 8(a)(5) and Section 8(b)(3);
- (2) such agreement will not bar the processing of valid petitions filed pursuant to Section 9(c) and Section 9(e);
- (3) in processing such petitions, the appropriate unit normally will be the single employer's employees covered by the agreement; and
- (4) upon the expiration of such agreements, the signatory union will

enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship.

Respondent argues (Br. pp. 10-15) that it properly repudiated the agreement which I have found was entered into on June 3. To evaluate this argument, I begin by noting that the Board in *Deklewa* reversed its previous view that a prehire agreement could be unilaterally repudiated at will. Now the law is that prehire agreements must be honored for the duration of their terms.

Yet Respondent contends that it should be judged under the old law expressly overruled by the Board in *Deklewa*. Noting that *Deklewa* shall be applied to all pending cases in whatever state, (Br. p. 12), Respondent argues that because the original charge was not filed until August 24, 1987, and because no other charge or lawsuit involving the same parties and lawsuit was before the Board or any other jurisdiction prior to August 24, "it is crystal clear that *Deklewa* is not applicable and that the present case must be decided on the basis of the law as it existed at the time Respondent repudiated its 8(f) agreement with the Union" (Br. p. 13).

I reject Respondent's argument as frivolous. All or most of the respondents whose cases were pending before the Board when *Deklewa* was decided also claimed that they relied on the old 8(f) law as it existed before *Deklewa* was decided. The Board, employing the retroactivity analysis of *SEC v. Chenery*, 332 U.S. 194 (1947), balanced the claimed ill effects of retroactivity against the "mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." *Id.* at 203. The Board then concluded, *Deklewa*, supra at 1389,

the statutory benefits from the announced changes in 8(f) law for employees, employers, and unions in the construction industry far outweigh any hardships resulting from immediate imposition of those changes. Consequently, we will apply the Board's new 8(f) principles in this case and to all pending cases in whatever stage.

In *Iron Workers Local 3 v. NLRB (John Deklewa)*, supra, 843 F.2d 770, the reviewing court upheld the Board's decision in *Deklewa* in all respects, including its application retroactively. In finding no "manifest injustice" precluding deferral to the Board's decision with respect to retroactivity, the court noted that a party such as *Deklewa* or Respondent here, who claimed to rely on the *R. J. Smith* rule did so at its own risk, because once conversion occurred, the 8(f) agreement would be automatically binding. The court went on to note that under *Deklewa*, the Board has done nothing more than hold the parties to the terms and conditions of the 8(f) contract into which they voluntarily entered (p. 781).

Although Respondent in the instant case contends that it effectively repudiated the 8(f) agreement under the old law prior to any conversion to a 9(a) collective-bargaining agreement, it is unnecessary to consider Respondent's arguments. Thus the issue is not whether Respondent can show prejudice by application of *Deklewa* to the facts and circumstance of the instant case. The issue is whether the instant case is a "pending case" before the Board, and I find that it is. Accordingly, I am bound to apply *Deklewa* and I am not bound to determine how Respondent would have been affected by

⁶Of course as noted earlier, constructive notice to the Union runs from July.

application of the pre-*Deklewa* law, and decline to do so. Under *Deklewa*, the 1985–1988 agreement between the Union and Respondent (Jt. Exhs.1 and 2) is binding, enforceable, and not subject to unilateral repudiation until expiration. I find further that Respondent violated Section 8(a)(5) and (1) of the Act by repudiating the 1985–1988 agreement with the Union during the contract terms. *Kephart Plumbing*, 285 NLRB 612 (1987); *City Electric*, supra, 288 NLRB 443. As noted above, the make-whole remedy shall be modified by the statute of limitations as required by *Al Bryant, Inc.*, supra.

CONCLUSIONS OF LAW

1. The Respondent, A & L Underground, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, Plumbers Local Union No. 8 of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the USA and Canada, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time journeymen and apprentice plumbers employed by Respondent in the counties of Platte, Clay, Ray, Carroll, Jackson, Cass, Bates, Vernon, Lafayette, Johnson, Henry, Saline, Pettis, Benton, St. Clair, and Morgan in the State of Missouri, and Leavenworth, Wyandotte, Johnson and Miami counties in the State of Kansas, but excluding professional employees, office clerical employees, guards, and supervisors as defined in the Act, constitute an appropriate unit of the Respondent's employees for the purpose of collective bargaining under the Act.

4. By repudiating its 1985–1988 collective-bargaining agreement with the Union and withdrawing recognition from

the Union during the term of the collective-bargaining agreement, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

5. The unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall recommend that Respondent be ordered to cease and desist and take certain affirmative action designed to effectuate the policies of the Act. I shall further recommend that Respondent be ordered to make its employees whole, as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), for any losses they may have suffered as a result of the Respondent's failure to adhere to the June 1, 1985–May 31, 1988 contract, with interest as computed in the manner prescribed in *New Horizons for the Retarded*.⁷ In accordance with *Deklewa* and *Al Bryant, Inc.*, supra, this make-whole remedy started from February 24, 1987, the beginning of the 10(b) period, and ends with the expiration date of the June 1, 1985–May 31, 1988 contract. The question of whether interest must be paid on trust fund contributions shall be left to the compliance stage of the proceeding. *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

[Recommended Order omitted from publication.]

⁷ In accordance with the Board's decision in *New Horizons for the Retarded* 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621) shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).