

**SCC Contracting, Inc. and International Union of
Operating Engineers, Local Union No. 17,
AFL-CIO. Case 3-CA-15671**

July 27, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND OVIATT

On November 18, 1991, Administrative Law Judge Robert T. Snyder issued the attached decision. The Respondent filed exceptions and a supporting brief and an erratum, and the General Counsel and the Charging Party each filed answering briefs.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order.²

¹ The 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), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. We do not, however, rely on the judge's finding that Michael Elia gave contradictory testimony regarding his January 29, 1990 discussions with the Union about manning disputes.

Additionally, the Respondent asserts that the judge's findings are a result of bias. After a careful examination of the entire record, we are satisfied that this allegation is without merit. In this regard, the Respondent contends, inter alia, that the judge attributed to it legal positions that it never advanced. Specifically, the Respondent contends that it never maintained that its dissatisfaction with the 1990 negotiations between the Union and the Associated General Contractors authorized it to cancel its contract with the Union; that it never argued that its contract with the Union was not effective until February 1, 1990; and that it never contended that McCarthy's alleged statements at the January 29, 1990 meeting, standing alone, permitted it to alter the language of the contract's termination clause. Even assuming that the judge mischaracterized certain of the Respondent's legal positions, we find that his interpretations did not evidence a bias on the judge's part against the Respondent's position. We further find that any misinterpretations did not affect his conclusion that the Respondent unlawfully repudiated its automatically renewed collective-bargaining agreement.

We correct certain errors made by the judge. We note initially that in sec. II,A, the final sentence in the fourth paragraph should read, "At the time, however, SCC had no relationship with the Union." In sec. II,B, the first sentence in the eighth paragraph should read, "It was also noted at the meeting that the contract SCC was being asked to sign would expire on March 31, 1990." Also regarding sec. II,B, we note that the Respondent and the Union met on January 29, 1990, rather than on January 19, and that the Respondent signed the agreement opposite the date of January 31, 1990. Finally, in his "Analysis and Conclusion," the judge, in citing *John Deklewa & Sons*, 282 NLRB 1375 (1987), inadvertently referred to "an 8(g) agreement," rather than an 8(f) agreement.

We find it unnecessary to pass on the judge's characterization of *Lifetime Shingle Co.*, 203 NLRB 688 (1973).

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, SCC Contracting, Inc., Niagara Falls, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

² We amend the remedy section of the judge's decision to rely on *Ogle Protection Service*, 183 NLRB 682 (1970), for the computation of lost wages or benefits, and *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), for the computation of any expenses ensuing from a failure to make fund contributions.

Ronald Scott, Esq., for the General Counsel.
Patrick J. Berrigan, Esq., of Niagara Falls, New York, for the Respondent.
Robert J. Reden, Esq. (Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria, Esqs.), for the Charging Union.

DECISION

STATEMENT OF THE CASE

ROBERT T. SNYDER, Administrative Law Judge. This case was heard by me on November 1, 1990, in Buffalo, New York. The complaint alleges that SCC Contracting, Inc. (SCC or Respondent) repudiated and failed to enforce an automatically renewed collective-bargaining agreement with the Charging Union, International Union of Operating Engineers, Local Union No. 17, AFL-CIO (Local 17 or the Union) in violation of Section 8(a)(1) and (5) of the Act. Respondent filed an answer denying that it violated the Act or that the agreement had automatically renewed.

All the parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. General Counsel and Respondent have each filed posthearing briefs which have been carefully considered. On the entire record in the case, including my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent, a corporation, with an office and place of business in Niagara Falls, New York, has been engaged in construction, excavation, and road building operations. Annually, Respondent, in the course and conduct of its business operations, purchases and receives at its Niagara Falls, New York facility products, goods, and materials valued in excess of \$50,000 directly from points outside the State of New York. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits, and I find, that the Charging Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *The AGC/Local 17 Negotiations Forestalling Automatic Renewal of Their Agreement*

The Respondent is not, and has not been a member of the Labor Relations Division, Western New York Region, Associated General Contractors of America, New York State Chapter, Inc. (AGC). Neither has Respondent authorized the AGC to represent it in collective-bargaining with any labor organization. Respondent has been and continues to be a member of the AGC, but not of its Labor Relations Division which acts as collective-bargaining agent with Local 17 for these members who so authorize it. The AGC and Local 17 were parties to a prehire collective-bargaining agreement within the meaning of Section 8(f) of the Act, effective from April 1, 1987, to March 31, 1990, concerning heavy and/or highway construction and building site work performed in the Counties of Erie, Wyoming, Cattaraugus, Chautauqua, Orleans, and the western part of Genesee, New York, by AGC members. The contractual bargaining unit includes all engineers, apprentice engineers, assistant engineers, maintenance engineers (also referred to as mechanics), firemen, mechanic's helpers, maintenance welders, maintenance welders' helpers, maintenance burners, master mechanics, assistant master mechanics, and all other skills and crafts when within the jurisdiction of the union.

The 1987-1990 agreement contained an automatic renewal clause which reads as follows:

ARTICLE XVIII

Termination

1. This Agreement shall continue in effect from the 1st day of April, 1987, until and including the 31st day of March, 1990, and during each calendar year thereafter, unless on or before the 31st day of January, 1990, or any year thereafter, written notice of proposed changes in this Agreement shall be served by either party on the other party. In the event that such written notice shall have been served and changes in this Agreement have been agreed upon, a new Agreement embodying such changes shall be drawn up and signed.

By certified letter dated December 20, 1989, Leo Hopkins, Local 17 business manager, notified the AGC that it was Local 17's desire to make changes in wages, conditions, and other terms of the 1987-1990 agreement. There is a sharp difference between Local 17 and SCC as to whether SCC received notice of this letter which forestalled automatic renewal of the AGC-Local 17 agreement. Local 17 Business Manager Leo Hopkins swore that a copy was not sent to SCC with which it had no contractual relationship and which employer was not a member of the AGC. Local 17 Business Representative David Patrick Harrigan swore that the letter went only to the employers named on a list attached to copies of letters sent to the New York State Mediation Board and Federal Mediation Board dated December 21, 1989, informing both agencies that Local 17's contract with the attached list of contractors expired on March 31, 1990. That list apparently contains names of the members of the AGC as well as independent contractors who had adopted the

1987-1990 agreement. Respondent's name does not appear on the list.

Yet, two principals of Respondent, Michael A. Elia, an officer and his brother Lawrence A. Elia, vice president in charge of labor relations, swore that Respondent received a copy of the December 20 letter. However, the letter was never produced, Michael claiming he gave it to Lawrence without reading it and Lawrence stating he discarded it after reading it as it was a routine notification like others he received from time to time from other unions like the Carpenters and Laborers with which SCC had contractual relationships. At the time, however, SCC had no relationship with SCC.

It is likely that Respondent did receive a copy of the letter. The list to which the union representatives alluded was a list of Local 17's current contracting employers. It is not altogether clear that Local 17 would not have forwarded a copy of its letter seeking to modify the AGC contract to employers with whom it had past relationships such as SCC. See *infra*. In any event, it is apparent that Respondent was certainly aware of the fact that the AGC-Local 17 agreement was not automatically renewing by the time of their face-to-face meeting held on January 29, 1990. See *infra*.

By letter dated May 2, 1990, from Hopkins of Local 17 directed to contractors, this time admittedly including SCC, the contractors were requested to sign and return an enclosed copy of an interim agreement covering the period of April 1, 1990, through March 31, 1993, which provided for the adoption of a memorandum of agreement, also enclosed, made on March 29, 1990, between the AGC and Local 17, which continued unchanged all terms and conditions of the 1987-1990 agreement except for 10 changes and additions to the prior agreement which were spelled out in the memorandum. SCC did not sign the interim agreement nor otherwise adopt the memorandum of agreement.

B. *The Events Leading to the Parties' Execution of Their Collective-Bargaining Agreement*

Sometime in the past, apparently to 1987, Respondent had a collective-bargaining relationship with Local 17. However, some disagreements between the parties, among them SCC objections to manning requirements, excessive manning or so-called featherbedding, had led to a breaking off of the relationship. By 1987 when Local 17 negotiated the agreement with the AGC it no longer had any bargaining relationship with SCC.

Gene McCarthy, business manager of International Union of Operating Engineers, Local Union No. 463, in Niagara County, sister local to Local 17, until his retirement on May 1, 1990, had known the Elia family for many years. Local 463 had a lengthy history of contractual relationships with SCC, its predecessor, and related companies operated by the Elia's, in Niagara County. McCarthy had good relations with SCC as a contractual employer, and with Local 17 as a sister local. Acting in the self-described role as a mediator, McCarthy sought to bring about a renewal of a collective-bargaining relationship between SCC and Local 17. In furtherance of this aim McCarthy arranged a meeting between the two parties on January 29 at the Holiday Inn in Niagara Falls.

According to McCarthy those attending were himself and Local 463 Business Agent George McCollum, Michael Elia, Laurence Elia, and their father, Arthur Elia, also a principal

in SCC, for Respondent, and Leo Hopkins, Pat Harrigan, and another business agent, Bert Pritchard, for Local 17. McCarthy in substance asked if it was possible that they could bury the hatchet, and see if they could come to terms so far as entering again into a contractual relationship which they had enjoyed prior to 1987. Hopkins and Michael Elia then engaged in a conversation, touching first on some of the problems which had led to the dissolution of the relationship in the past, and then going on to noting that times were favorable to reentering a contractual relation. It was McCarthy's understanding from what he heard that the parties were amenable to burying their past differences and entering into a contractual situation again.

McCarthy could not recall any specific jobs or projects having been discussed. He was not sure whether contractual booklets were passed around or whether that occurred after the meeting broke up.

Under cross-examination, McCarthy agreed that in his discussions prior to the meeting the Elia had expressed dissatisfaction with Hopkins as a business agent, in particular, his or the Union's requirement of unnecessary personnel on a job, so-called featherbedding.

In discussing with the Elia their attendance at a meeting with Local 17 representatives, McCarthy also suggested that the terms was relatively short, this being the end of the contract cycle, indicating that certain bargaining processes take place. McCarthy explained that with a limited amount of time left in the contract, other avenues were open to the Elia, including renegotiations or continuation of the agreement. As McCarthy stated it to them, the contract allows certain options, and they're an experienced contractor, they would know what those options would be, and McCarthy indicated to the Elia that they knew that, and they agreed that they did know that there were options available to them.

At the meeting, Michael Elia did raise concerns about so-called featherbedding, making the statement that they wouldn't tolerate it, and the Union's response was that they didn't engage in the practice. The participants also committed themselves to resolving complaints and problems of either party as they arose.

It was also noted at the meeting that the contract SCC was being asked to sign would expire on March 31, 1990, McCarthy himself may have said it.

McCarthy also recalled a request made at the meeting by SCC to have a single business agent, probably Harrigan, cover all of their jobs. When the meeting broke up, it was McCarthy's understanding that the resolution of the problem between the parties would take place, and there would be a renewal of their bargaining relationship.

During McCarthy's later examination by Charging Party counsel be clarified that the agreement of which mention was made at the meeting of January 29, that it would be expiring shortly, was the AGC-Local 17 agreement which SCC representatives were being asked to sign as a nonmember of AGC.

McCarthy also noted that in preliminary discussions with Local 17 representatives leading up to the convening of the January 29 meeting, these representatives expressed the view that they wanted to resume an ongoing contractual relationship with SCC which would extend well beyond the 2 months remaining in the life of the Local 17-AGC agreement.

Local 17 Business Manager Leo Hopkins testified to his participation in the January 29 meeting and/certain followup events. He understood the purpose of the meeting to be resolution of past problems with the Elia family and reinstatement of a working relationship with SCC.

At the meeting SCC brought up the problems they had in the past, looked forward to having peace and a fruitful relationship. Hopkins sought to learn what jobs or projects in its geographic jurisdiction SCC was seeking. The only project mentioned was a swimming pool on Sheridan Drive in the Town of Tonawanda. No mention was made of a so-called Skyway project in Erie County which will be discussed, infra.

Hopkins recalled providing Mike Elia with two copies of the 1987-1990 AGC-Local 17 booklet agreement at the meeting. Elia's response was that the Company would like to look over the contract and they would mail it back to the Union.

Hopkins denied that any discussion took place on January 19 as to the termination clause in the AGC contract he provided. Michael Elia did ask at one point about the status of the Union's negotiations with the AGC and Hopkins informed him that they were rolling along and it was too early to tell. When Elia then started getting into articles in the agreement, Hopkins told him that if he, Elia, was interested, he felt the AGC would be happy to have him join and be on their negotiating committee, to which Elia replied that he had tried that before but wasn't successful in making any great changes and so wouldn't bother with that anymore.

Hopkins was emphatic in denying that Local 17 had any practice or intention of signing labor contracts for single jobs or projects or for a time period as short as 2 months. In Hopkins' estimation such a contract would serve no real purpose unless the contractor was from out of the area and had come into the Union's territory for a small job that would take a week or two to complete. The Union's intention in this case was to enter a long-term relation with the Elia Company (SCC). No purpose would be served by entering a 2-month agreement in the middle of winter.

The AGC-Local 17 booklet agreement entered in evidence contains the signature of Michael Elia for the employer, opposite the date of January 1990, and the signature of Leo Hopkins for Local 17, with the date of February 1, 1990. Elia signed the agreement after it was reviewed back at the SCC offices the day following the January 29 meeting, and Hopkins signed on receiving the agreement through the mails a day later. Both parties signed at the place in the agreement where nonlabor relations division employers were asked to execute. It follows a stated agreement in which the employer nonassociation member first acknowledged having read the agreement, and agrees to be bound by each and all of the terms, conditions, and provisions thereof, and the interpretations and enforcement of the agreement, and next waives the right to name or participate in the selection of any management trustee to any jointly trusted funds provided therein, agrees to accept the trustees named as his designated trustees, and to be bound by the provisions of the trust indentures creating the funds.

At no time following execution of the agreement did SCC employ any Local 17 members.

Hopkins became aware that as to the swimming pool project, SCC was not the low bidder and was not awarded

the contract for the job. However, sometime later in 1990, on a review of a particular Dodge Report, Hopkins learned that SCC had been successful low bidder on a New York State Department of Transportation heavy construction project located in Erie County, the so-called Skyway project. After receiving a complaint, Hopkins dispatched Harrigan to check the worksite and received information that SCC had started the job on the Skyway and had a piece of equipment, a compressor, that was not being manned as bargaining unit work by an operating engineer in accordance with AGC–Local 17 agreement.

By letter dated May 9, 1990, Hopkins filed a grievance against SCC with the AGC, claiming that on the job described SCC had run an air compressor unattended by a Local 17 operating engineer from May 8 to 16 and asking that a meeting be set up as soon as possible. It was and is Local 17's position that SCC continue as party to a collective-bargaining contract with Local 17 after March 31, 1990, for at least 1 year by virtue of its automatic renewal. By letter dated May 15, 1990, Laurence Elia, as vice president on behalf of SCC responded to the AGC's forwarding of Local 17's grievance with the statement that Local 17 harbored a mistaken belief that SCC was signatory to the 1990–1993 agreement between Local 17 and LRD/AGC. Elia asserted that since no agreement exists, there is no basis for Local 17's grievance or the grievance meeting Local 17 requested in its letter. Elia closed by requesting that the AGC advise Local 17 of SCC's position and that any issue Local 17 wishes to raise concerning SCC should be addressed directly to SCC.

Under cross-examination, Hopkins denied being privy to any discussion or hearing anyone, either from SCC's side, or McCarthy, or his agent, at the January 19 meeting, discuss the topic of the Association contract expiring in a short period of time. Hopkins further noted that while there was no mention at the meeting that this contract is only good for 2 months or any other set period of time, there were questions posed by SCC representatives as to the status of Local 17's bargaining with the AGC. Hopkins acknowledged that there couldn't have been ongoing negotiations at the time with the AGC unless either Local 17 or the AGC had triggered the termination clause of article XVIII of the agreement, thereby forestalling its automatic renewal. Hopkins also agreed that SCC representatives at least by virtue of the talk of the state of negotiations, had to know by the January 29 meeting that this was the case.

Later examination by Charging Party counsel established that at the January 29 meeting the Elia were interested in coming back into the area and establishing a good, long-term relation with Local 17. Thus, in the course of discussions the Elia asked Hopkins if the Union had a young fellow who was a good operator and a good mechanic that they could utilize as a master mechanic for the future, someone who could grow with the Company. Hopkins said he did have one, but then asked what was wrong with the master mechanic they had had in previous years, a Robert Blount, who still had 8 to 10 years before retirement. The Elia said they could take Blount back again.

Harrigan corroborated Hopkins that none of the SCC representatives at the January 29 meeting made any reference to the termination clause in the AGC–Local 17 agreement, although he couldn't recall if copies of the agreement were

brought to the meeting or later mailed to the Company. Neither did Harrigan McCarthy make any reference to the agreement being of 2-month duration during an attempt to calm down Arthur Elia. Harrigan was emphatic in his denial.

As did Hopkins, Harrigan recalled the Elia saying they would look over the agreement and he left the meeting with the understanding they would be participants (in collective bargaining).

Under cross-examination, Harrigan agreed that it was usual for Local 17 to set up protocols for a job of the magnitude of the Skyway job which the Union had learned about in February through the Dodge report. However, it was the responsibility of the employer, in this case SCC, to call the union hall to set up a prejob meeting. Harrigan said the Union took no initiative to arrange one when SCC did not because the Union didn't have any problem with SCC and didn't want one.

Harrigan also explained in later examination that when SCC failed to return a signed copy of the interim successor agreement which it was forwarded in May 1990, the Union considered the earlier AGC agreement it had signed as an independent as still in effect.

Harrigan also agreed that the renewal of SCC's relationship with Local 17 ripened into an agreement as of February 1, 1990, when Hopkins signed the AGC–Local 17 1987–1990 agreement, although the agreement by its terms required notice of termination to be submitted by a contracting party by January 31, a day before the contract came into being. Harrigan later claimed that Hopkins signed on January 31, although neither Hopkins nor the date of February 1, 1990, next to his signature support that conclusion, and I reject it.

Respondent produced two witnesses to the meeting leading to the execution of the AGC agreement.

Michael Elia testified that he served as the spokesman for SCC at the meeting. At one point he interrupted McCarthy who had opened with a long review of his relationship with his father, Arthur Elia, the Elia family, and Local 17, and told Hopkins that the firm was considering doing heavy highway and building work in the Buffalo region, wanted to discuss the possibility of entering an agreement, but did not want to have the difficulties they had in the past. Michael Elia went into detailed specifics of grievances that had arisen over the years, involving alleged over manning incidents. At this point, according to Michael, his father, Arthur, became a little agitated, said something about the ATV¹ and Gene McCarthy said "Arthur, settle down, this agreement is only for two-months, its going to expire in a couple of months, settle down, don't worry about it." Michael told his father to settle down, we can come to terms with this. Michael also did not know what, if anything Hopkins said at this point because he was concentrating on his father.

Michael Elia denied that he was given any contract at the meeting. However, he noted that the meeting had gone well and it was understood that SCC was going to return a signed

¹Michael Elia later explained that his father's reference to the ATV was an allusion to a grievance that Local 17 had once filed on a job in Salamanca, New York, involving the installation of fence posts with a post hole digger which protested, inter alia, the Company's operation of an all terrain vehicle (ATV) unmanned by a Local 17 operator.

agreement to the Union after it received it from Local 1. That agreement had an expiration date of March 1990.

When Michael Elia signed the agreement on January 31, Hopkins had not yet signed.

Subsequently, SCC bid on the Skyway job in February 1990, was awarded the job, and started work at the beginning of May. Between April 1 and May 1, he had no communication with Local 17 about the job because his agreement with the Union had expired at the end of March.

When questioned closely as to why he would enter a 2-month agreement when he had anticipated having no work within Local 17's area during that period, Michael Elia replied that it was a good-faith effort to show that SCC was going to begin work with Local 17. The Company knew the Union was negotiating with the AGC and they wanted to see what came out of the negotiations and if SCC was satisfied that it would continue, it would sign the new agreement.

Michael Elia also further explained that it was Gene McCarthy's persistence, and his personal friendship with his father, Arthur Elia, which persuaded him to make a good-faith gesture to both unions and sign the 2-month agreement.

Michael Elia then explained that information he received regarding the negotiations then underway between the AGC and Local 17 on the 1990 successor agreement convinced him not to enter further negotiations with Local 17 leading to an agreement after March 31. Elia referred here to Local 17's pursuit of a significant wage increase as well as knowledge gleaned from members of the AGC negotiating committee that with respect to manning requirements on certain pieces of equipment Local 17 was not flexible and was going to require that the machines be, in Elia's words, double-manned.

When questioned as to what discussions had taken place at the January 29 meeting regarding manning requirements, Michael Elia said the matter had been discussed generally, without reference to particular equipment, contradicting in this regard his earlier testimony that he had gone into detailed specifics regarding alleged over-manning incidents. Elia then immediately referred to the ATV, the post hole digger and things of that nature as to which manning disputes had become very disruptive, describing them for the second time as "chicken shit" type of things. Yet, in spite of these rehashings on January 29, Elia left that meeting with an understanding that they—SCC and Local 17—could work together and would attempt to keep things at a low key at job level without getting into upper management grievance-type proceedings. Hopkins did deny Elia's request that Pat Harrigan be assigned to SCC to work as a go-between, Harrigan having worked with SCC to good effect in the 1970s and early 1980s, but this was apparently not troubling to Elia since Hopkins repeated the promise that the parties would work together to solve problems early.

As to the Skyway job, Elia bid on the job based on SCC's estimate that certain pieces of equipment to be utilized on the project would be manned and certain pieces would not be manned (by Local 17). Michael Elia next indicated that he was unsure whether the terms incorporated in the newly proposed AGC-Local 17 agreement would preclude SCC from operating as it planned on the Skyway job. It was Elia's intention to employ a subcontractor out of Texas who would supply its own high-pressure water blaster for the removal of the concrete off the piers holding up the bridge (the Skyway

as well as its own trained operator to man the equipment. Apparently, on inquiry of the AGC, Elia learned that under the new agreement Local 17 would also be manning the equipment. Elia considered this an unacceptable double manning. This advice was one of the reasons SCC refused to extend a contractual relationship with Local 17 beyond the March 31 expiration date.

Under cross-examination, Elia agreed that McCarthy never represented to him that he was an agent of Local 17. Neither did he ever represent that Local 17 would agree to enter a 2-month contract. Neither did Elia ever explain to Local 17 at the January 29 meeting that his intention to enter into a short-term contract was a gesture of good faith. When it was further suggested to Elia by counsel for General Counsel that if he did not approve of any of the manning or other terms of the newly negotiated AGC agreement he could have sought his own modifications in an independent agreement, at first he aspired that Local 17 in his experience news negotiated any "sweetheart" terms, but finally answered that he had no idea if he could do so.

Under union counsel cross-examination, Elia acknowledged that on January 29 he was personally unaware that the 1987-1990 AGC/Local 17 agreement had been canceled since he, himself, had not read the December 20 letter Local 17 had forwarded to SCC.

Elia also testified that when McCarthy at the January 29 meeting told his father to quiet down, it's a 2-month agreement, he, Michael Elia, had no idea whether any of the representatives present from Local 17 heard it. Furthermore, the only reference to a 2-month agreement made at the meeting was made by McCarthy to Arthur Elia, his father. However, later questioning of Michael Elia by SCC counsel brought out that when McCarthy spoke to calm down Michael's father, McCarthy walked over to Arthur Elia and put his hand on Arthur's shoulder. At that time Hopkins was roughly 4 feet away, apparently on the other side of the table.

Finally, Michael Elia noted that, although, he had not read and was not familiar with article XVIII of the AGC agreement, among other terms, that Local 17 submitted to him—the article dealing with termination of the agreement or its automatic renewal, see *supra*—he signed the agreement and agreed to abide by all of its terms, including article XVIII. And SCC had never sent notice of cancellation or proposed changes in the agreement to Local 17 pursuant to that article.

Later colloquy between myself and counsel for the parties brought into focus the issue as to whether SCC ever had the opportunity to forestall automatic renewal by January 31 when Local 17 did not sign the agreement until February 1 at the earliest. See Tr. 186-188. Charging union counsel argued that the agreement was effective by January 31 since the Union had already indicated that it would sign the contract, and thus SCC's execution was, in effect, an acceptance of Local 17's offer. Local 17 counsel's promise to deal with this matter in its posthearing brief was not fulfilled, the Union not having filed a brief, but the matter was dealt with by General Counsel and will be discussed in the following section of this decision.

Laurence Elia, Michael's brother and SCC vice president in charge of labor relations, corroborated Michael Elia as to McCarthy's comments when their father raised the ATV grievance. McCarthy told Arthur Elia just settle down, and not to worry, that this was a matter of a couple of months.

Hopkins was then across table about 4 or 5 feet away and there were no noises in the room to interfere with normal hearing.

Laurence Elia disclosed a continued communication with McCarthy at the point in early May 1990 that SCC commenced operations on the Skyway job without a Local 17 operator. In his, Laurence's presence Michael Elia wrote down some three items for McCarthy to take back to Local 17 after McCarthy asked what was bothering SCC about a continued relationship with Local 17.

In earlier discussions with McCarthy preceding the January 29 meeting, McCarthy had said to him "what are you worried about; it's only for a couple of months." McCarthy, in fact, mentioned that the agreement expires on January 31. But McCarthy made no mention of automatic renewal in these discussions.

Laurence Elia also confirmed, as had his brother earlier, that in February and March 1990 SCC had no projects going on within the jurisdiction of Local 17. And yet SCC entered into a 2-month contract with Local 17 due to expire on March 31.

Respondent counsel represented for the record that Arthur Elia would have testified in support of Respondent's defense but for the fact of his having had a serious health problem of a continuing nature which prevented his appearance on the hearing date.

Hopkins testified in rebuttal that he did not hear McCarthy saying anything to Arthur Elia in the nature of "settle down, it's only a two-month contract." He did recall Arthur Elia having mentioned some items on past jobs that SCC was not happy with.

Hopkins recalled a contact from McCarthy probably in May 1990 regarding certain manning requirements on equipment that SCC did not agree with, in accordance with their agreement. But this contact took place after Local 17 had filed its grievance, and Hopkins was unwilling to relieve SCC from manning requirements contained in the agreement.

Analysis and Conclusion

As to the credibility of the Elia brothers attribution of certain remarks to McCarthy after their father's outburst at the January 29 meeting, I am inclined to find that McCarthy did not make the remarks attributed to him, or that, even if he did, neither Hopkins nor Harrigan heard them. While McCarthy admits he may have referred at some point during the meeting to the agreement being of short duration, he was clearly making reference to the AGC agreement. And as to that agreement McCarthy asserted that in his view the officials of SCC were well aware by their own prior statements to him of their options regarding its termination, one of which by its terms included automatic renewal for each year after March 31, 1990, unless notice of proposed changes was timely served, given McCarthy's explanations on the record during his cross-examination especially of the nature of his remarks regarding termination, I find it highly unlikely that he would have sought to soothe an upset Elia family member with reference to the agreement's early termination, when, based on the parties' general discussions and their understanding of the purpose of the meeting, they were both seeking an accommodation in order to resume a long-term relationship. I am also troubled by Respondent counsel's unwillingness to confront McCarthy with the allegation prior to his

release as a witness. Fairness required that the one who was claimed to have made the statement at issue be confronted with it, so that he could either deny, or admit it, or offer some explanation regarding it. This Respondent failed to do.

As I have noted, even if the remark was made by McCarthy, I am unable to find that the Local 17 representatives heard it. Michael Elia could not so testify, even though they were then across the table. Both Local 17 representatives offered credible denials. I am inclined to find that had either Hopkins or Harrigan heard McCarthy's comments either would have responded as Hopkins forcefully stated on the record, that Local 17 was not interested in and would not enter a 2-month agreement, especially with a local employer who had no work available for that period in what is traditionally the slow winter months.

In any event, McCarthy was clearly not Local 17's agent in either arranging or participating in the meeting. SCC admits as much. I conclude that if SCC seeks to rely on a spontaneous remark by a mediator directed to soothing an upset representative of one party, which remained unacknowledged by the other party and was not, thereafter referred to, discussed, or clarified by either party, to establish either an understanding regarding the agreement's term or, alternatively, to demonstrate a failure of the parties to agree on the term, its reliance is misplaced. I am unwilling to support a finding of this nature on so slender and inadequate an underpinning.

Much more was required before one could reasonably conclude that the termination clause of the AGC agreement was intended by the parties to receive an interpretation or meaning other than that manifested by its words. Indeed, the meaning of the language contained in article XVIII was plain and unambiguous. If Respondent wanted to change or modify the provision it should have said so instead of leaving its ostensible contrary intention unexpressed either at the meeting or on any other occasion.

I use the word ostensible advisedly, because the reasonable interpretation of the parties' conduct at the January 29 meeting was that they had reached an understanding which encompassed at least the following points: (1) they had agreed on the adoption by SCC as an independent of the 1987-1990 AGC industrywide agreement; (2) they were going to seek to overcome their past differences; and (3) they intended to resume a collective-bargaining relationship of indefinite duration. No other conclusion can be drawn from their expressed willingness to move on beyond their past disputes on the job, and seek to resolve future ones at the honest level on the job, SCC's interest in securing the services of a young qualified master mechanic who could grow with the Company on heavy and highway jobs within the Union's greater Buffalo jurisdiction, and SCC's understanding to execute the AGC agreement on its receipt and review. Whether copies of the agreement were delivered at the meeting, or whether as SCC claimed, it received them shortly thereafter, the fact remains that SCC adopted the agreement without change by January 31, 1990.

SCC, nonetheless, asserts that its subsequent receipt of information regarding the manning provisions contained in the newly negotiated AGC-Local 17 agreement and the AGC's interpretation of them as applied to SCC's Skyway job convinced it that Local 17 did not intend to comply with its understanding of the agreement it executed on January 31, and

therefore permitted it to cancel the agreement on March 31. This argument is disingenuous. SCC failed to express any objection to the manning provisions either on January 29, 30, or 31 although it reshaped past manning disputes on January 21, but then agreed to move on. Rather, it signed the agreement without modification, an agreement which also contained a zipper clause in article XXXII, pursuant to which the parties agreed “this Agreement is the complete Agreement . . . and there are no other agreements expressed or implied.” SCC never sought to negotiate any modification of the extensive manning provisions contained in articles V, IX, and X which might have had some impact on its later desire to avoid a Local 17 operator on the specialized equipment it utilized under a subcontracting arrangement on its Skyway job. Even if the record evidence could support an interpretation that the parties orally varied the terms of the written agreement Respondent later executed—a conclusion I have rejected—the Board has concluded that attempts to vary the terms of a written collective-bargaining agreement valid on its face by parole testimony is unavailing. See *NDK Corp.*, 278 NLRB 1035 (1986).

Finally, on this point, it was incredible for SCC to conclude as it apparently did, that the Union agreed on January 29 to an arrangement pursuant to which its members would perform no services and which was subject to being discontinued on the unilateral initiative of one party before the occasion ever arose for the agreement to become operative.

Respondent asserts other defenses to the effectiveness of the parties’ agreement extending beyond March 31 by virtue of the application of the automatic renewal language contained in the termination clause. Respondent claims that since the agreement was not effective until February 1, 1990, when Hopkins signed on behalf of the Union. SCC had no opportunity to seek to forestall automatic renewal, which required notice of modification or cancellation by January 31. The short answer is that the agreement became effective on January 31, 1990, when Michael Elia adopted it for SCC, a date still timely for SCC to have sought to notify Local 17 of proposed changes, thereby forestalling automatic renewal. The agreement became effective on January 31, because on that date SCC accepted Local 17’s offer of the AGC agreement. The principle of labor law is well-established that “[T]echnical rules of contract law do not necessarily control regarding the making of collective-bargaining agreements.” *Curtin-Matheson Scientific*, 287 NLRB 350, 354 (1987). Local 17’s later execution of the agreement did not add to an understanding which had already been achieved and which the Board has routinely concluded, even absent any signed writing, may be enforced as a refusal to execute and implement an agreed-upon contract. See Section 8(d) of the Act which expressly requires “the execution of a written contract incorporating any agreement reached” and *H. J. Heinz v. NLRB*, 311 U.S. 51 (1941), in which even prior to its enactment, the Supreme Court held such a failure to sign a written memorandum to be an independent refusal to bargain.

Respondent can also hardly claim unfamiliarity with the language of the termination and automatic renewal clause of the AGC agreement which in the words of Gene McCarthy is fairly standard in heavy and highway contracts negotiated by the AGC and the unions with which it bargains. That being so, and given SCC’s past adoption of AGC agreements

in bargaining with Local 17, among other unions, SCC must be charged with knowledge of the effect of the clause when it agreed, orally, to adopt the agreement on January 31 when it adopted the agreement in writing.

Respondent nonetheless seeks to avoid responsibility for its adoption of the agreement including its automatic renewal language because it received notice in writing from Local 17 even before its negotiation session, that automatic renewal of the AGC agreement—the very one it signed—had been forestalled. Thus, argues Respondent, the cases on which General Counsel relies to establish its liability here, are distinguishable because none of them involved prior notice to the employer that the multiemployer agreement it adopted had not automatically renewed.

These cases, relied on by the General Counsel to establish the viability of the automatic renewal clause in the multiemployer agreement adopted by an independent employer are *Victor Block, Inc.*, 276 NLRB 676 (1985); *C.E.K. Industrial Mechanical Contractors*, 295 NLRB 635 (1989), and *Fortney & Weygandt, Inc.*, 298 NLRB 69 (1990). Taken together, and putting aside certain differences among them, not relevant for the disposition of the instant case, these cases stand for the propositions that an independent employer who adopts a multiemployer association agreement is a “party” under the terms of that agreement, in particular, the termination and automatic renewal clause, so that, in the absence of timely notice pursuant to that clause by either the independent employer or the union to the other, the independent employer is bound under the renewed agreement, at least for the year following automatic renewal if the clause so provides, and further automatic renewal is left for compliance to determine. In the course of making these determinations the Board rejected the defense that the Union’s later request, untimely to forestall automatic renewal, to the independent to sign the renewed multiemployer agreement was inconsistent with or a waiver of its position that the prior independently adopted contract, automatically renewed. The Board also concluded in these cases that nothing in *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. 843 F.2d 770 (3d Cir. 1988), precluded a finding that an 8(g) agreement, such as the one at issue in the instant proceeding, may, in appropriate circumstances, automatically renew.

The Board further concluded in these cases that the Union’s or the multiemployer association’s timely notice to the other of intent to negotiate agreement did not preclude the effectiveness of the automatic renewal clause as to the independent employer respondent because the independent had never delegated bargaining authority to the employer association.

In each of these three cases, the independent employer adopted the association agreement prior to timely notice of cancellation having been filed by either the Union or Association to the other under the multiemployer agreement. In none of the three cases was there evidence that either the Union or Association advised the independent of this notice to terminate.

I conclude, contrary to the argument of Respondent, that these factual differences here are insignificant on the record before me to warrant a departure from the legal conclusions reached in the line of cases relied on by General Counsel.

At the time that SCC received notice of the timely cancellation of the AGC agreement it was not a party to any

agreement with Local 17 and it was not and had no intention of becoming a member of the AGC's labor relations division. Thus, notice to it even if only by way of receipt of a courtesy copy of the Union's notice to the AGC, could have had no effect on its later adoption of the AGC agreement as an independent party who had not delegated any bargaining authority to the AGC. In adopting the terms of the AGC agreement as its own, SCC was binding itself to a provision, among others, which required it to serve timely notice on Local 17 or Local 17 to serve timely notice on it as a contracting party if it wished to prevent an automatic renewal at least to March 31, 1991. This was never done. Incorporation of the December 20, 1989 notice into the independent agreement SCC adopted on January 31 was never proposed. Since SCC was not a party to the AGC agreement and the agreement SCC signed contained no reference to that notice but contained only the termination article XVIII requiring notice of changes to be served by January 31, the parties' knowledge of the outstanding union notice to the AGC could not operate to vary the terms of their agreement, particularly since under the complete agreement language of article XXXII no other agreements, either express or implied, could serve to vary its terms.

In reaching this result I am not unmindful of the language used by the Board in *Lifetime Shingle Co.*, 203 NLRB 688 (1973), a division cited with approval in *C.E.K. Industrial Mechanical Contractors*, supra, to support its conclusion that the association's notice to the union of a desire to change the contract did not operate to preclude the effectiveness of the automatic renewal as to C.E.K. In *Lifetime Shingle Co.*, the Board noted that "the fact that Respondent may have become aware of the Union's notice to the Association does not affect this result [that the Respondent was bound by his own contract in absence of timely notice to prevent automatic renewal], particularly since the evidence does not show that this occurred in timely position, at least 60 days prior to August 31, 1971 [the termination date of the initial contract]." To the extent the Board would appear in that case to be implying that the independent employer's receipt of timely knowledge of the notice by either party to the multi-employer association agreement may preclude automatic renewal of the independent employer's own contract, it should be appropriately limited to those situations where at the time such notice is received the independent employer is contractually bound to a contract containing such termination and automatic renewal language. Certainly, given the language of the agreement at issue here, knowledge of that notice alone, without its incorporation into the parties' later agreement by at least some writing recognizing its import, should not serve to limit the agreement to a 2-month period during which its terms never became effective or operational. Accordingly, I conclude that SCC was bound for 1 year² by the automatic renewal clause of the 1987-1990 contract agreement.

For all the foregoing reasons I conclude that Respondent's repudiation of its agreement with Local 17, on and after March 31, 1990; its failure to apply the terms of the agreement, including but not limited to the grievance and arbitration provisions, to its Skyway job which commenced in May 1990, constitutes a continuing refusal to bargain with Local

²I shall leave to compliance whether the contract renewed again in 1991. *C.E.K.*, supra at fn. 3.

17 in violation of Section 8(a)(5) and (1) of the Act. *East Kentucky Paving Corp.*, 293 NLRB 1132 (1989); *Hydrologics, Inc.*, 293 NLRB 1060 (1989).

CONCLUSIONS OF LAW

1. The Respondent, SCC Contracting, Inc., is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Operating Engineers, Local Union No. 17, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All engineers, maintenance engineers, assistant engineers, maintenance maintenance welders, maintenance welders' helpers, maintenance burners, master mechanics, assistant master mechanics, and all other skills and crafts when within the jurisdiction of the union.

4. By virtue of the principles established by the Board in *John Deklewa & Sons*, 282 NLRB 1335 (1987), the Union at all times material has been and is the limited exclusive collective-bargaining representative for the employees in the unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

5. The Respondent was bound by the automatic renewal clause of the 1987-1990 collective-bargaining agreement between the Associated General Contractors of America, New York State Chapter, Inc., Labor Relations Division Western New York and the Union.

6. By repudiating the Union as the limited exclusive representative of its employees in the aforesaid appropriate unit and by failing to continue in full force and effect all of the terms and conditions of the automatically renewed 1987-1990 agreement, by failing to abide by or apply such provisions of the agreement, among others, as the grievance and arbitration and welfare and pension fund contributions articles, Respondent has refused to bargain with the Union as the limited exclusive collective-bargaining representative of the employees in the aforesaid appropriate unit in violation of Section 8(a)(5) and (1) of the Act.

REMEDY

Having found that Respondent has violated the Act, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the purposes of the Act. Specifically, I shall recommend that Respondent be ordered to make whole employees for any losses they may have suffered as a result of the Respondent's failure to honor the automatically renewed 1987-1990 Associated General Contractors agreement, including contributions the Union would have received, with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and *Merryweather Optical Co.*, 240 NLRB 1213 (1979).³ I shall also recommend that Respond-

³As noted by counsel for General Counsel in its brief, for the purpose of the make-whole remedy, Respondent's employees will be treated as union members under the union-security clause of the

ent be ordered to process the grievance filed by the Union with the Associated General Contractors on May 9, 1990.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴

ORDER

The Respondent, SCC Contracting, Inc., Niagara Falls, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

- (a) Repudiating the Union as the limited exclusive representative of its employees, and failing to apply the terms and conditions of its 1987–1990 Associated General Contractors of America, New York State Chapter, Inc., Labor Relations Division Western New York contract with International Union of Operating Engineers, Local Union No. 17, AFL–CIO, to its employees, in the following appropriate unit:

All engineers, maintenance engineers, assistant engineers, maintenance engineers (also referred to as mechanics), firemen, mechanic’s helpers, maintenance welders, maintenance welders’ helpers, maintenance burners, master mechanics, assistant master mechanics, and all other skills and crafts when within the jurisdiction of the union.

- (b) Refusing to process the grievance filed by the Union with the Associated General Contractors on May 9, 1990.

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

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

- (a) Make whole employees for any losses suffered as a result of Respondent’s failure to honor the automatically renewed 1987–1990 contract, including contributions the Union would have received, in the manner set forth in the remedy section of this decision.

- (b) On request, process the grievance the Union filed with the Associated General Contractors on May 9, 1990.

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

- (d) Post at its office and place of business in Niagara Falls, New York, and jobsites in Erie, Wyoming, Cattaraugus, Chautauqua, Orleans, and the western part of Genesee, New York, copies of the attached notice marked

agreement, from the inception of their employment. Furthermore, as noted by the Board, e.g., in *Wayne Electric*, 226 NLRB 409 fn. 3 (1976), this recommended Order encompasses all employees who would have been referred to Respondent for employment but for Respondent’s refusal to abide by its automatically renewed collective-bargaining agreement with Local 17.

⁴If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

“Appendix.”⁵ Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

⁵If 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.”

APPENDIX

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

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

WE WILL NOT repudiate the Union as exclusive representative of our employees, or fail to apply the terms and conditions of the 1987–1990 Associated General Contractors of America, New York State Chapter, Inc., Labor Relations Division Western New York, contract with our employees, in the following appropriate unit:

All engineers, maintenance engineers, assistant engineers, maintenance engineers (also referred to as mechanics), firemen, mechanic’s helpers, maintenance welders, maintenance welders’ helpers, maintenance burners, master mechanics, assistant master mechanics, and all other skills and crafts when within the jurisdiction of the union.

WE WILL NOT refuse to process the grievance filed by the Union with the Associated General Contractors on May 19, 1990.

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

WE WILL make whole employees for any losses suffered as a result of our failure to honor the automatically renewed 1987–1990 contract, including contributions the Union would have received, plus interest.

WE WILL, on the Union’s request, process the grievance it filed with the Associated General Contractors on May 9, 1990.

SCC CONTRACTING, INC.