

Sheet Metal Workers Local Union No. 91, affiliated with Sheet Metal Workers International Association and Robert Borders, d/b/a Neyens Refrigeration Company. Case 33-CB-2540

July 9, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On June 22, 1988, Administrative Law Judge Robert W. Leiner issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed a brief in support of the judge's decision, and both the General Counsel and the Charging Party filed briefs in response to the Respondent's exceptions.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge's findings of fact but to reverse his conclusions of law and, accordingly, to dismiss the complaint.¹

A. The Judge's Findings and Conclusions

In this case the judge held that Sheet Metal Workers Local Union No. 91 (the Respondent) violated Section 8(b)(1)(B) of the Act by submitting an alleged contract dispute with Charging Party Robert Borders d/b/a, Neyens Refrigeration Co. (Neyens) to an interest arbitration panel of the National Joint Adjustment Board (NJAB) on which Neyens had no designated representative. He predicated the violation on his finding that the dispute was submitted over Neyens' objection and after expiration of the 1985-1987 collective-bargaining agreement under which the obligation to submit disputes to a NJAB panel arose. The judge found a further violation on the ground that the NJAB award purported to bind Neyens to a contract with terms identical to those in a specified multiemployer agreement which included an interest arbitration clause, although the NJAB award added the following proviso:

2. It is not the intent of the NJAB to impose any non-mandatory subjects on an unwilling party. In the event either the NLRB or any court of competent jurisdiction finds that any provision of this agreement imposed is a non-mandatory subject, that provision will be deleted. The parties in such event are directed to enter into negotiations to substitute a mandatory replacement. In the event the parties cannot agree on a replacement for the disputed section, the Board [NJAB] retains jurisdiction to resolve that issue.

¹Chairman Stephens would not vote to overrule existing Board precedent in this case and, for institutional reasons, joins in the decision to dismiss the complaint.

The judge found it unnecessary to decide whether Neyens lawfully, under the authority of *John Deklewa & Sons, Inc.*, 282 NLRB 1375 (1987), enf. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988), terminated any obligation to bargain with the Respondent on expiration of the 1985-1987 agreement.²

The judge's recommended Order requires, inter alia, that the Respondent cease and desist from continuing to submit its contract dispute with Neyens to NJAB while Neyens is not represented on that body and from attempting to cause Neyens to be bound to the multi-employer agreement specified in the NJAB award.

B. Analysis

We find that the facts of this case bring it within the holdings of *Electrical Workers IBEW Local 113 (Collier Electric)*, 296 NLRB 1095 (1989), and *Sheet Metal Workers Local 206 (Warrens Industrial)*, 298 NLRB 760, 762 fn. 4 (1990). Under those precedents, dismissal of the complaint in this case is mandated.

In *Collier Electric* the Board held that when a union invokes an interest arbitration clause that can reasonably be read as requiring employers bound by the agreement in which the clause appears to submit disputes over the terms of a successor contract to an interest arbitration panel, the union will not be deemed in violation of Section 8(b)(1)(B). Under its analysis, the Board would find no 8(b)(1)(B) violation regardless whether the employer against which the clause has been invoked objects and has withdrawn, for the purpose of any subsequent negotiations, from the multi-employer bargaining association that had negotiated the contract containing the clause. So long as the employer is "arguably" bound by the interest arbitration clause and the union has bargained in good faith up to the point of the submission of the dispute to the interest arbitration panel, the union's good-faith resort to arbitration will not be found to violate the Act. Id. at 1098. Accord: *West Coast Sheet Metal v. NLRB*, 938 F.2d 1356 (D.C. Cir. 1991).

In *Warrens Industrial*, supra, the Board held that inclusion of an interest arbitration clause in a NJAB award issued under circumstances like those in this case did not violate the Act, because the award included a proviso that if any clause of the incorporated agreement were deemed nonmandatory by the Board or a court, the clause would be deleted and the dispute returned to NJAB. The Board reasoned that this proviso assured that the NJAB award would "not 'saddle' the parties with 'a perpetual cycle of binding interest

²Although the Respondent excepted to what it described as the judge's "finding that *Deklewa* permitted Neyens to disregard the interest arbitration clause of the parties' contract," neither the General Counsel nor the Charging Party filed any exceptions.

arbitration.”’ 298 NLRB at 762 fn. 4, quoting from *Collier Electric*, supra, 296 NLRB at 1097 fn. 9.

In the present case Neyens was arguably bound by article X, section 8 of the 1985–1987 collective-bargaining agreement to submit disputes over negotiations of a successor contract to the National Joint Adjustment Board (NJAB). The proviso appended to the interest arbitration clause in the NJAB award was identical to the one considered in *Warrens Industrial*, supra. There is no allegation that the Respondent refused, in violation of Section 8(b)(3), to bargain in good faith. Pursuant to the holdings of *Collier Electric* and *Warrens Industrial*, we dismiss the complaint.³

ORDER

The complaint is dismissed.

MEMBER RAUDABAUGH, dissenting.

It is a fundamental tenet of the Act that each party in a collective-bargaining relationship has a statutory right to negotiate a contract through its own representatives. It is also a fundamental tenet of the Act that a statutory right can be waived only by “clear and unmistakable” consent. My colleagues have reached a result that is in conflict with these principles. They permit the imposition of a contract on an employer, even though that contract was not negotiated by representatives of the employer and even though the employer did not clearly and unmistakably waive its statutory right. I therefore dissent.

My dissent is based on the view that *Collier Electric*¹ was wrongly decided. In *Collier Electric*, the Board held that a union could lawfully seek to impose on an employer a contract that was handed down by an interest arbitration panel. The union could do this even though the employer had not clearly and unmistakably agreed to interest arbitration, i.e., it had not clearly and unmistakably waived its statutory right to negotiate its own contract. The Board set forth only two conditions on the union’s ability to impose the interest arbitration contract. The first condition was that the submission to interest arbitration must be pursuant to an interest arbitration clause by which the employer is *arguably bound*. The second condition was that the union must have bargained in good faith prior to the submission. The Board found that both conditions were met in *Collier Electric*.

In a dissenting opinion, Chairman Stephens took issue with the “arguably bound” standard, and he set forth a basis for finding that the union’s actions violated Section 8(b)(1)(B) and (3) of the Act. For the reasons stated in Chairman Stephens’ dissent, and for

³Member Devaney is not persuaded by the dissent for the reasons stated in detail in the majority opinions in *Collier Electric* and *Warrens Industrial*.

¹*Electrical Workers IBEW Local 113 (Collier Electric)*, 296 NLRB 1095 (1989).

the reasons set forth here, I would find that the Respondent violated the Act as alleged.²

As discussed above, I start from the proposition that both employers and employees enjoy statutory rights to choose their own representatives for purposes of collective bargaining.³ The employer’s right is protected by Section 8(b)(1)(B) of the Act. That section makes it an unfair labor practice for a union “to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.” Perhaps, the most basic of the rights guaranteed by Section 8(b)(1)(B) is the right of an employer to negotiate its own collective-bargaining agreement. Indeed, the majority in *Collier Electric* did not question the proposition that an employer’s rights under Section 8(b)(1)(B) would be violated if, without the employer’s consent, a union submitted collective-bargaining issues to interest arbitration and then sought to impose the interest arbitration agreement on the employer. Such an agreement clearly would not be one negotiated by representatives of the employer.

The issue dividing the majority and the dissent in *Collier* concerned the standard to be used in determining *whether* an employer has consented to the use of interest arbitration. More particularly, where a multiemployer contract contains a clause which provides for interest arbitration in connection with the negotiation of the next multiemployer contract, is that clause binding on an employer who withdraws from the multiemployer unit prior to the negotiations for that next contract? The majority held that a contract clause that could “arguably” be read as binding such an employer to the use of interest arbitration for a subsequent agreement would be sufficient to warrant the dismissal of the unfair labor practice complaint against the union, provided that the union bargained in good faith with the employer prior to proceeding to interest arbitration. In the majority’s view, the interest arbitration clause in a multiemployer contract “arguably” applies to an employer who subsequently withdraws from multiemployer bargaining.

I believe that such reasoning overlooks the importance of the statutory right to bargain one’s own contract. Clearly, that statutory right, like any other, can be waived only by “clear and unmistakable consent.” (*Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708

²The present case involves only allegations that the Respondent violated Sec. 8(b)(1)(B) of the Act.

³See, e.g., *Missouri Portland Cement Co.*, 284 NLRB 432, 433 (1987) (employees’ right under Sec. 7 to select own bargaining representatives); *Asbestos Workers Local 27 (Master Insulators)*, 269 NLRB 719, 721 (1984) (employer’s statutory right to select own bargaining representative).

(1983)).⁴ Dismissing a complaint on the grounds that the clause in question “arguably” waives the statutory right is wholly inconsistent with this policy.

In the instant case, the statutory right has not been clearly and unmistakably waived. Neyens was part of a multiemployer unit represented by Illowa. Illowa and the Respondent Union agreed to use interest arbitration *if their negotiations* for the next contract (i.e., the negotiations between Illowa and the Union) reached an impasse. Prior to negotiations for a new contract, Neyens withdrew from Illowa. The Union then sought to apply interest arbitration to the negotiations between Neyens and the Union. In these circumstances, it is far from “clear and unmistakable” that the interest arbitration clause *in the multiemployer contract* applied to the *single-employer negotiations* between Neyens and the Union. Indeed, my colleagues in the majority do not say this; they say only that it is “arguable” that this is so. However, as discussed *infra*, I do not believe that important statutory rights are waived on a bare showing that it is “arguable” that they are waived.

In addition, the case for a violation here is even more compelling than in *Collier Electric*. The collective-bargaining relationships are governed by Section 8(f), not Section 9. Under *Deklewa*,⁵ a party to such a relationship has a statutory right to terminate it after the expiration of the 8(f) contract. Neyens has elected to exercise that right. However, my colleagues in the majority effectively foreclose that right by permitting the Union to bind Neyens to a new contract. This waiver of the *Deklewa* right is accomplished by a bare showing that Neyens “arguably” consented to it. In my view, as with the 8(b)(1)(B) right, the Board should not permit the waiver of a *Deklewa* right on a bare showing that such right has “arguably” been waived.⁶

Based on the above, I conclude that Neyens did not waive its right to negotiate its own contract and did not waive its right to terminate the 8(f) relationship.

The next issue is whether the Union “restrained” Neyens in exercising that right. I believe that the Union did so. The Union sought court enforcement of

the interest arbitration award. It thus sought to force Neyens to honor the contract or be held in contempt of court. Quite literally, the Union sought to “restrain” Neyens with respect to its right to negotiate its own contract.⁷

I recognize that *Bill Johnson’s Restaurants v. NLRB*, 461 U.S. 731 (1983), ordinarily protects a party who brings a lawsuit which has a reasonable basis. And, I do not quarrel with the proposition that the Union had a colorable contract claim. However, *Bill Johnson’s* states, at footnote 5, that its general rule (privileging lawsuits) does not apply if the lawsuit has an unlawful objective. In the instant case, the lawsuit sought to achieve a result that is unlawful under Section 8(b)(1)(B). That is, the lawsuit sought to impose on Neyens a contract that it did not negotiate. Accordingly, the lawsuit falls within the footnote 5 exception to *Bill Johnson’s* and can be proscribed as an unfair labor practice.

By declining to find a violation, my colleagues essentially cede jurisdiction to the district court. I would not do so. In the first place, the lawsuit was itself unlawful. I would not defer to an unlawful lawsuit. Second, this case differs fundamentally from the deferral doctrine of *Collyer Insulated Wire*.⁸ Under that doctrine, the Board defers (i.e., holds in abeyance) an unfair labor practice case in order to give the grievance-arbitration process an opportunity to resolve a parallel dispute. However, in *Collyer*, the Board retains jurisdiction to review the award to make sure that statutory rights have been adequately safeguarded. In the instant situation, the Board gives the court *carte blanche* to do whatever it wants; there is no opportunity for Board review.

In addition, the instant case involves matters which are exclusively entrusted to the Board. These matters include the interpretation of Section 8(b)(1)(B), the application of waiver concepts, the enforcement of *Deklewa* rights, and the consequences of withdrawal from a multiemployer unit. By contrast, the court is presented only with an issue of contract construction. By deferring to the court, the Board essentially abdicates its responsibility to interpret the statute and enforce statutory rights.

Finally, I recognize that the Union here has prevailed in Federal district court. However, I do not believe that the Board is bound to the court’s decision by the doctrine of collateral estoppel. In this regard, I note that (1) the Board was not a party to that case, (2) the parties in that case were pursuing private rights;

⁴ See, e.g., *Missouri Portland Cement Co.*, supra, 284 NLRB at 433 (standard applied to employees’ right to choose grievance representative); *Asbestos Workers Local 27 (Master Insulators)*, supra, 269 NLRB at 721 (standard applied to employer’s choice of grievance panel representatives); *Sheet Metal Workers Local 59 (Employers Assn.)*, 227 NLRB 520 at 521 (1976) (standard applied in determining whether employers had agreed that dispute over inclusion of interest arbitration clause in future contract could itself be referred to an interest arbitration panel).

⁵ *John Deklewa & Sons, Inc.*, 282 NLRB 1375.

⁶ I am *not* suggesting that the Respondent’s efforts to preclude the Employer from exercising its *Deklewa* right constitutes an additional violation of the Act. I am simply noting that this is an additional factor to be considered in deciding whether Sec. 8(b)(1)(B) has been violated and whether the resolution of this issue should be ceded entirely to the courts.

⁷ The Board has held that resorts to court can constitute restraint and coercion under Sec. 8(b)(1)(B). *Masters, Mates & Pilots (Cove Tankers)*, 224 NLRB 1626 fn. 2, 1634–1635 (1976), enf. 575 F.2d 896 (D.C. Cir. 1978). See also *Sheet Metal Workers Local 59 (Employers Assn.)*, supra, 227 NLRB 520, in which the Board, after finding an 8(b)(1)(B) violation, proscribed court enforcement action.

⁸ 192 NLRB 837 (1971).

the Board here enforces public rights and obligations, and (3) the court case involved only the construction of a contract clause; the instant clause involves Section 8(b)(1)(B), *Deklewa*, and the impact of withdrawal from a multiemployer unit.⁹

The opinion of the D.C. Circuit in *West Coast Sheet Metal v. NLRB*¹⁰ does not require a contrary result. The court there held that the doctrine of *Collier Electric* was a *permissible* reading of the National Labor Relations Act (NLRA). Thus, the court was *not* holding that a contrary result would be *forbidden* by the NLRA. Indeed, the court suggested that a contrary position would also be a “reasonable construction of the Act.” For the reasons set forth above, I believe that a result contrary to *Collier Electric* is not only permissible but is more protective of the fundamental right of a party to negotiate its own contract.¹¹

Finally, I find an additional violation of Section 8(b)(1)(B) in this case based on this fact that the Respondent sought, through interest arbitration, to get a new interest arbitration clause. The Respondent sought to place the Employer on an interest arbitration merry-go-round from which it could never alight. Such conduct is unlawful.¹² The fact that the Respondent did not insist to impasse on such a clause does not warrant a contrary result. In this regard, I do not agree with the panel decision in *Sheet Metal Workers Local 20 (Baylor Heating)*, 301 NLRB 258 (1991), that no violation of Section 8(b)(1)(B) may be found unless it can be shown that the union bargained to impasse over the subject before submitting the issue to interest arbitration. In the instant case, impasse was not reached prior to the unilateral submission to interest arbitration because the Employer had lawfully claimed its right under *Deklewa*, *supra*, to terminate the collective-bargaining relationship. Regardless of the state of negotiations prior to a unilateral submission to interest arbitration, permitting inclusion of an interest arbitration clause in the submission without the other party’s consent would allow self-perpetuation of the interest arbitration system—a result that is contrary to Federal labor policy. See *NLRB v. Columbus Printing Pressmen*, 543 F.2d 1161, 1169 (5th Cir. 1976).

I acknowledge that the interest arbitration award included a clause which said that a provision of the contract would be “deleted” if “either the NLRB or any court of competent jurisdiction finds” that the provi-

sion “is a non-mandatory subject.” I do not, however, find that this renders the provision harmless. In order to escape from the self-perpetuating provision, an employer must litigate to conclusion the proposition that the provision is a nonmandatory subject. Significantly, the employer remains bound to that self-perpetuating provision during such litigation. That litigation is likely to be long and arduous. In these circumstances, I do not agree that the employer is adequately protected from the self-perpetuating provision. Cf. *Carpenters (Associated Contractors)*, 141 NLRB 858, 869 (1963), *revd. on other grounds* 332 F.2d 636 (3d Cir. 1964) (unlawful contract provision not immunized by other contract provisions “leaving the question of legality for later determination” in arbitration, Board, or court proceedings).¹³

In sum, I would find that the Respondent violated Section 8(b)(1)(B) of the Act when, in the absence of a clear and unmistakable manifestation of Neyens’ consent, it submitted unresolved contract issues to interest arbitration—including a request for a new interest arbitration clause—and then sought court enforcement of the resulting interest arbitration award.

¹³To the extent inconsistent, I would overrule *Sheet Metal Workers Local 206 (Warrens Industrial)*, 298 NLRB 760, 762 fn. 4 (1990).

Judith T. Poltz, Esq., for the General Counsel.
David W. Stuckel, Esq. (Harvey & Stuckel), of Peoria, Illinois, for the Respondent.
Kathleen A. Reimer, Esq. (Black, Reimer & Goldman), of Des Moines, Indiana, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge. This matter was heard in Peoria, Illinois, on March 1 and 2, 1988, upon issues raised by General Counsel’s amended complaint¹ alleging, in substance, that the above-captioned Sheet Metal Workers Local Union No. 91 (the Union) violated Section 8(b)(1)(B) of the Act² in that the Union unlawfully restrained and coerced the Charging Party, an employer, in the selection of its representative for the purposes of collective bargaining or adjustment of grievances. Respondent’s answer admits certain allegations of the complaint, denies others, and denies the commission of any unfair labor practices.

At the hearing, all parties were represented by counsel, were given full opportunity to call and examine witnesses, submit oral and written evidence, and to argue orally on the

⁹Compare *Litton Business Systems v. NLRB*, 111 S.Ct. 2215 (1991), in which only a question of contract interpretation was involved.

¹⁰938 F.2d 1356 (1991).

¹¹It should be emphasized that the right involved here is *not* any right to be free of a lawsuit; it is the right to negotiate one’s own contract.

¹²*Sheet Metal Workers Local 59 (Employers Assn.)*, 227 NLRB 520, 521 (1976), and *Sheet Metal Workers Local 263 (Sheet Metal Contractors)*, 272 NLRB 43 (1984).

¹The amended complaint was issued February 11, 1988, to which Respondent Union filed a timely answer. The Charging Party’s (Neyens Refrigeration Co.) unfair labor practice charge was filed and served on Respondent on November 30, 1987.

²“8(b) It shall be an unfair labor practice for a labor organization or its agents (1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.”

record. At the close of the hearing, all parties waived final argument and elected to submit posthearing briefs. Thereafter, all parties submitted timely briefs which have been carefully considered.

On the entire record, including the briefs, and from my observation of the demeanor of the witnesses as they testified, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Charging Party as Statutory Employer

The complaint alleges, and the parties stipulated (Jt. Exh. 28), that at all material times, Robert Borders has been a sole proprietor doing business as Neyens Refrigeration Company (Neyens), with offices and a place of business located in Keokuk, Iowa. Neyens is in the business of commercial and residential installation and service of refrigeration, heating and cooling equipment and sheet metal work. During the past 12 months, a representative period, Neyens purchased and caused to be transported and delivered to its jobsites located in Iowa goods and materials valued in excess of \$50,000 directly from States other than the State of Iowa. Neyens is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE UNION AS A STATUTORY LABOR ORGANIZATION

The complaint alleges and the parties stipulated (Jt. Exh. 28) that the above-captioned Union, at all material times, has been and is a labor organization within the meaning of Section 2(5) of the Act.³

III. THE ALLEGED UNFAIR LABOR PRACTICES

Prior to the opening of the hearing, the parties entered into a substantial stipulation concerning the facts here (Jt. Exh. 28). In addition, supplementary testimony was adduced at the hearing. That stipulation, together with testimony and other evidence received at the hearing, shows that at all material times Illowa Sheet Metal Contractors Association, Inc. (Illowa), an affiliate chapter of the Sheet Metal and Air Conditioning Contractors National Association (SMACNA), has been an organization of employers who are engaged, inter alia, in the sale, installation, and servicing of air-conditioning products and which exists for the purpose, inter alia, of representing its constituent employer-members in negotiating and administering collective-bargaining agreements with Respondent.

In late 1980 or early 1981, Neyens signed a collective-bargaining agreement with Respondent. At that time, Neyens employed only Ed Borders, as a sheet metal employee. Ed Borders is the brother of Robert Borders, sole proprietor of the Charging Party. I find that Neyens at that time, and at all material times thereafter, has been an employer engaged primarily in the building and construction industry and that the collective-bargaining agreement executed at that time

³The parties also stipulated that the following individuals were agents of the Union within the meaning of Sec. 2(13) of the Act: Edward M. Praet, business manager; Richard Laue, business representative; John Churuvia Jr., business representative; and Julius Pearson, president, Local 91.

concerned the construction employees of the Charging Party. I also conclude that this was a prehire agreement and was lawfully exempted from any requirement of majority status by Section 8(f) of the Act. Section 8(f) exempts prehire agreements in the construction industry from the requirement of majority union status as a condition of lawfulness. *Harris Painting*, 286 NLRB 642 (1987).

Neyens became a member of Illowa, the local affiliate chapter of SMACNA, in 1981 or 1982 (Tr. 229). The terminal date of the latest Illowa-Respondent collective-bargaining agreement, binding Neyens, was May 31, 1985 (Tr. 229, 232).

On March 1, 1985, Neyens dispatched letters to the Union and to Illowa informing them that Neyens was "withdrawing from the Union and from Illowa effective June 1, 1985," i.e., after the terminal date of the collective-bargaining agreement between the Union and Illowa (Jt. Exh. 2). When Neyens withdrew its membership from Illowa and the Union, it advised them that thereafter it would be a "merit" shop. A merit shop is a nonunion shop. Iowa is a right-to-work state.

When Illowa received this 1985 notice of Neyens' withdrawal from Illowa and from recognition of the Union, its executive secretary (Richard Davison) notified Neyens that his attempted withdrawal from Illowa was untimely (Tr. 243) and that he was considered to be still "in" Illowa. The Union made no response to Neyens' March 1, 1985 withdrawal attempt. However, at this time, Robert Borders took a withdrawal card from the Union and no longer had to pay dues (Tr. 246).

In the late summer and fall of 1985, the Union, having discovered that Robert Borders, apparently contrary to the Illowa agreement, was himself working at a jobsite, objected to Border's doing active jobsite installation work. As a result, on October 3, 1985, Robert Borders, on behalf of Neyens, signed a consent to be bound by the existing "Illowa Agreement," June 1, 1985-May 31, 1987. (Jt. Exh. 4.)⁴

At the time Borders signed the consent, Neyens employed three employees: Richard Lindsay, Tim Leimbach, and Ron Hultz (Tr. 371-372). Although Union Agent Richard Laue testified that Richard Lindsay and Tim Leimbach were members of the Union (Tr. 362-363), it does not appear that Laue was personally familiar with either of them and was testifying from records showing Neyens' payment of contractual fringe benefits to the Union on behalf of its unit employees. However, these payments were made on behalf of unit employees, not necessarily on behalf of union members. (Tr. 364, 366.) The evidence shows that Neyens had no dues-checkoff procedure (Tr. 366); that Robert Borders had no knowledge of whether any of his employees were actually members of the Union (Tr. 372); that he was not told by the individual employees that they were union members; that in October 1985, Tim Leimbach was an apprentice in the ap-

⁴The consent was also signed by several other independent construction contractors. The text of the consent is:

We, the undersigned, having full knowledge and authority of the Company we represent acknowledge receipt of a signed copy of the June 1, 1985 thru May 31, 1987 labor agreement negotiated by the Illowa Sheet Metal Contractors Assn. Inc. and the Sheet Metal Workers Local Union No. 91, and further agree to be bound by the terms and conditions as set forth herein.

prentice program established under the collective-bargaining agreement between the Union and Illowa (Tr. 375); and, of the three employees, only Ron Hultz had been referred from the union hiring hall (Tr. 376). In any event, the Union never filed a petition for certification among Neyens' employees; there had never been a card check relating to their union membership; and the Union had never demanded recognition as majority representative from Neyens at any time commencing on or about October 3, 1985.⁵

With the termination date of the 1985–1987 Illowa-Local 91 agreement being May 31, 1987, Neyens, on January 14, 1987, sent a letter (Jt. Exh. 5) to Illowa in which he withdrew any bargaining rights Neyens assigned to Illowa regarding the negotiation of collective-bargaining agreements.⁶

A month later, by letter dated February 13, 1987 (Jt. Exh. 6), Robert Borders reminded Local 91 that Neyens had withdrawn from Illowa and for a number of years had bargained with the Union on an individual employer basis.⁷ In particular, Neyens notified the Union that it would continue to bargain individually for future collective-bargaining agreements and, pursuant to the expiring (1985–1987) agreement, was notifying the Union of its intent to terminate that agreement effective at its expiration on May 31, 1987. Neyens also notified the Union that it intended to make substantial changes in its employees' terms and conditions of employment and desired to begin negotiations regarding such changes (Jt. Exh. 7). These changes included the elimination of the fringe benefits package (pension, annuity, health and welfare, etc.); a different wage rate system; different starting hours, elimination of travel pay, etc.

The Union and Neyens thereafter had three collective-bargaining sessions on April 10, April 28, and May 18, 1987, but the parties failed to reach agreement on a further contract. By letter dated May 18, 1987 (Jt. Exh. 11), Robert Borders notified the Union that it would not renew the "prehire agreement" after May 31, 1987.

By telegram of June 1, 1987, the Union notified Illowa and Neyens Refrigeration that, pursuant to article X, section 8 of the expired collective-bargaining agreement, the Union

was requesting a hearing before the National Joint Adjustment Board (NJAB) concerning renewal of the collective-bargaining agreement (Jt. Exh. 13). On June 8, 1987, SMACNA notified Neyens Refrigeration that the meeting of the NJAB would take place in the week of June 22–June 26, 1987, in Kansas City, Missouri (Jt. Exh. 14).⁸

On June 9, 1987, Neyens notified NJAB and Respondent (Jt. Exh. 16) that it objected to NJAB attempting to assert jurisdiction over Neyens with respect to any matter, and that NJAB was without authority to decide any term or condition of employment covering Neyens' employees; that Neyens' employees were not represented by the Union for the purposes of collective bargaining; that Neyens had timely withdrawn bargaining rights from Illowa; that under the rules of the National Labor Relations Act (*John Deklewa & Sons, Inc.*, 282 NLRB 1375 (1987)), Neyens had successfully repudiated the 8(f) relationship with Respondent and that since May 31, 1987, the Union had no standing as collective-bargaining representative of Neyens' employees. Finally, Neyens asserted that since Neyens had withdrawn its conveyance of bargaining rights to Illowa and SMACNA, the NJAB had no jurisdiction over Neyens or the subject matter of the Local 91 complaint.

On June 12, 1987, Neyens, in an action filed in the United States District Court for the Central District of Illinois, applied for an order restraining Respondent from submitting any matter involving Neyens' employees to the NJAB (Jt. Exh. 17). On June 16, 1987, the court denied the application for the restraining order. On June 18, 1987, Neyens nevertheless wrote to both the NJAB and SMACNA, again protesting NJAB's assertion of jurisdiction over Neyens Refrigeration (Jt. Exh. 18). This protest was supported by Neyens again

⁸ It is undisputed that the NJAB membership consists of equal representation of members of SMACNA and the Union. There is no independent member on the NJAB.

Art. X, sec. 8, of the expired collective-bargaining agreement, in pertinent part, provides:

Section 8. In addition to the settlement of grievances arising out of interpretation or enforcement of this agreement . . . any controversy or dispute arising out of the failure of the parties to negotiate a renewal of this agreement shall be settled as hereinafter provided:

(a) Should the negotiations for renewal of this agreement become deadlocked . . . the parties shall promptly be notified so that either party may submit the dispute to the National Joint Adjustment Board The unanimous decision of said Board shall be final and binding upon the parties. . . .

There shall be no cessation of work by strike or lockout unless and until said Board fails to reach a unanimous decision.

Under the terms of art. XII of the expired agreement, the agreement remains in full force and effect until May 31, 1987:

and shall continue in force from year-to-year thereafter unless written notice of reopening is given not unless the (90) days prior to the expiration date. In the event such notice of reopening is served, *this Agreement shall continue in force and effect until conferences relating thereto have been terminated by either party, provided, however, that the contract expiration date contained in this section shall not be effective in the event proceedings under Article X, Section 8 are not completed prior to that date.* In that event, this Agreement shall continue in full force and effect until modified by Order of the National Joint Adjustment Board or until the procedures under Article X, Section 8 have been otherwise completed. [Emphasis added.]

⁵ By art. 5, sec. I of the 1985–1987 agreement to which Neyens assented to be bound on October 3, 1985, the requirement for union membership is 8 days following the beginning of an employee's employment covered by the agreement.

⁶ The letter of January 14, 1987, reads:

Re: Collective Bargaining with Local 91 Sheet Metal Workers Union. Dear Mr. Davison [Executive Director of Illowa]: As you are aware Neyens Refrigeration withdrew any and all bargaining rights it may have assigned to the Illowa Sheet Metal Contractors Association, Inc., to negotiate any collective-bargaining agreements with Local 91 some time ago.

We wish to remind you that Neyens Refrigeration is not and will not be part of any multi-employer collective-bargaining group with respect to future negotiations with Local 91, and we ask that you be certain not to make any representations to Local 91 to the contrary.

⁷ Illowa Executive Secretary Davison testified that (Tr. 131 et seq.), not only was Neyens not an Illowa member in 1987, but in the bargaining of 1985 for the new (1985–1987) contract (between Illowa and Local 91), because of an internal dispute, there were no "members" of Illowa; that Illowa did not notify the Union on whose behalf it was bargaining and that Illowa believed it was not then authorized to bargain for anyone. It then reached agreement with Local 91 and thereafter employers reestablished membership in Illowa.

advising NJAB and SMACNA that Neyens had terminated its collective-bargaining relationship with the Union.

The NJAB met in Kansas City on June 23 to consider the Union's request for determination of the wages, hours, and working conditions of Neyens' employees. Robert Borders, on behalf of Neyens, appeared at the proceeding to protest NJAB's assertion of jurisdiction and to note the alleged inequitable nature of Neyens being subjected to continued representation by the Union and to the allegedly economically unbearable terms of a union collective-bargaining agreement (Jt. Exh. 19).

The Decisions of NJAB

As above noted, the NJAB is composed equally of members of SMACNA (employers) and of Sheet Metal International Association and the evidence shows that in 1987 Neyens was a member neither of Illowa nor SMACNA.⁹ Respondent admits that article X, section 8 of the expired Illowa agreement provides a procedure for resolving the failure of the parties to negotiate a *renewal* of the expired agreement including submission of the dispute or controversy to the National Joint Adjustment Board (NJAB). NJAB is a dispute adjustment panel and may act on the renewal question upon notice by either of the parties that their negotiations were deadlocked. In his June 23 appearance before the NJAB, Borders objected to being "dragged" before the NJAB when Neyens allegedly had no representation thereon (Jt. Exh. 19).

On the next day, June 24, 1987, NJAB nevertheless issued two decisions: the first affecting Illowa, the second affecting Neyens.

(a) The NJAB decision concerning Illowa directed that Illowa and Local 91 execute a 3-year collective-bargaining agreement (June 1, 1987, through May 31, 1990) in which NJAB specified certain contractual changes from the expired agreement: wage increases; a COLA wage differential based on workshift; changes in the apprentice program; and a wage reopener clause. In particular, however, there was no change with regard to the contract renewal clause, i.e., the "interest arbitration" clause, in the expired collective-bargaining agreement (Jt. Exh. 21).

(b) With regard to the separate decision concerning Neyens Refrigeration, it rejected Neyens' objection to NJAB jurisdiction based upon *John Deklewa & Sons*, supra. It determined, that in view of the breadth of the arbitration provision in the 1985-1987 contract (art. X, sec. 8), the so-called *expired* collective-bargaining agreement had *not* expired, and had, indeed, by the terms of the agreement, been specifically *extended* (art. XII) to include the proceedings of the NJAB concerning contract renewal. Therefore, since the "expired" contract continued in existence Neyens' rejection of an *existing* Section 8(f) collective-bargaining agreement, made specifically unlawful in the *Deklewa* decision, provided no defense.

NJAB then directed (Jt. Exh. 20) Local 91 and Neyens to execute an agreement "identical to the multi-employer agree-

ment which was ordered to be placed into effect between the Illowa Sheet Metal Contractors and SMWIA Local Union 91." In addition, however, the NJAB added a second paragraph to its decision and direction:

2. It is not the intent of the NJAB to impose any non-mandatory subjects on an unwilling party. In the event either the NLRB or any court of competent jurisdiction finds that any provision of this agreement imposed is a non-mandatory subject, that provision will be deleted. The parties in such event are directed to enter into negotiations to substitute a mandatory replacement. In the event the parties cannot agree on a replacement for the disputed section, the Board [NJAB] retains jurisdiction to resolve that issue.

On August 18, 1987, Neyens filed an action in the United States District Court for the Central Division of Illinois seeking vacation of the arbitration award and a permanent injunction restraining the Union from enforcement of the NJAB decision. Neyens also sought a declaratory judgment affirming the right of Neyens not to be bound after the expiration of the terms of the Illowa agreement (1985-1987) because it was a prehire agreement lawfully repudiated by Neyens.

In response to Neyens' court action, Respondent filed an answer and a counterclaim (Jt. Exh. 25). In substance, the counterclaim prayed for an order binding Neyens to the NJAB decision, directing that Neyens execute an agreement the same as the 1987-1990 Illowa agreement.

Finally, on February 8, 1988, the Union filed a Motion for Summary Judgment on both Neyens' cause of action and on its counterclaim (Jt. Exh. 26). In response, on February 15, 1988, Neyens moved to stay the proceedings, particularly the Union's Motion for Summary Judgment, asserting that the issues to be resolved in the instant NLRB proceeding would have a direct and substantial impact on the court's determination of the merits in the district court action (Jt. Exh. 27). Through the time of the hearing here, the court has not acted on the Union's Motion for Summary Judgment or Neyens' request for a stay; nor have I been thereafter advised of any court disposition.

Discussion and Conclusions

There is no dispute that on October 3, 1985, Robert Borders, on behalf of Neyens, signed an agreement to be bound by the 1985-1987 Illowa agreement and the General Counsel so concedes (G.C. Br. 3-4 (Jt. Exh. 4)). On January 14, 1987, Borders nevertheless timely informed both Respondent and Illowa, in writing, that it was withdrawing all bargaining rights from Illowa and would thereafter bargain separately. There is no dispute that this withdrawal from Illowa was "timely" (Jt. Exh. 5) and it was so stipulated (Jt. Exh. 28, par. 7):

From at least this date and thereafter, Neyens was neither a member of, nor had it assigned its bargaining rights to SMACNA, Illowa, nor to any constituent of SMACNA or Illowa.

On February 13, 1987, Neyens notified the Union that it intended to terminate the expiring collective-bargaining agreement effective on the expiration date, May 31, 1987 (Jt. Exh. 28, par. 8). After bargaining separately in April and

⁹Referral of the "grievance" of the contract renewal dispute to NJAB, where Neyens has no representation among the employer-members, cannot be considered a device in the mechanics of further collective bargaining. *Sheet Metal Workers Local 59 (Employers Assn. of Roofers)*, 227 NLRB 520 (1976).

May for a new agreement, Borders, on May 18, 1987, notified the Union that it would not renew the "Illowa agreement" which was about to expire on May 31, 1987 (Jt. Exh. 28; Jt. Exh. 11).

It is also further stipulated that commencing June 1, 1987, Respondent not only notified Borders that it had requested an NJAB hearing, but that despite Neyens' June 9 protest against the submission to NJAB for lack of jurisdiction, NJAB did meet (Borders appearing) on June 23 and rendered its decisions on June 24, 1987. On June 24, 1987, the NJAB directed Illowa to execute a new 3-year collective-bargaining agreement containing, inter alia, the interest arbitration clause, wage raises, and other terms and conditions of employment relating to Illowa members' employees. At the same time, NJAB directed Neyens Refrigeration to execute and be bound by the Illowa agreement (Jt. Exhs. 20 and 21). Thereafter, by its counterclaim of September 23, 1987 (Jt. Exh. 25), and its February 8, 1988 Motion for Summary Judgment (Jt. Exh. 26), the Union sought to enforce in Federal district court the NJAB award of June 24, 1987, whereby Neyens was directed to be bound by the new 3-year Illowa collective-bargaining agreement with Local 91. Respondent concedes that its June 1, 1987 submission to the NJAB was pursuant to the "interest arbitration clause" of the expired 1985-1987 contract and, in particular, article X, section 8. ("[A]ny controversy or dispute arising out of the failure of the parties to negotiate a renewal of this agreement shall be settled as hereinafter provided.") (R. Br. 2).

In support of the alleged 8(b)(1)(B) violation, General Counsel and the Charging Party rely on *Sheet Metal Workers Local 59 (Employers Assn. of Roofers)*, 227 NLRB 520 (1976);¹⁰ and *Electrical Workers IBEW Local 194 (Cahn Electric Co.)*, 285 NLRB 328 (1987).

In *Employers Assn. of Roofers*, supra at 521, the Board said:

One can hardly conceive of a more fundamental right embodied in our Act than the right of both employees and employers to bargain collectively through representatives of their own choosing. Thus, while it is clear that the parties may agree to substitute another individual or entity to resolve disputes associated with the collective-bargaining process, it is also true that the right to select one's own bargaining representative is so basic and important that its relinquishment will not be casually imputed.

In the same case, the Board held, in finding a violation of Section 8(b)(1)(B) of the Act, that the Union's conduct, in forcing to impasse, bargaining on the interest arbitration clause in order to involve that very clause (the same clause as in the instant case) as a dispute resolution mechanism before the NJAB, where the employer association was unrepresented, was "in patent derogation of [the Employer's] right to bargain collectively through representatives of its own choosing."

¹⁰The General Counsel does not allege that Respondent's recourse to the Federal court to enforce the NJAB award constitutes unlawful restraint or coercion within Sec. 8(b)(1)(B). See *Sheet Metal Workers Local 59 (Employers Assn. of Roofers)*, supra at 523 (Member Fanning, dissenting).

Somewhat closer to the instant facts, the Board held, in *Cahn Electric Co.*, supra, that the union violated Section 8(b)(1)(B) by coercing an employer, under an interest arbitration clause, to appear before an interest arbitration panel where the employer had already timely withdrawn from multiemployer bargaining and from the multiemployer association which served on the dispute resolution panel. The Board further held, consistent with the administrative law judge's decision, that the individuals comprising the panel (other than union representatives) were representatives of the employer within the meaning of Section 8(b)(1)(B) of the Act; and that the union's submission of the dispute, against the desire of the employer, unlawfully coerced the employer to select, as his collective-bargaining representatives, the employer-members of the panel on which he had no representation. Further, I agree with General Counsel (G.C. Br. 10) that, in *Cahn Electric*, the Board held, that the individual employer's timely withdrawal from membership in, and bargaining authority from, the multiemployer association "effectively abrogated the interest arbitration provisions of the existing agreement, inasmuch as arbitration can exist only by mutual consent of the parties." In short, *Cahn Electric* supports the conclusion that a multiemployer member's interest arbitration obligation terminates upon lawful withdrawal; and that the union's submission of the dispute, against the withdrawn-member's desire, under the interest arbitration clause, to a panel on which the former member is unrepresented, constitutes unlawful coercion within Section 8(b)(1)(B) of the Act.

Respondent's Defenses

1. Respondent argues that the mere contract-agreed submission of the "interest arbitration" dispute to the NJAB, notwithstanding Neyens' not having representation thereon, and over his objection, cannot constitute unlawful restraint or coercion of Neyens in his selection of his collective-bargaining representative within the meaning of Section 8(b)(1)(B) of the Act. *Cahn Electric*, if not *Employers Assn. of Roofers*, holds to the contrary.

2. Respondent further argues: that whatever the holdings in *Employers Assn. of Roofers* and *Cahn Electric*, those cases are distinguishable because, in the instant case, Neyens individually assented to the 1985 agreement and the General Counsel's cited cases are premised upon an employer's withdrawal from multiemployer bargaining during the term of the agreement which required submission of the renewal dispute to the grievance panel selected by the multiemployer association. Respondent submits that the courts and the Board recognize that interest arbitration clauses are valid and enforceable, *Employers Assn. of Roofers*, supra; *Electrical Workers IBEW Local 367 v. Graham County Electric Co.*, 121 LRRM 2924 (9th Cir. 1986); and that the Board has never held that an employer who individually signed an agreement which incorporates the specific contract renewal procedure can unilaterally abrogate and escape from that procedure.¹¹ Moreover,

¹¹However, an employer's repudiation of an interest arbitration clause, while perhaps a breach of contract, is not an unfair labor practice because the clause is a nonmandatory subject of bargaining. *Allied Chemical Workers v. Pittsburgh Plate Glass*, 404 U.S. 157,

in support of the assertion that even timely withdrawal from multiemployer bargaining does not vitiate an interest arbitration obligation, Respondent cites *Sheet Metal Workers Local 57 Welfare Fund v. Tampa Sheet Metal Co.*, 786 F.2d 1459 (11th Cir. 1986), a non-Board case. In that case, Respondent accurately observes that the Court of Appeals for the Eleventh Circuit rejected, per curiam, the argument that timely withdrawal from a multiemployer bargaining group constituted a withdrawal from the obligation to abide by the interest arbitration clause (the same clause as in the instant case) negotiated by the multiemployer group. It is apparent, therefore, that Respondent is correct in asserting that the court, in a Section 301 suit to confirm the decision of an arbitration panel's "interest arbitration" award renewing agreements, has extended the enforceability to timely withdrawn employers. *Tampa Sheet Metal Co.*, supra. Further, Respondent, noting the possible inconsistency between *Cahn Electric* and *Tampa Sheet Metal*, would escape the issue by distinguishing *Cahn Electric*. According to Respondent, *Cahn Electric* it dealt with termination of the interest arbitration obligation because of an employer's withdrawal from a multiemployer association rather than, as in the instant case, where the employer individually consented "to an agreement which incorporates a specific contract renewal procedure" (R. Br. 6). It must be noted, however, that the court in *Tampa Sheet Metal*, supra at 1461, following *NLRB v. Columbus Printing Pressman*, 543 F.2d 1161 (5th Cir. 1976), permitted enforcement of the interest arbitration award against the timely withdrawn member only to the extent of a new contract specifically minus the interest arbitration clause. According to the court, the fear of perpetually binding the parties to arbitration makes arbitrated enforcement of an interest arbitration clause, more than one time, against national policy.

If the Board's *Cahn Electric* rule (termination of interest arbitration obligation upon timely withdrawal) applies to the instant facts, however, I am bound thereby notwithstanding, with due deference, the court's apparently limited contrary position in *Tampa Sheet Metal*.

The short of the matter is that I reject Respondent's proffered distinction between, on one hand, an individual employer who binds himself to, and then, upon apparent contract termination, seeks to escape from, a multiemployer agreement (along with the overall grievance procedure, which is the fruit of multiemployer bargaining); and, on the other hand, an employer who, having lawfully withdrawn from a multiemployer group, seeks to escape from the group's interest arbitration mechanism, as in *Cahn Electric*. In either case, the employer, after apparent contract termination, whether a former member or a former consenting individual, is acting in its individual capacity and not as a member of the group. In either case, the entire interest arbitration mechanism was a result of multiemployer bargaining to which the erstwhile member or, as here, the erstwhile consenting "individual employer" was bound.

Where, as here, an employer affirmatively and timely, notifying all parties, rejects the use of the interest arbitration mechanism agreed upon by the multiemployer group, the holding in *Cahn Electric* is that the withdrawal from, or the

separation of, the individual employer from the group interest arbitration provision effectively cancels the interest arbitration provision as binding on the individual. Indeed, *Cahn Electric* dictum declares that even without effective withdrawal from the multiemployer group, and even prior to contract termination, an employer can abrogate the interest arbitration clause without violating the Act because such a clause relates to a mere nonmandatory subject of bargaining. Moreover, the decision in *Cahn Electric* specifically rejects the argument that the Union was merely seeking to enforce its rights under the interest arbitration provision which survived the termination of the agreement.¹²

Again, the issue is the applicability of the rule in *Cahn Electric*. The parties here stipulated that Neyens, on January 14, and February 13, 1987, reaffirmed to Illowa and to the Union that it had withdrawn its bargaining rights from Illowa; that it never thereafter assigned such rights to Illowa or SMACNA, and that it would no longer recognize the Union after the May 31 contract termination. It is a little late in the day for Respondent to implicitly now argue, distinguishing *Cahn Electric*, that Neyens' action of January 14, 1987, "withdrawing" from Illowa, was a nullity because Neyens had independent standing at all times and did not withdraw from anything. Thus while I have concluded that the holding in *Cahn Electric* is broad enough, under the instant facts, to include an employer, like Neyens, who was not a withdrawn member of the multiemployer group, it appears that Respondent treated Neyens as a former member of the multiemployer group by never challenging his repeated assertion that he had timely withdrawn from Illowa.

I conclude, therefore, that contrary to Respondent's argument (R. Br. 6), Neyens' individual consent to the 1985 agreement does not distinguish the case from *Cahn Electric Co.*, supra. The entire interest arbitration procedure was a product of multiemployer bargaining. When Neyens "withdrew" from granting its bargaining rights to Illowa on January 14, 1987, it sufficiently came within the holding of *Cahn Electric*, supra, relating to former members, to make the unilateral submission by the Union unlawful. As noted by General Counsel, the Board, in *Cahn Electric* and *Employers Assn. Roofers*, supra, held that, in similar situations, there was statutory restraint and coercion, within the meaning of Section 8(b)(1)(B) of the Act since "restraint" and "coercion" is not limited to tactics involving violence, intimidation, or economic reprisals.

3. Two further observations, I believe, are pertinent, the matters in subparagraph (a) being not dispositive in view of the conclusion in subparagraph (b):

(a) *Tampa Sheet Metal's* contractual resolution should not be followed in view of the Board's contrary statutory policy in *Retail Associates*:

I believe the rule in *Cahn Electric* is not only consistent with the underlying *Retail Associates* (120 NLRB 388 (1958)) rationale, see *Watson-Rummel Electric Co.*, 277

¹² In *Tampa Sheet Metal*, the court, citing *Nolde Bros. v. Bakery Workers Local 358*, 430 U.S. 243 (1977), and the same contract renewal language in art. X, sec. 8—which clause was before the Court held, that the arbitrator (Joint Board) properly ruled that under the "expansive language in the arbitration clause" ["this agreement shall remain in force and effect until conferences relating thereto have been terminated by either party"], the contract was in force and bound the parties.

185 (1971); cf. *Advice Memo, re Air Systems Engineering*, 117 LRRM 1508, 1510 (1984).

NLRB 1401 (1985), but that to permit the enforcement of the interest arbitration clause against a withdrawn member or, as here, an individual employer formally bound by assent to a multiemployer agreement, might well disturb the keystone element of the individual employer's "consent" necessary to the foundation of group bargaining. As the court noted in *Carvel Co. v. NLRB*, 560 F.2d 1030, 1034-1035 (1st Cir. 1977):

The application of the *Retail Associates* rule over the last two decades has given it sufficient precision of formulation to leave action under it unembarrassed by uncertainty and misgivings about possibly vagarious administrative applications. No more is necessary to operate safely in its domain of operation than advertence to the notice dates in the current bargaining agreement. Freedom of action is uncontrolled so long as it is unequivocal and timely.

With all due deference to the contrary holding in *Sheet Metal Workers Local 57 Welfare Fund v. Tampa Sheet Metal Co.*, 786 F.2d 1459 (11th Cir. 1986), cited by Respondent, the parties' bargain for interest arbitration is derived from group bargaining. Employer-members otherwise bound to the group bargain, postexpiration, of course remain bound to the interest arbitration provision. But those individual employers who have lawfully disassociated themselves from the group bargain should have the *statutory Retail Associates* benefit regardless of the group contractual obligation. The court's resolution of the *contractual* interest arbitration problem—imposing the new *group* contract on *Tampa Sheet Metal* minus the interest arbitration clause, while clearly reasonable, nevertheless impinges on the individual employer's *statutory* right, under *Retail Associates*, to escape that very result: to be free of the group bargain, with or without the group's interest arbitration clause or the fruit of any other group action. To hold that the otherwise withdrawn member or individual remains bound, nevertheless, under interest arbitration conflicts with *Retail Associates*.

(b) *Even if the Board should choose to follow Tampa Sheet Metal, implicitly thereby overruling Cahn Electric, the NJAB decision here goes well beyond the court's position:*

Lastly, there is the fear of being perpetually bound to arbitration and arbitrated contracts. *Sheet Metal Workers Local 59 (Employers Assn. of Roofers)*, 227 NLRB 520, 521 (1976). Even if Respondent's distinction—which I have rejected—between former group membership (*Cahn Electric*, supra) and an employer assenting to the group bargain containing the interest arbitration clause, were tenable, here, the NJAB decision (for which Respondent is actively pursuing court enforcement) directs Neyens to execute and be bound by the Illowa contract *with* the interest arbitration clause therein (Jt. Exh. 20). Thus, here, Respondent has obtained, and is pursuing enforcement of, an agreement with a provision well beyond that which the court in *Sheet Metal Workers Local 57 Welfare Fund v. Tampa Sheet Metal*, supra, and the Board, in *NLRB v. Columbus Printing Pressmen*, 543 F.2d 1161 (5th Cir. 1976), enfg. 219 NLRB 268 (1975), declare as lawful national policy. In *Tampa Sheet Metal*, the court stated (786 F.2d 1459, 1461):

Strong national policy favors arbitration of labor disputes. *Nolde Bros. Inc. v. Bakery Workers Local 358*, 430 U.S. 243 . . . (1977). This strong national policy does not, however, allow interest arbitration clauses to be forced into arbitrated contracts more than one time.

Apparently recognizing that the NJAB decision openly transgresses the lawful scope of Board and court public policy (a decision binding nonconsenting individual employers to arbitrated contracts under an interest arbitration clause with the new contract itself containing an interest arbitration clause), the NJAB decision, as above stated, then adds:

2. It is not the intent of the NJAB to impose any non-mandatory subjects on an unwilling party. In the event either the NLRB or any court of competent jurisdiction finds that any provision of the agreement imposed is a non-mandatory subject, that provision will be deleted. The parties in such event are directed to enter into negotiations to substitute a mandatory replacement. In the event the parties cannot agree on a replacement for the disputed section, the Board retains jurisdiction to resolve that issue.

This paragraph imposes on Neyens the obligation to commence, and win, a lawsuit to escape an obligation which the court, in *Sheet Metal Workers Local 57 Welfare Fund v. Tampa Sheet Metal Co.*, supra, relied on by Respondent, states is against national policy. Not only is this interest arbitration clause the imposition of a nonmandatory term which, as the Board states in *Sheet Metal Workers Local 59 (Employers Assn. of Roofers)*, supra, 227 NLRB at 521, is a barrier to future negotiations (establishing the perpetual existence of unlawful arbitration), but, if it does not conclusively bind Neyens to an Illowa contract containing the prohibited clause, it imposes an unacceptable burden and drag on Neyens' rights under *Retail Associates*. If, under the court's position in *Tampa Sheet Metal*, supra, as I read it, Neyens, after disassociating himself from group bargaining, must be absolutely free, in his new contract, from imposition of a further interest arbitration clause, then he should not be "free" only by recourse to successful litigation, which is the recourse he has under the instant NJAB decision. The burden of NJAB-directed legal entanglement of Neyens on Neyens' court and Board right to be "free" from a subsequent interest arbitration device is too heavy to be lawfully supported.

The full extent of the Union's (NJAB's) continued interest arbitration entanglement of Neyens may be observed in what awaits Neyens if, attempting recourse to the above contract procedures, as required by the NJAB, decision, his court or NLRB action is *successful*: he must nevertheless then bargain to seek a *mandatory* replacement for the ousted arbitration clause and, upon impasse, then again return to the NJAB to "resolve" the issue (whatever that means). Respondent, through NJAB, thus, has gone far beyond the limit imposed on individuals under interest arbitration clauses in *Tampa Sheet Metal*, supra, its own principal support, i.e., to be free of an interest arbitration clause in any succeeding contract imposed under an interest arbitration clause in an "expired" contract. By forcing Neyens to be bound by a contract against public policy, Respondent is similarly unlawfully re-

straining and coercing Neyens within the meaning of Section 8(b)(1)(B).¹³

The Application of *John Deklewa Co.*, 282 NLRB
1375 (1987)

The General Counsel argues that under *Deklewa*, Neyens had the right to repudiate the collective-bargaining relationship with the Union because the agreement was a Section 8(f) agreement and that, at its expiration on May 31, 1987, Neyens was under no obligation to recognize and bargain with the Union. This is so, according to General Counsel, because the Union never achieved the status under Section 9(a) of the Act as the employees' majority representative. Respondent counters by arguing that Neyens' three employees at the time of expiration were indeed union members; and, alternatively, even if they were not, *Deklewa* is not applicable because the contract had not expired on May 31 even though some of its terms would lead to that conclusion. In particular, Respondent points to the inclusion in the collective-bargaining agreement of article XII, section 1 (which provides that the contract remains in effect beyond its expiration date where proceedings pursuant to art. X, sec. 8, are not completed prior to the expiration date). Thus, Respondent would argue that here, the NJAB proceedings were proceedings under article X, section 8, and therefore the contract, by its terms, was extended beyond May 31 and that Neyens' repudiation of the agreement, contrary to the *Deklewa* rule, was the unlawful repudiation of an existing Section 8(f) agreement rather than the repudiation after expiration.¹⁴ Cf. *Sheet Metal Workers Local 57 v. Tampa Sheet*

¹³I do not pass on the further question of whether Respondent's Federal court enforcement of its NJAB-created contract against Neyens thus runs afoul of *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731 (1983).

¹⁴In 8(f) cases, the following four *Deklewa* principles apply, see *Garman Construction Co.*, 287 NLRB 88 (1987):

- (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 agreements 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.

Metal Co., supra, 786 F.2d at 1461. While I find that the *Deklewa* issue is immaterial to the disposition of this case, I agree with General Counsel (G.C. Br. 16) that a Neyens violation of Section 8(a)(5) in refusing to bargain, even assuming arguendo that, as Respondent asserts, Neyens unlawfully repudiated a Section 9(a) relationship under *Deklewa*¹⁵ is not a defense to the Union's misconduct under Section 8(b)(1)(B) in forcing the unwilling Neyens before an arbitration panel in which he is not represented. *S. Freedman Electric*, 256 NLRB 432 (1981), enf'd. without published opinion (2d Cir. 1981), petition for rehearing denied December 21, 1981. Thus, even if Neyens repudiated a Section 9(a) collective-bargaining relationship, and even if this were not lawful, this would not serve as a defense to Respondent's own unlawful conduct under Section 8(b)(1)(B).

CONCLUSIONS OF LAW

1. Robert Borders, d/b/a Neyens Refrigeration Co. (Neyens), is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Sheet Metal Workers Local Union No. 91, affiliated with Sheet Metal Workers International Association, AFL-CIO (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union unlawfully restrained and coerced Neyens, in violation of Section 8(b)(1)(B) of the Act, by causing Neyens to select the National Joint Adjustment Board (NJAB) as its collective-bargaining representative for settling contract disputes after the expiration of Neyens' obligation under the collective-bargaining agreement to submit to NJAB jurisdiction and after Neyens had rejected the NJAB as its collective-bargaining representative, and at a time when Neyens was not represented on NJAB by any members of its own choosing.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[Recommended Order omitted from publication.]

¹⁵In 8(f) contracts, under *Deklewa*, upon contract expiration, the Union enjoys no presumption of majority status, and the Union has the burden to prove that 9(a) relationship. *Harris Painting*, 286 NLRB 642 (1987).