

Oscar David McDaniel d/b/a McDaniel Electric and International Brotherhood of Electrical Workers, Local 477, AFL-CIO. Case 31-CA-19638

November 23, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

On June 30, 1993, Administrative Law Judge Michael D. Stevenson issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

We agree with the judge that the Respondent violated Section 8(a)(5) and (1) by repudiating the terms of a current collective-bargaining agreement with IBEW Local 477 (the Union). For the reasons set forth below, we adopt the judge's findings that the Respondent did not employ a stable one-man bargaining unit that would privilege repudiation of the agreement.

Facts

On December 3, 1978, the Respondent, an electrical contractor in the construction industry, executed a letter of assent (Letter of Assent-A) authorizing Southern Sierra Chapter, National Electrical Contractors Association (NECA) to act as its collective-bargaining representative for the purpose of negotiating contractual terms with the Union. The letter of assent, by its terms, remained effective until terminated by timely written notice to NECA and the Union. The Respondent stipulated at the hearing that it has not sent a termination letter either to NECA or to the Union.

The most recent bargaining agreement between Southern Sierra Chapter, NECA and the Union is effective from June 1, 1992, through May 31, 1995. The 1992-1995 agreement, covering jobsites in the counties of San Bernardino, Inyo, and Mono, California, provides that the Union shall be the exclusive referral source of employment applicants for the Respondent. The agreement also provides that the Respondent shall regularly contribute on behalf of unit employees to various IBEW-NECA benefit trust funds.

In October 1992, the Respondent commenced work at a construction project in San Bernardino County.¹

¹There is no evidence in the record detailing the Respondent's employment pattern before October 1992. Accordingly, the only relevant time period before us for consideration in determining whether the Respondent employed a stable one-man unit, is the period from October 1992 through February 1993.

At the time of the March 16, 1993 hearing in this proceeding, the Respondent had worked at the project for 21 weeks. It is undisputed that the Respondent employed unit employee Richard Harris at the project on a regular basis. At various times, the Respondent also employed two other employees at the project. Thus, between November 30, 1992, and February 26, 1993, the Respondent employed two or more employees at the project during at least 5 weeks of this 13-week period, including all three employees for 5 workdays during the most recent workweek in evidence at the hearing (the week ending February 27, 1993). Employee Marcelino Lepe worked at the project with employee Harris for at least 12 days over 3 weeks between November 30, 1992, and February 26, 1993, including the week ending February 27, 1993. Employee Mario Magdaleno worked with Harris at the project for 7 days over 3 weeks between January 29, 1993, and February 26, 1993, including the week ending February 27, 1993.² The Respondent stipulated at the hearing that "from the start of this job" in San Bernardino County, it has failed to abide by any of the terms and conditions set forth in the 1992-1995 bargaining agreement.

Discussion

As the judge found, the 1992-1995 bargaining agreement is an 8(f) agreement enforceable under *John Dektewa & Sons*, 282 NLRB 1375 (1987), *enfd.* sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988). By virtue of the Respondent's execution of

²Apart from the Respondent's above-recited history, we are unable to discern from the record the *exact* number of days and weeks that the Respondent employed other employees at the project. The Respondent stipulated at the hearing that employee payroll records introduced by the General Counsel "represent the total payroll for McDaniel Electric." In its brief in support of exceptions, the Respondent contends that certain hours listed on these payroll records pertain to work performed on a different, nonunit project outside San Bernardino County that is not covered by the collective-bargaining agreement. At the hearing, however, the judge noted that the payroll records contained references to the other worksite outside San Bernardino County but that the General Counsel had stated on the record that these notations were erroneous "and shouldn't be there." In response, the Respondent stated at the hearing that it had "no information to believe that that's not correct," but that it might be appropriate for the Respondent's owner, Oscar McDaniel, to testify on that matter. The judge then indicated that he had no objection to the stipulation and Oscar McDaniel never testified. Later in the hearing, the General Counsel attempted to clarify the stipulation so as to encompass the earlier representations regarding the allegedly erroneous notations. The Respondent objected on the basis that "the record reflects what we stipulated to." The General Counsel replied that "I'll leave it as it stands." In view of this state of ambiguity, we are unable to construe the stipulation as establishing, on this record, that all the work hours listed on the payroll records necessarily reflect work performed *only* at the San Bernardino County project. Accordingly, contrary to the judge, our above calculations are based on work hours, set forth in the payroll records, which are not in dispute and which all parties agree pertain to the San Bernardino County jobsite.

Letter of Assent-A and its failure to notify the Union and NECA of its termination in a timely manner, the Respondent is bound by the 1992–1995 bargaining agreement unless, as the Respondent contends, it had no more than one employee performing unit work at all material times. *Haas Garage Door Co.*, 308 NLRB 1186, 1187 (1992). For the reasons below, we agree with the judge that the Respondent violated Section 8(a)(5) and (1) as alleged.

The Board has long recognized the principle that collective bargaining presupposes that there is more than one eligible person who desires to bargain. *Luckenbach Steamship Co.*, 2 NLRB 181, 193 (1936). And the Board has recognized that if it is not empowered to direct an election and to certify a one-man unit, it logically follows that the Act precludes the Board from directing an employer to bargain with respect to such a unit. *Foreign Car Center*, 129 NLRB 319 (1960). In short, when the employee complement at issue has no “collective” character, and thereby has no meaningful relationship to the practice and procedure of collective bargaining that underlies the statutory framework, it is altogether appropriate for the Board to withhold its statutory representational and unfair labor practice processes.

Before we will withhold those processes, however, we will require proof that the purportedly single-employee unit is a stable one, not merely a temporary occurrence. Thus, in *Wilson & Sons Heating*, 302 NLRB 802 (1991), the Board found that there was not a stable one-employee unit even though the employer employed only one permanent employee for a 9-month period, encompassing a 4-month period before repudiation of the contract and a 5-month period after the repudiation. At other critical times, including the most recent period preceding the hearing and at the time of contract execution, the employer there employed more than one employee.

Here, the Respondent at the outset of the San Bernardino County project employed but one employee. In the last 13-week period preceding the hearing it employed two or more employees during at least 5 of those weeks. In the final workweek of that period it employed three employees for 5 workdays. This most recent employment pattern reveals the existence of a larger work force in the unit than is indicated by the initial employment on the project, and is more than enough to offset the Respondent’s employment for a time of only one employee. Indeed, the Respondent’s employment history at the project is typical, as the judge noted, of employment fluctuations in the construction industry. Accordingly, we agree with the

³ See generally *John Deklewa & Sons*, supra at 1376, 1389 fn. 62 (employer engaged in no projects between September 1983 and May 1984 in which it directly employed unit employees covered by bargaining agreement; Board held that “(a)n 8(f) contract is enforceable

judge that the Respondent’s recent employment of two or more employees at the project cannot be considered insignificant and that such employment belies the Respondent’s argument that it employs there a stable one-employee unit that is not collective in character.³

Further, although the Respondent contends that it performed no work within the jurisdiction of the Union for many years preceding the October 1992 commencement of work in San Bernardino County, and, therefore, employed no unit employees during that period, the record, as noted, is silent regarding the Respondent’s employment pattern before October 1992. In any event, even assuming that the Respondent’s assertions are accurate, it is our view that the Respondent’s most recent employment history is more relevant to our inquiry than are more remote periods when the Respondent purportedly was not engaged in business at all in the locality covered by the bargaining agreement.

Finally, we find that the cases relied on by the Respondent, in which the Board found a stable one-man unit, are factually distinguishable. In *Stack Electric*, 290 NLRB 575, 577 (1988), the employers there employed more than one employee for only about 2 weeks over a 3-year period, and employed no more than one employee during the remainder of that period. At the time of the hearing, the employers had employed no more than one employee continuously for several months. In *Searls Refrigeration Co.*, 297 NLRB 133, 135 (1989), one of two individuals at issue was found to be a supervisor and, following his exclusion, only a one-man employee unit, at most, remained. In *D & B Masonry*, 275 NLRB 1403, 1408–1410 (1985), the employer employed only one employee at the time of the hearing and the most recently laid-off unit employees had no reasonable expectation of reemployment, or worked elsewhere. In *Garman Construction Co.*, 287 NLRB 88, 94 (1987), there was no factual dispute that the employer employed only one unit employee. And in *Haas Garage Door Co.*, supra, two of the three individuals at issue were found to be independent contractors, leaving, at most, one unit employee.⁴

Accordingly, we adopt the judge’s finding that the Respondent violated Section 8(a)(5) and (1) by repudiating its obligations under the 1992–1995 bargaining agreement with the Union.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and

throughout its term although at a given time there may not be any employees to which the contract would apply”).

⁴ As explained above, the focus of our inquiry in this 8(a)(5) case is whether the employer maintains a stable one-man unit. Because the critical inquiry here is directed to the scope of the employer’s work force, the individual voting eligibility standards of *Daniel Construction Co.*, 133 NLRB 264 (1961), are not controlling.

orders that the Respondent, Oscar David McDaniel d/b/a McDaniel Electric, Anaheim, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Ann L. Weinman, Esq., for the General Counsel.
Wayne A. Hersh and Jon G. Miller, Esqs., of Irvine, California, for the Respondent.
Robert B. Bowen, Business Representative, of San Bernardino, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL D. STEVENSON, Administrative Law Judge. This case was tried before me at San Bernardino, California, on March 16, 1993,¹ pursuant to a complaint issued by the Regional Director of Region 31 for the National Labor Relations Board on December 23 and which is based on a charge filed by International Brotherhood of Electrical Workers, Local 477, AFL-CIO (the Union) on November 17. The complaint alleges that Oscar David McDaniel d/b/a McDaniel Electric (Respondent) has engaged in certain violations of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act).

Issues

Whether Respondent, while a party to an 8(f) agreement with the Union, failed to abide by and repudiate the agreement in violation of the Act.

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

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

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS

Respondent admits that for all times material herein it is a sole proprietorship owned by Oscar McDaniel d/b/a McDaniel Electric and engaged in the construction business as an electrical contractor and having an office and principal place of business located in Anaheim, California. Respondent, in the course and conduct of its business operations, annually sells goods or provides services valued in excess of \$50,000 to customers or business enterprises within the State of California, which customers or business enterprises themselves meet one of the Board's jurisdictional standards, other than the indirect inflow or indirect outflow standard. Furthermore, Respondent, in the course and conduct of its business operations, annually derives gross revenues in excess of \$250,000. Accordingly, it admits, and I find, that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

¹ All dates herein refer to 1992 unless otherwise indicated.

II. THE LABOR ORGANIZATION INVOLVED

Respondent admitted and stipulated during the hearing (Tr. 9), and I find, that International Brotherhood of Electrical Workers, Local 477, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

A. The Facts

On December 3, 1978, Respondent executed a Letter of Assent-A (G.C. Exh. 2), the effect of which is that Respondent has, since that time, been bound to a series of successive collective-bargaining agreements (Inside Wireman's Agreement) between the Union and Southern Sierras Chapter, National Electrical Contractors Association (NECA). The agreements, including the most recent which is effective between June 1, 1992, through May 31, 1995 (G.C. Exh. 3), cover jobsites located in San Bernardino, Inyo, and Mono Counties within the State of California.

The last agreement requires, inter alia, that the Union be the exclusive source of employment referrals for Respondent (G.C. Exh. 3, p. 21) and that Respondent regularly contribute certain payments to benefit trust funds on behalf of its unit employees (G.C. Exh. 3, p. 72 et. seq.).

Since early October (G.C. Exh. 4(a)) Respondent has performed work as an electrical subcontractor at a construction project called the Cooley Ranch Elementary School, located in Colton, California, which in turn is located within San Bernardino County. The general contractor on this same project is Gentosi Brothers, to whom Respondent submitted weekly payroll records, dated for weeks ending October 3 through February 27, 1993 (G.C. Exhs. 4(a)-4(aa)).

At hearing, the parties agreed and stipulated that for all times material to this case, Respondent has not complied with the terms and conditions of the agreement with the Union nor has Respondent sent a termination letter to the Union or to NECA (Tr. 19-20).

B. Analysis and Conclusions

The parties do not dispute that for all times material to this case, Respondent and the Union had a collective-bargaining relationship governed by Section 8(f) of the Act.² Accordingly, I look first to the Board's decision in *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), for guidance. In that case, the Board overruled previous interpretations of Section 8(f) and held that prehire agreements made pursuant to Section 8(f) are "binding, enforceable and not subject to unilateral repudiation throughout their term (id. at 1389 fn. 62). To ensure that employers and unions had available appropriate means for redress, the Board also stated in *Deklewa* that a collective-bargaining agreement permitted by

² All agree that Respondent is an employer primarily engaged in the building and construction industry. Because Respondent voluntarily entered into a collective-bargaining relationship with the Union by virtue of the Letter-of-Assent-A without regard to whether the Union had the support of a majority of the employees, or indeed without regard to whether there were any employees at the time, I conclude that an 8(f) relationship has been established initially and through succeeding contracts. *Stack Electric Co.*, 290 NLRB 575, 577 (1988); *Bifco Corp.*, 291 NLRB 1015, 1015 (1988).

Section 8(f) shall be enforceable through the mechanisms of Section 8(a)(5) and Section 8(b)(3).

The principles established by the Board’s decision in *Deklewa & Sons* are subject to an exception where applicable. As explained by the Board in *Stack Electric Co.*, supra, 290 NLRB at 577:

In *D & B Masonry*, 275 NLRB 1403 (1985), the Board adopted the judge’s discussion of this issue at 1408.

It is settled that if an employer employs one or fewer unit employees on a permanent basis that the employer, without violating Section 8(a)(5) of the Act, may withdraw recognition from a union, repudiate its contract with the union, or unilaterally change employees’ terms and conditions of employment without affording a union an opportunity to bargain. *SAC Construction Co.*, 235 NLRB 1211, 1230 (1978); *Sunray Limited*, 258 NLRB 517, 518 (1981); *Chemetrans Corp.*, 268 NLRB 335 (1983). The basis for permitting an employer to engage in this conduct was explained by the Board in *Foreign Car Center*, 129 NLRB 319, 320 (1960), as follows:

The Board has held that it will not certify a one-man unit because the principles of collective bargaining presuppose that there is more than one eligible person who desires to bargain. The Act therefore does not empower the Board to certify a one-man unit. By

parity of reasoning, the Act precludes the Board from directing an employer to bargain with respect to such a unit. While we have held that the Act does not preclude bargaining with a union on behalf of a single employee, if an employer is willing, we have never held that an employer’s refusal to bargain with a representative on behalf of a one-man unit is a refusal to bargain within the meaning of Section 8(a)(5).

See also *Jervis B. Webb Co.*, 302 NLRB 316, 317 fn. 7 (1991).

As its sole defense in the instant case, Respondent contends that it had only a single unit employee, Richard Harris; Respondent concludes therefore, that “employers with one or fewer unit employees are free to: (1) withdraw recognition from a Union; (2) repudiate their purported contracts with a Union, or (3) unilaterally change their employees terms and conditions of employment without affording a Union an opportunity to bargain.” (Br. pp. 3–4, Tr. 14–15).

The General Counsel, on the other hand, contends that Respondent employed four unit employees, Harris, Brian McDaniel (son of Respondent’s owner), Mario Magdaleno, and Marcelino Lepe (Tr. 22–23). Because none of the four alleged unit employees testified, I must look to Respondent’s payroll records (G.C. Exh. 4) to resolve the issue.

Summary of Payroll Records³

<i>For Week Ending</i>	<i>Brian McDaniel</i>	<i>Richard Harris</i>	<i>Mario Magdaleno</i>	<i>Marcelino Lepe</i>
10/3 (G.C. Exh. 4(b))	9/30 (8 hrs.), 10/1 (1 hr.)	9/30 (8 hrs)		
10/10 (G.C. Exh. 4(c))	10/7 (4 hrs.), 10/8 (8 hrs.)	10/8 (8 hrs.)		
10/17 (G.C. Exh. 4(d))	10/12 (3 hrs.), 10/14 (4 hrs.) 10/15 (8 hrs.)			
10/24 (G.C. Exh. 4(e))	10/19 (7 hrs.), 10/21 (8 hrs.) 10/22 (8 hrs.)	10/21 (8 hrs.), 10/22 (8 hrs.)		
10/31 (G.C. Exh. 4(f))	10/27 (2 hrs.), 10/28 (7 hrs.) 10/29 (8 hrs.)	10/27 (2 hrs.), 10/28 (7 hrs.) 10/29 (8 hrs.)		
11/7 (G.C. Exh. 4(h))	11/2–11/6 (8 hrs./day)	11/2–11/6 (8 hrs./day)		
11/14 (G.C. Exh. 4(i))	11/9–11/13 (8 hrs./day)	11/9–11/13 (8 hrs./day)		
11/21				

³In her brief, p. 4, the General Counsel refers to the “jobsite payroll records for the weeks ending September 27, 1992 “This appears to be a mistake since the first payroll record in evidence is for the

week ending October 3 (G.C. Exh. 4(b)). Furthermore, when the General Counsel first introduced the records, she described the first date as October 3, 1992 (Tr. 15).

Summary of Payroll Records³—Continued

<i>For Week Ending</i>	<i>Brian McDaniel</i>	<i>Richard Harris</i>	<i>Mario Magdaleno</i>	<i>Marcelino Lepe</i>
(G.C. Exh. 4(j))	11/16–11/20 (8 hrs./day)	11/16–11/20 (8 hrs./day)		
11/28				
(G.C. Exh. 4(k))	11/23 (8 hrs.), 11/24(8 hrs.)	11/23 (8 hrs.), 11/24 (8 hrs.)		
.....	11/25 (4 hrs.)	11/25 (4 hrs.)		
12/5				
(G.C. Exh. 4(m))	11/30–12/4 (8 hrs./day)	11/30–12/4 (8 hrs./day)		11/30–12/4 (8 hrs./day)
12/12				
(G.C. Exh. 4(n))	12/7–12/11 (8 hrs./day)	12/7–12/11 (8 hrs./day)		12/7–12/11 (8 hrs./day)
12/19				
(G.C. Exh. 4(o))	12/14–12/18 (8 hrs./day)	12/14–12/18 (8 hrs./day)		12/14–12/18 (8 hrs./day)
12/26				
(G.C. Exh. 4(p))	12/21 (8 hrs.), 12/22 (8 hrs.)	12/21 (8 hrs.), 12/22 (8 hrs.)		12/21 (8 hrs.)
.....				12/22 (8 hrs.)
1/2/93				
(G.C. Exh. 4(q))	12/28 (8 hrs.), 12/29 (8 hrs.)	12/28 (8 hrs.), 12/29 (8 hrs.)		12/28 (8 hrs.)
.....	12/30 (8 hrs.)			12/29 (8 hrs.)
1/9/93				
(G.C. Exh. 4(s))	NO WORK	NO WORK	NO WORK	NO WORK
1/16/93				
(G.C. Exh. 4(t))	1/11 (6 hrs.), 1/12 (6 hrs.)			
.....	1/13 (6 hrs.), 1/14 (2 hrs.)			
1/23/93				
(G.C. Exh. 4(u))	1/19 (2 hrs.), 1/21 (5 hrs.)			
.....	1/22 (6 hrs.)			
1/30/93				
(G.C. Exh. 4(v))	1/25–1/29 (8 hrs./day)	1/25–1/29 (8 hrs./day)	1/29 (8 hrs.)	
2/6/93				
(G.C. Exh. 4(x))	2/1–2/5 (8 hrs./day)	2/1–2/5 (8 hrs./day)	2/2 (8 hrs.)	
2/13/93				
(G.C. Exh. 4(y))	2/10 (8 hrs.), 2/12 (8 hrs.)	2/10 (8 hrs.), 2/12 (8 hrs.)		
2/20/93				
(G.C. Exh. 4(z))	2/15 (2 hrs.), 2/16 (6 hrs.)	2/15 (2 hrs.), 2/16 (6 hrs.)		
.....	2/17 (8 hrs.)	2/17 (8 hrs.)		
2/27/93				
(G.C. Exh. 4(aa))	2/22–2/26 (8 hrs./day)	2/22–2/26 (8 hrs./day)	2/22–2/26 (8 hrs./day)	2/22–2/26 (8 hrs./day)

In analyzing the payroll records, I first disregard Brian McDaniel because, as the son of Respondent's owner, he is not an "employee" pursuant to Section 2(3) of the Act.⁴ "Where the employer does business as a sole proprietorship

⁴In its brief, p. 3, the Union describes Brian McDaniel as "foreman on the project." Because he is excluded from the unit based on his status as son of the owner, it is unnecessary to consider the question as to whether Brian McDaniel was a statutory supervisor. Further, this issue was never litigated.

[as is true here], it is clear that the employer's children . . . are statutorily excluded." II Hardin, *Developing Labor Law* 1633 (3d Ed. 1992) citing *Johnson Metal Products*, 161 NLRB 844 (1966).

Turning next to the payroll records, I count 21 weeks of work and 1 week of no work. For the first 9 weeks; Respondent had only a single unit employee, Harris. Thereafter beginning the week ending December 5, Respondent had

more than a single employee on 8 out of the remaining 13 weeks.

In *Haas Gargage Door Co.*, 308 NLRB 1186, 1187 (1992), the Board stated:

[T]he Board has held that the one-man unit rule applies in an 8(f) context. That rule provides that when a unit consists of no more than a single *permanent employee at all material times*, an employer has no statutory duty to bargain and thus, will not be found in violation of the Act for disavowing a bargaining agreement and refusing to bargain. [Emphasis added.]

The Board then reversed the administrative law judge and dismissed the case finding that Respondent had no employees doing unit work.

Despite the Board's flat statement quoted above, other cases reflect that the Board does not intend to apply mechanically the "one man unit" rule. For example, in *Searls Refrigeration Co.*, 297 NLRB 133 (1989), the Board affirmed the decision of the administrative law judge recommending dismissal of a case though Respondent had employed two persons on a part-time basis over a period of 2 months out of a 27-month period. One of the two persons may have been a supervisor. However, the administrative law judge in *Searls Refrigeration Co.* noted that in *Stack Electric Co.*, the Board applied the "one man unit" rule to one of the respondents (North Town), even though North Town employed two employees during 2 weeks of the 3-year contract term. The administrative law judge concluded that, "apparently, the Board considered the 2-week period to be insignificant under the circumstances" (id. at 135).

The work performed by the two- or three-person unit in the present case for the weeks in question cannot be considered insignificant. Rather the facts here show the type of fluctuation in unit size which would be typical for many employers during construction work and which is the basis for Section 8(f) of the Act. In *Garman Construction Co.*, 287 NLRB 88 (1987), the Board reversed the administrative law judge and found application of the "one man unit" rule to be proper in that case. However, in *Garman Construction*, supra at 89 fn. 8, the Board added:

We note that had the facts been different and the unit of operating engineers been subject to fluctuations in size, only temporarily decreasing in size to a single employee unit, the Respondent's actions would have violated Section 8(a)(5) of the Act. See *Deklewa* above at fn. 62.⁵

Respondent's argument that the repudiation occurred during the initial 2 months, after which it was free to disavow the 1978 agreement would allow an employer to manipulate its work schedule to defeat its bargaining obligations. Only by looking at the total work schedule for all the weeks in issue can a proper decision be reached.

⁵The *Deklewa* footnote reads as follows: "Accordingly, the Respondent's defense that it employed no ironworkers when it repudiated the contract is without merit. An 8(f) contract is enforceable throughout its term, although at a given time there may not be any employees to which the contract would apply."

By examining the total work schedule in this case and all other relevant evidence, I find that Respondent has violated Section 8(a)(5) and (1) of the Act because under the circumstances present in this case, the Board's one-person unit defense is not available. I further find that Respondent's authorities of *Stack Electric*, and *D & B Masonry* may be distinguished on their facts and do not apply to this case.

THE REMEDY

Having found that Respondent has engaged in an unfair labor practice, I will recommend that it be ordered to cease and desist and take certain affirmative actions designed to effectuate the policies of the Act. The Respondent will be ordered to make whole, as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), any employees for losses they may have suffered as a result of the Respondent's failure to adhere to the contract, with interest, as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

CONCLUSIONS OF LAW

1. The Respondent, Oscar David McDaniel d/b/a McDaniel Electric, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union, International Brotherhood of Electrical Workers, Local 477, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.
3. The following described employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

Included: All inside wiremen, including journeymen and apprentices employed by Respondent in San Bernardino, Inyo and Mono Counties, California.

Excluded: All other employees, guards and supervisors as defined in the Act.

4. By repudiating its current collective-bargaining agreement with the Union, by refusing to honor and abide by the terms of article IV, referral procedure of the 1992-1995 Inside Wireman's Agreement between the Union and Southern Sierras Chapter of NECA and by refusing to make trust fund contributions as required by the same agreement, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the Act.

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

The Respondent, Oscar David McDaniel d/b/a McDaniel Electric, Anaheim, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Repudiating its current collective-bargaining agreement (Inside Wireman's Agreement) with the Union.

⁶If 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.

(b) Refusing to honor and abide by the terms of article IV, referral procedure of the 1992–1995 Inside Wireman’s Agreement.

(c) Refusing to make trust fund contributions as required by the same agreement.

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

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

(a) Honor and adhere to the current collective-bargaining agreement (Inside Wireman’s Agreement) entered into by the Southern Sierra Chapter of NECA and the Union.

(b) Make all past due and current trust fund contributions as required by the same agreement referred to in 2(a) above.

(c) Make whole any employees, in the manner set forth in the remedy, for any losses they may have suffered as a result of the Respondent’s failure to adhere to its contract.

(d) 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.

(e) Post at its Anaheim, California office, copies of the attached notice marked “Appendix.”⁷ Copies of the notice, on forms provided by the Regional Director for Region 31, 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 where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure

⁷If 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.”

that the notices are not altered, defaced, or covered by any other material.

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

APPENDIX

NOTICE TO EMPLOYEES
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 our current collective-bargaining agreement (Inside Wireman’s Agreement) with the International Brotherhood of Electrical Workers, Local 477, AFL–CIO.

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

WE WILL honor and adhere to the current collective-bargaining agreement entered into for the period June 1, 1992, through May 31, 1995, between the Southern Sierras Chapter of NECA and the Union.

WE WILL make all past due and current trust fund contributions as required by the same agreement referred to immediately above.

WE WILL make employees whole for any losses they may have suffered as a result of our failure to adhere to the collective-bargaining agreement described above.

OSCAR DAVID MCDANIEL D/B/A MCDANIEL
ELECTRIC