

Cowboy Scaffolding, Inc. and Carpenters District Council of Kansas City and Vicinity. Case 17–CA–19433

September 18, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

On April 17, 1998, Administrative Law Judge Steven M. Charno issued the attached bench decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed an answering brief.

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

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

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by repudiating its 8(f) collective-bargaining agreement with the Union and by failing to make contractually required payments to pension and other employee benefit funds. In its exceptions, the Respondent admits that it entered into a contract with the Union in January 1993, but contends that that contract was only for one job, a brief project at Lacygne, Kansas.² We find no merit in that contention.

As the Respondent concedes, on January 27, 1993, its chief operations officer and part owner, Roy Mercer, executed a "contract stipulation" on behalf of the Respondent which stated:

The Employer signatory hereto . . . acknowledges receipt of a copy of the Joint Agreement ("Labor Agreement") presently in effect between the Builders' Association of Missouri (the "Association") and . . . [the Union]. The Employer and the Union hereby stipulate and agree to be bound by the terms and conditions of the aforesaid Labor Agreement for the duration thereof and it is further stipulated and agreed hereby that they will be similarly bound by all subsequent agreements between the Association and the Union unless both parties thereto (the Asso-

ciation and the Union) receive from the Employer written notice of withdrawal of this stipulation at least sixty but no more than ninety days prior to the termination of any such Labor Agreement.

Article XV of the "Labor Agreement" to which the Respondent agreed to be bound provided:

This agreement entered into on August 20, 1990 shall remain in full force and [e]ffect until March 31, 1993, and shall be automatically renewed from year to year thereafter unless opened by either party hereto for changes or termination by a notice to the other party at least sixty (60) days prior to the expiration date.

There is nothing in either of these provisions that suggests that the parties contemplated a single-job agreement. To the contrary, the latter provision clearly states that the 1990–1993 contract will remain in effect through its March 31, 1993 expiration date and will automatically renew on a yearly basis thereafter unless either of the parties gives timely notice of an intent to modify or terminate. The "contract stipulation" states with equal clarity that the Respondent is bound by the terms and conditions of the contract for its duration, and of any subsequent contracts, unless it gives timely notice to the contrary. Nor is there any evidence that the Respondent informed the Union, at the time it executed the original stipulation, that it intended to be bound only for the brief duration of the Lacygne project. Mercer admitted that he had not so informed the Union and that the Union had not communicated any such understanding to him. Indeed, the General Counsel's witnesses testified, without contradiction, that the Union does not enter into single-job agreements, and that it never has done so.

The Respondent argues that certain conduct by the parties indicates that they intended only a single-project agreement. We are not persuaded. As the Respondent notes, Larry Burton, the union business representative who was initially contacted concerning a possible contractual relationship with the Respondent, was aware that the Lacygne job would be brief and that the Respondent was going to leave the area when the job was finished. However, Burton also testified that Charlie Cheek, who at the time was a co-owner of the Respondent, stated that the Respondent wanted to get into the Kansas City market.³ The Respondent's absence from the Union's juris-

¹ No exceptions were filed to the judge's finding that the bargaining unit comprises only employees of the Respondent. The judge inadvertently referred to Union Business Representative "Robert" Greer. Greer's first name is William, not Robert. The error is inconsequential.

² The Respondent also argues that its absence from the Union's jurisdiction for several years, during which it employed no employees represented by the Union, absolves it from any bargaining obligation. There is no merit to that argument. As the Board held in *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988), an 8(f) agreement is enforceable throughout its term even though at any given time there may be no employees to whom it applies. 282 NLRB at 1389 fn. 62. See also *McDaniel Electric*, 313 NLRB 126, 127 (1993) (employer's most recent employment history more relevant than more remote periods when it was not working in the area covered by the union contract).

³ Burton first testified that he had spoken to Mercer regarding the Respondent's becoming a signatory contractor. On cross-examination, he stated that he might have talked to Cheek instead of Mercer. Cheek died in 1995, and Burton's account of his transaction with Cheek is un rebutted. Thus, Mercer's self-serving hearsay testimony that Cheek told *him* the contract was for only one job is of no probative value.

The Respondent contends that Burton did not call the "evergreen" language in the contract to the Respondent's attention. This contention is contrary to Burton's un rebutted testimony. It is also irrelevant, because the "evergreen" language is plain on the face of the contract, a

diction for nearly 4 years is as consistent with an inability to acquire work in the area as it is with an intention not to work there. Neither is it significant that two of the Respondent's supervisors made statements to the Union indicating the absence of a contract between the parties.⁴ Their actions are consistent with a subjective lack of awareness of the contract on those individuals' part. Finally, that the Union did not notify the Respondent that successor agreements had been entered into, and did not furnish it with copies of those agreements, indicates only that the Union did not think it necessary to act as the Respondent's agent in these matters. There was nothing to prevent the Respondent from asking to be furnished with notice of subsequent contract negotiations or with copies of any successor collective-bargaining agreements, or even from insisting on those conditions as part of the initial agreement.

The Respondent also contends that it could not have withdrawn from the contract stipulation in a timely fashion because it executed the stipulation in 1993 at a time when it was too late to terminate the 1990–1993 contract and because it was never notified of, and never received copies of, successor agreements from the Union. This argument is without support. To begin with, the Respondent signed the stipulation on January 27, 1993, more than 60 days before the 1990–1993 contract expired on March 31. Thus, there was nothing, on this record, to prevent the Respondent from exercising its right to withdraw from the stipulation in a timely fashion, immediately after signing it. Moreover, even if the Respondent actually had been presented with the stipulation to sign less than 60 days before the contract was due to expire, it could have attempted to negotiate a more favorable withdrawal provision, but there is no indication that it did so. Finally, even if the Respondent had been automatically made a party to the 1993–1996 successor agreement, it could have timely withdrawn from it under the terms of the stipulation, but it did not. It is no answer that the Union failed to notify the Respondent of the existence of successor contracts or to furnish copies of them.⁵ Again, the Respondent could have requested to be notified of any successor agreements and to be sent cop-

copy of which was faxed to the Respondent before Mercer signed the contract stipulation.

⁴ One individual approached the Union in September 1996 on the subject of the Respondent's possibly signing a contract; the other, in 1997, denied that the Respondent had a contract with the Union. Neither testified, and there is no evidence that either knew of the circumstances surrounding the Respondent's original execution of the contract stipulation.

⁵ The "contract stipulation" signed by the Respondent did not require the Union to give notice of successor contracts between the Builders Association and the Union. In addition, that "contract stipulation" provided that an employer who wishes to terminate has the obligation to give notice. Thus, an employer who signs the stipulation must take steps to ascertain the termination dates of successor contracts, and then (if it wants to terminate) must act timely with respect to such dates. In this case, the Respondent did neither.

ies of them, or even insisted on such terms, but there is no indication that it did so.

Thus, the plain, unambiguous terms of both the collective-bargaining agreement and the stipulation belie any suggestion that the parties intended only a single-project agreement, and the conduct of the parties both at and after the time the Respondent signed the stipulation does not cast doubt on their intentions as embodied in those documents.⁶ We therefore agree with the judge that the Respondent was bound by the 1990–1993 agreement and that, because it did not timely exercise its right to withdraw from the stipulation and terminate either that agreement or any of the successor agreements that are in evidence, it continued to be bound by the agreement in existence in September 1997, when it unlawfully repudiated its contractual duties.⁷

AMENDED REMEDY

In his recommended Order, the judge directed the Respondent to make the pension and other benefit funds whole for its unlawful failure to make the contractually required payments on behalf of employees represented by the Union. He did not, however, provide for interest on those payments or order make-whole relief for any affected employees. We shall modify the judge's recommended Order to provide the usual remedies imposed in such cases.⁸ Specifically, we shall require the Respondent to make whole any employees adversely affected by its failure to abide by the terms of the collective-bargaining agreement, in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), *enfd.* 444 F.2d 502 (6th Cir. 1971), and by reimbursing them for any expenses they may have incurred because of its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 *fn.* 2 (1980), *enfd. mem.* 661 F.2d 940 (9th Cir. 1981), with interest on all amounts owing as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).⁹ We shall also provide for any interest and other amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB

⁶ See *Cedar Valley Corp.*, 302 NLRB 823, 830 (1991), *enfd.* 977 F.2d 1211 (8th Cir. 1992).

⁷ *Neosho Construction Co.*, 305 NLRB 100 (1991); *Cedar Valley Corp.*, *supra*; *McDaniel Electric*, *supra*.

⁸ The complaint alleges, and the Respondent admits, that it failed and refused to adhere to the most recent collective-bargaining agreement, *including but not limited to* making the required fund contributions. In view of this admission, which at least potentially includes failing to abide by other contractual terms, we shall provide make-whole relief for any employees who may not have received the wages and benefits called for by the contract, and/or who may have incurred expenses as a result of the Respondent's failure to make the required contributions to the fringe benefit funds.

⁹ To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer's delinquent contributions during the period of the delinquency, the respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the respondent otherwise owes the fund.

1213, 1216 fn. 7 (1979). Finally, we shall modify the Order in accordance with our decision in *Excel Container*, 325 NLRB 17 (1997).

ORDER

The National Labor Relations Board orders that the Respondent, Cowboy Scaffolding, Inc., Burleson, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Untimely repudiating the terms and conditions of its collective-bargaining agreement with Carpenters District Council of Kansas City and Vicinity and failing and refusing to recognize and abide by the terms of that agreement.

(b) Refusing to bargain collectively with the Union by failing and refusing to adhere to the terms of the collective-bargaining agreement, including but not limited to making contractually required payments to pension and other benefit funds that are mandatory subjects of bargaining.

(c) 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) On request, recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in the following appropriate unit:

All carpenters, millwrights, pile driver men, and lathers employed by the Respondent on job sites in the counties of Jackson, Clay, Platte, Lafayette, Ray, Carroll, Saline, Bates, Johnson, Cass, Harrison, Mercer, Grundy, Davies, Caldwell, Livingston, Henry, St. Clair, Hickory, Camden, Laclede, and Vernon, in the state of Missouri, and in the counties of Johnson, Miami, Lynn, Leavenworth, and Wyandotte, in the state of Kansas, excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act, and all other employees.

(b) Make the employees in the bargaining unit whole, with interest, for any losses they may have suffered as a result of the Respondent's unlawful failure and refusal to adhere to the terms of the collective-bargaining agreement, in the manner set forth in the Amended Remedy section of this Decision and Order.

(c) Make the pension and other benefit funds that are mandatory subjects of bargaining whole for the losses they have suffered as a result of the Respondent's unlawful failure and refusal to make the contractually required payments to those funds.

(d) Preserve and, within 14 days of a 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 back-pay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its current jobsites within the geographic area encompassed by the appropriate unit, and at its place of business in Burleson, Texas, copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 22, 1997.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that 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.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT untimely repudiate the terms and conditions of our collective-bargaining agreement with Carpenters District Council of Kansas City and Vicinity or fail and refuse to recognize and abide by the terms of that agreement.

¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT refuse to bargain collectively with the Union by failing and refusing to adhere to the terms of the collective-bargaining agreement, including but not limited to making contractually required payments to pension and other benefit funds that are mandatory subjects of bargaining.

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

WE WILL, on request, recognize and bargain with the Union as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All carpenters, millwrights, pile driver men, and lathers employed by us on job sites in the counties of Jackson, Clay, Platte, Lafayette, Ray, Carroll, Saline, Bates, Johnson, Cass, Harrison, Mercer, Grundy, Davies, Caldwell, Livingston, Henry, St. Clair, Hickory, Camden, Laclede, and Vernon, in the state of Missouri, and in the counties of Johnson, Miami, Lynn, Leavenworth, and Wyandotte, in the state of Kansas, excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act, and all other employees.

WE WILL make the employees in the bargaining unit whole, with interest, for any losses they may have suffered as a result of our unlawful failure and refusal to adhere to the terms of the collective-bargaining agreement.

WE WILL make the pension and other benefit funds that are mandatory subjects of bargaining whole for the losses they have suffered as a result of our unlawful failure and refusal to make the contractually required payments to those funds.

COWBOY SCAFFOLDING, INC.

Susan A. Wade-Wilhoit, Esq. and Mary Taves, Esq., for the General Counsel.

David Crittenden, Esq. and Rayfford T. Blankenship, Esq. (R. T. Blankenship & Associates), of Greenwood, Indiana, for the Respondent.

Michael T. Manley, Esq. (Blake & Uhlig, P.A.) of Kansas City, Kansas, for the Charging Party.

BENCH DECISION AND CERTIFICATION

STEVEN M. CHARNO, Administrative Law Judge. This case was tried before me in Overland Park, Kansas, on March 20, 1998. After oral argument, I issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations. Appendix A is the portion of the transcript containing my decision, while Appendix B contains corrections to that transcript. [Omitted from publication. Errors in the transcript have been noted and corrected.] In accordance with Section 102.45 of the Board's Rules and Regulations, I certify the accuracy of the amended transcript containing my decision.

[Recommended Order omitted from publication.]

APPENDIX A

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ADMINISTRATIVE LAW JUDGE CHARNO: All right. Any—any last bite at the apple, gentlemen?

MR. CRITTENDEN: No objection.

ADMINISTRATIVE LAW JUDGE CHARNO: Let me ask you to be back here at half past. Hopefully, we'll be here at that point or shortly thereafter, at which point you'll get my decision.

(Off the record.)

ADMINISTRATIVE LAW JUDGE CHARNO: Parties have anything else that they have discovered during their researches over the recess that they'd like to bring to my attention at this time?

MS. WADE-WILHOIT: Your Honor, I'd just bring to your attention that the cases cited by Respondent, being Stack, D & B Masonry, and Garman, all apply to situations where the—the contracting—the employer had consistently one employee in its work force and didn't apply to the situation we have here where we have intermittent work. That was specifically raised in Re-senger and dealt with, and also in Declowa.

ADMINISTRATIVE LAW JUDGE CHARNO: All right. In response to charges timely filed, Amended Complaint was issued in this matter on March 5, 1998, which alleged that Cowboy Scaffolding, Inc., hereinafter Respondent, had violated Sections 8(a)(1) and

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(5) of the National Labor Relations Act as amended, hereinafter Act, by refusing to adhere to a Collective Bargaining Agreement and by withdrawing recognition from the Carpenters District Council of Kansas City and Vicinity, hereinafter the Union. Respondent's Answer denied the commission of any unfair labor practice.

The hearing was held before me on March 20, 1998, in Kansas City, Missouri. At the conclusion of the parties' presentation of evidence I heard oral argument from the General Counsel, the Union, and Respondents.

Based upon those arguments and the record now before me I make the following findings which are, unless otherwise indicated, based on credible uncontroverted evidence.

Respondent is a corporation with a place of business in Burlington, Texas, where it is engaged in the erection—or let me rephrase that. It is engaged in the erection of scaffolding in the building and construction industry. During the 12 months ending October 31, 1997, Respondent, in the conduct of its business, purchased and received goods valued in excess of \$50,000 from outside Texas and sold and shipped goods of similar value to points outside Texas. Respondent is admitted to be, and I find is, an employer engaged in commerce within the meaning of the Act.

Respondent has admitted that at all material times it and AMS Construction Company, Inc., d/b/a AMS Staff Leasing,

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hereinafter AMS, have been parties to a contract which provides among other things that Respondent leases its employees from AMS and AMS provides payroll and human resources functions for Respondent with regard to a construction project at the Kansas City International Airport in Kansas City, Missouri, hereinafter the KCI jobsite.

Respondent further admits that at all material times AMS has administered a common labor policy with Respondent for the KCI jobsite employees of Respondent and AMS.

Respondent further admits that at all material times Respondent and AMS have been joint employers at the—of the KCI job site employees of Respondent and AMS.

It is admitted and I find that the Union is a labor organization within the meaning of the Act.

It is admitted that at all material times the Builders Association of Missouri, hereinafter the Association, has been an organization composed of various employers engaged in the building and construction industry, one purpose of which is to represent employer members and other employers who stipulate to be bound to Collective Bargaining Agreements negotiated by the Association, in negotiating and administering Collective Bargaining Agreements with the Union. As relevant, the Association and the Union have been parties to successive Collective Bargaining Agreements, hereinafter Joint Agreements, for the following terms: August 20, 1990 through March 31st,

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1993; May 1, 1993 through March 31st, 1996; and April 1, 1996 through March 31st, 1999, as amended for the period April 1, 1997 through March 31st, 1998.

Based on Article 2 and Amendment 1 of the 1990 through 1993 Joint Agreement, I find that the appropriate unit for the purpose of collective bargaining within the meaning of Section 9(b) of the Act is as follows. All carpenters, millwrights, pile driver men, and lathers, employed by Respondent on jobsites in the counties of Jackson, Clay, Platte, Lafayette, Ray, Carroll, Saline, Bates, Johnson, Cass, Harrison, Mercer, Grundy, Davies, Caldwell, Livingston, Henry, St. Clair, Hickory, Camden, Laclede, and Vernon, in the state of Missouri, and in the counties of Johnson, Miami, Lynn, Leavenworth, and Wyandot, in the state of Kansas, excluding office clerical employees, professional employees, guards, and supervisors as defined in the Act, and all other employees.

In January of 1993 one of Respondent's owners contacted the Union and inquired about hiring employees to work on a carpentry job in Lacygne, Kansas. It is uncontroverted that in response to this call the Union sent Respondent a copy of the then effective Joint Agreement and a copy of a contract stipulation under which a signatory Employer agreed to be bound by the terms of the Joint Agreement, including those requiring contributions to the Health and Welfare, Pension, and Industry Advancement and Education Funds, as well as by all future

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agreements, unless timely notice was given of termination by the Employer.

In the face of Mr. Mercer's lack of memory on the subject, my finding is based upon, first, the signed acknowledgment by Mr. Mercer, who is one of Respondent's owners and its Chief Operating Officer, that he received the Joint Agreement then in effect. Second, the parties' stipulation concerning receipt of the agreement. Third, the parties' stipulation and Mr. Mercer's candid admission that he signed the contract stipulation in question. Mr. Mercer did, in fact, sign that stipulation and return it to the Union. The Union and Respondent fully met their obligations under the contract stipulation with respect to the Lacygne job.

It is uncontested that Respondent has not terminated the contract stipulation in the manner required by the terms of that document. It is equally uncontested that the Union has made no effort to, first, inform Respondent of the termination of or renegotiation of any of the Joint Agreements subsequent to the 1990 through 1993 contract or, second, convert its existing Section 8(f) relationship to a full Section 9(a) relationship.

From September 24, 1997, to the present Respondent has been engaged in a construction project at the KCI airport. On October 22nd, 1997, or thereabouts, Robert Greer, a Union business representative, visited the KCI jobsite and observed

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Respondent's employees performing a significant amount of carpentry work, which is within the jurisdiction of his Union. Greer spoke with Respondent's admitted supervisor and agent, Jack Larson, at the jobsite informing him that Respondent had a contract with the Union. Larson responded that Respondent didn't think it had such a contract. The following day when Greer returned the call of John Larson, another admitted supervisor and agent of Respondent, the latter repeated that Respondent did not have a contract with the Union.

The parties have stipulated that since 1964 [sic] Respondent has made no contributions to the Union's Health and Welfare Fund, its Pension Fund, or its Industry Advancement an Education Fund. The question before me is whether Respondent has violated the Act by refusing to make the fund contributions required by the effective Joint Agreement and by withdrawing recognition from the Union as the exclusive collective bargaining representative of Respondent's unit employees.

Relying upon the rationale articulated in *John DeClewa & Sons*, 282 NLRB 1375, 1385 (1987), I conclude that Respondent was party to a Section 8(f) agreement with the Union and that Respondent was not free to repudiate the terms of that—of the current Joint Agreement except as provided in the contract stipulation. That is, by giving written notice of withdrawal at least 60, but not more than 90 days prior to the termination of that Joint Agreement or one of its predecessors.

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I am unaware of any authority which would require the Union under these circumstances to inform the signatory to a contract stipulation that a Joint Agreement was about to be terminated or renegotiated.

Under the holdings in the *Niosho Construction Co.*, 305 NLRB 100, 102 (1991), and *R. L. Reisinger Co.*, 312 NLRB 915, 917 (1993), I conclude that Respondent's failure to make the required contributions and its attempted repudiation of the current Joint Agreement are violative of Section 8(a)(1) and (5) of the Act. The single-man unit and repudiation by conduct cases are factually inapposite to the situation before me.

Finally, I conclude that there is no legal requirement that a Union convert an existing 8(f) relationship to a full 9(a) relationship in order to secure enforcement of the relationship.

Have I omitted any finding or conclusion which the parties believe necessary to resolve this matter?

MR. MANLEY: Your Honor, I think at one point you stated that it was—I don't know if you stated it was stipulated or that it was from the evidence—that Respondent had not made any contribution since 1964.

ADMINISTRATIVE LAW JUDGE CHARNO: Did I misspeak?

MR. MANLEY: I think it's 1994.

S. TAVES: Go ahead, I don't know.