

America Piles, Inc., Agostino Quality Carpentry Inc., Kenney Drapery Associates Inc., Stone Systems Inc. d/b/a Century Wood Floors and Van Tag Corporation and District Council of New York City and Vicinity, United Brotherhood of Carpenters and Joiners of America, AFL-CIO. Cases 2-CA-31033, 2-CA-31097, 2-CA-31123, 2-CA-31152, and 2-CA-31154

April 25, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS
LIEBMAN AND WALSH

On July 26, 1999, Administrative Law Judge Steven Fish issued the attached decision. The General Counsel filed exceptions and a supporting 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 record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

1. The consolidated complaint alleges that each of the Respondents violated Section 8(a)(5) and (1) of the Act by refusing to execute and abide by collective-bargaining agreements reached by the Union and the Respondents. No exceptions were filed to the judge's findings and conclusions that Respondents American Piles, Inc., Stone Systems Inc. d/b/a Century Wood Floors, and Van Tag Corporation violated Section 8(a)(5) and (1). We adopt these findings.

2. The General Counsel has excepted to the judge's dismissal of similar 8(a)(5) and (1) allegations against Respondents Agostino Quality Carpentry Inc. and Kenney Drapery Associates Inc. For the following reasons, we reverse the judge's dismissals as to these Respondents, and find that they violated the Act as alleged.

The Union and various employer bargaining associations were parties to the Independent Building Construction Agreement effective from July 1, 1993, through June 30, 1996,¹ and bargained for a new agreement, which was reached in July and August 1996 and effective from July 1, 1996, through June 30, 2001. The Union and Respondent Agostino arranged a meeting on April 11, 1996, when Agostino signed the 1993-1996 Independent Building Construction Agreement and an Interim Compliance Agreement. Similarly, on September 9, 1996, Respondent Kenney met with the Union and signed the

1993-1996 Independent Building Construction Agreement and a Compliance Agreement for Newly Organized Employer. On October 28, 1996, the Union sent both Agostino and Kenney copies of the new 1996-2001 agreement for execution. Neither Respondent signed the 1996-2001 agreement or abided by its terms.

The signed 1993-1996 agreements introduced into evidence by the General Counsel are merely truncated, four-page versions of the complete agreements they represent—a cover sheet, what appears to be the first page, a signature page, and an added page on an industry promotion fund. The General Counsel also introduced into evidence a full (but unsigned) copy of the 1993-1996 agreement. In addition, the General Counsel introduced into evidence full and complete compliance agreements signed by Agostino and Kenney on April 11, and on September 9, 1996, respectively.

As more fully discussed below, each of the compliance agreements on its face bound the signatory to follow the terms and conditions of employment of the new contract reached by the Union and obligated the signatory to execute the contract on request. While the judge acknowledged that the compliance agreements would bind the signatories to follow any new bargaining agreement, the judge concluded that, because the compliance agreements did not set forth the scope of the unit or other related matters, reference must be made to the independent construction agreements. The judge found that the truncated (and signed) 1993-1996 construction agreements the General Counsel submitted did not conform to the complete (but unsigned) 1993-1996 agreement the General Counsel also submitted. The truncated versions of the agreement began at page 3 and were signed at page 49; the complete agreement began at page 1 and had its signature page at page 46. In addition, there were discrepancies in the added pages (industry promotion fund). The judge concluded that "it cannot be determined with certainty precisely what these Respondents signed in 1996" and that the General Counsel therefore failed to establish that either Respondent Agostino or Respondent Kenney signed the complete construction agreement. Accordingly, the judge found sufficient ambiguity that resort to extrinsic evidence was warranted.

Agostino and Kenney each introduced testimony, which the judge credited, that they did not intend to sign anything more than one-job, project-only agreements and believed that they had in fact signed such limited agreements. Based on these findings, the judge concluded that there was no meeting of the minds on the agreements and, therefore, that the General Counsel failed to prove that Respondents Agostino and Kenney violated the Act as alleged.

¹ This is the agreement relevant to Respondents Agostino and Kenney, as well as Century Wood and Van Tag. Another agreement, the Dockbuilding Agreement, is relevant only to Respondent America Piles.

Contrary to the judge, we find that the compliance agreements alone are sufficient to prove the General Counsel's case and that, by these agreements, Agostino and Kenney are bound to the 1996–2001 agreement. Accordingly, we find that the judge inappropriately focused on the ambiguities in the signed versions of the 1993–1996 agreement, and it is unnecessary for us to consider them.²

The evidence shows and it is undisputed that on April 11, 1996, Respondent Agostino signed a full and complete interim compliance agreement with the Union. The three-page agreement states in relevant part at article II:

When the union concludes negotiations with the Association(s), whose members perform work similar to the work performed by this firm, all terms and conditions of the newly negotiated agreement [the "New Agreement(s)"], including but not limited to, wages, fringe benefits, all other terms and conditions of employment, and the arbitration provisions, as agreed between the Union and the Association(s), shall be binding on our firm retroactive to July 1, 1996.

Article V states in relevant part:

Our firm, its successors and/or assignees, shall execute successor agreement(s) within five (5) days of the receipt of the Union's request. However, our firm shall be bound to the terms contained in the New Agreement(s) retroactive to July 1, 1996, by virtue of executing this agreement, regardless of whether it actually executes a successor agreement.

Similarly, the evidence shows and it is undisputed that on September 9, 1996, Respondent Kenney signed a full and complete Compliance Agreement for Newly Organized Employer. The two-page agreement states in relevant part at numbered paragraph 2:

Upon the conclusion of the negotiations with the aforementioned Member Associations, the wages and fringe benefits, as [well] as all other terms and conditions of employment, agreed to by and between your District Council and Member Associations, shall be binding on this company, retroactive to July 1, 1996.

Numbered paragraph 3 states:

It is further agreed that [this] employer, its successors or assigns, will within five (5) days of receipt of the District Council's request to execute the newly pre-

pared contract, in the form described above, sign and abide by the new agreement or agreements. However, this employer will be bound by the terms of the new agreement whether or not it is actually executed by this employer.

Both agreements clearly and unequivocally bound these two Respondents to the terms and conditions of the new 1996–2001 collective-bargaining agreements and obligated them to execute the agreements on request. See *City Electric*, 288 NLRB 443, 444 (1988) (Employer's execution of letter of assent bound it to a series of collective-bargaining agreements negotiated by multiemployer association). Accord: *Gary's Electrical Service Co.*, 326 NLRB 1136 (1998), enfd. sub nom. *Local 58 Pension Trust Fund v. Gary's Electric*, 227 F.3d 646 (6th Cir. 2000). Although both Respondents introduced testimony that they intended to agree only to project agreements, the compliance agreements are clear that they were not so limited, but rather obligated the Respondents to abide by and execute successor collective-bargaining agreements negotiated by the Union and the multiemployer association.³ In these circumstances, Board precedent prohibits the use of parol evidence to vary the unambiguous terms of compliance agreements. See *NDK Corp.*, 278 NLRB 1035 (1986). (National labor policy requires that evidence of oral agreements be unavailable to vary the provisions of a written collective-bargaining agreement valid on its face.) As the Ninth Circuit has stated, "Where contractual provisions are unambiguous, the NLRB need not consider extrinsic evidence. Parol evidence is therefore not only unnecessary but irrelevant." *NLRB v. Electric Workers Local 11*, 772 F.2d 571, 575 (9th Cir. 1985).

For the foregoing reasons we find that Respondent Agostino and Respondent Kenney, as alleged in the complaints, unlawfully refused to abide by and execute the 1996–2001 collective-bargaining agreements with the Union. Accordingly, we shall order them to abide by and execute the agreements, and make employees and fringe benefit funds whole for any losses they may have suffered.

AMENDED CONCLUSION OF LAW

Substitute the following for paragraph 8 of the judge's Conclusions of Law.

"8. By refusing to abide by and execute the agreed-to collective-bargaining agreement despite union requests

² The relevance of the 1993–1996 agreement was, as the judge discusses, to bridge the gap. Thus, the compliance agreements bound the signatories to the terms of the current 1993–1999 agreement while a successor agreement was being negotiated with the Union.

³ Contrary to the judge, we find that the absence of a unit scope provision in the compliance agreements is immaterial because the compliance agreements bound the Respondents to the successor collective-bargaining agreement which contained such a provision.

to do so, Respondents Agostino and Kenney have violated Section 8(a)(5) and (1) of the Act.”

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge, except that the final paragraph is deleted, and orders that

A. The Respondents, America Piles, Inc., Brooklyn, New York; Stone Systems, Inc. d/b/a Century Wood Floors, Fairfield, New Jersey; and Van Tag Corporation, Yonkers, New York; their officers, agents, successors, and assigns, shall take the action set forth in the Order.

B. The Respondent, Agostino Quality Carpentry Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to execute and abide by the terms of the Independent Building Construction Agreement (the agreement) effective by its terms from July 1, 1996, to June 30, 2001.

(b) 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, bargain with the Union as the exclusive bargaining representative of the employees in the unit set forth in the agreement described above.

(b) Sign and abide by the agreement, effective from July 1, 1996, to June 30, 2001.

(c) Make whole employees and benefit funds for any losses suffered as a result of Agostino’s unlawful conduct, with interest, in the manner set forth in the remedy section of the judge’s decision.

(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, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Brooklyn, New York, copies of the attached notice marked “Appendix D.”⁴ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and main-

⁴ 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.”

tained 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 a 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 since October 28, 1996.

(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.

C. The Respondent, Kenney Drapery Associates Inc., Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to execute and abide by the terms of the Independent Building Construction Agreement (the agreement) effective by its terms from July 1, 1996, to June 30, 2001.

(b) 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, bargain with the Union as the exclusive bargaining representative of the employees in the unit set forth in the agreement described above.

(b) Sign and abide by the agreement, effective from July 1, 1996, to June 30, 2001.

(c) Make whole employees and benefit funds for any losses suffered as a result of Kenney’s unlawful conduct, with interest, in the manner set forth in the remedy section of the judge’s decision.

(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, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Bronx, New York, copies of the attached notice marked “Appendix E.”⁵ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent’s authorized repre-

⁵ See fn. 4, above.

sentative, 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 a 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 since October 28, 1996.

(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 D

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 refuse to execute or abide by the terms of the Independent Building Construction Agreement (the Agreement) effective by its terms from July 1, 1996, to June 30, 2001.

WE WILL NOT in any like or related matter 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 bargaining representative of our employees in the unit set forth in the Agreement described above.

WE WILL sign and abide by the agreement, effective from July 1, 1996, to June 30, 2001.

WE WILL make whole our employees and the Benefit Funds for any losses suffered as a result of our unlawful conduct, plus interest.

AGOSTINO QUALITY CARPENTRY INC.

APPENDIX E

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 refuse to execute or abide by the terms of the Independent Building Construction Agreement (the Agreement) effective by its terms from July 1, 1996, to June 30, 2001.

WE WILL NOT in any like or related matter 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 bargaining representative of our employees in the unit set forth in the Agreement described above.

WE WILL sign and abide by the Agreement, effective from July 1, 1996, to June 30, 2001.

WE WILL make whole our employees and the Benefit Funds for any losses suffered as a result of our unlawful conduct, plus interest.

AMERICA PILES INC., AGOSTINO
QUALITY CARPENTRY INC., KENNEY
DRAPERY ASSOCIATES INC., STONE
SYSTEMS INC., AND VAN TAG
CORPORATION

Matthew T. Bodie, Esq. and *Christene S. Mann, Esq.*, for the General Counsel.

Thomas J. Bianco, Esq. and *Christina Bennett, Esq.* (*Kaufman, Schneider & Bianco, LLP*) of Jericho, New York, for a Respondents America Piles, Inc.¹ and Kenney Drapery Associates, Inc.

Michael Greber, Esq. of Brooklyn, New York, for the Respondent.

¹ The complaint was amended at trial to reflect the correct name of this Respondent.

Agostino Quality Carpentry, Inc., Scott Weiss, Esq. (Weiss & Weiss, LLC) of Fairfield, Connecticut, for the Charging Party.

DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. On December 23, 1997, New York Vicinity United Brotherhood of Carpenters and Joiners AFL-CIO, (the Union or Charging Party) filed charges in Cases 2-CA-31033 through 2-CA-31157 alleging similar violations of Section 8(a)(1) and (5) of the Act by various named employers. Thereafter the Region issued a number of complaints in some of these cases, with an identical hearing date of November 16, 1998.

Subsequently, a number of these cases were disposed of by either withdrawal or summary judgment. On November 6, 1998, an order was issued consolidating the 13 remaining cases. Prior to the start of the trial, seven of these cases were withdrawn. A trial was held before me concerning the six remaining cases on November 16 and 17, 1998, in New York. During the course of the trial, the Union requested and I granted a conditional withdrawal of the charge and dismissed the complaint against Manty Glass & Aluminum, Inc; Case 2-CA-31130.

The five remaining complaints, which are to be decided here, allege identical violations of Section 8(a)(1) and (5) of the Act by America Piles, Inc. (Respondent America), in Case 2-CA-31033; Agostino Quality Carpentry Inc. (Respondent Agostino) in Case 2-CA-31097; Kenney Drapery Associates, Inc. (Respondent Kenney), in Case 2-CA-31123; Stone Systems, Inc., d/b/a Century Wood Floors (Respondent Stone), in Case 2-CA-31152; and Van Tag Corporation (Respondent Van Tag); in Case 2-CA-31154.

Briefs have been filed by the General Counsel and Respondents America and Kenney and have been carefully considered. Based on the entire record, including my observation of the demeanor of the witnesses, I make the following:

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION

Respondent America, a corporation with an office and place of business in Brooklyn, New York, has been engaged in the building and construction industry, including at jobsites located in or around New York City, New York. Annually, Respondent America purchases goods and services valued in excess of \$50,000 directly from entities outside the State of New York.

Respondent Agostino, a corporation with an office and place of business in Brooklyn, New York, has been engaged in the building and construction industry. Annually, Respondent Agostino sells goods services in excess of \$50,000 to various entities which meet a direct standard for the assertion of Board jurisdiction.

Respondent Kenney, a corporation with an office and place of business in Bronx, New York, has been engaged in the building and construction industry. Annually, Respondent Kenney sells goods and services valued in excess of \$50,000 directly to entities located outside the State of New York.

Respondent Stone, a corporation with an office and place of business in Fairfield, New Jersey, has been engaged in the

building and construction industry, including at jobsites located in or around New York, New York. Annually, Respondent Stone sells goods and services valued in excess of \$50,000 directly to entities located outside the State of New Jersey.

Respondent Van Tag, a corporation with an office and place of business in Yonkers, New York, has been engaged as a construction contractor in the building and construction industry, including at jobsites located in or around New York, New York. Annually, Respondent Van Tag sells goods and services valued in excess of \$50,000 to various entities which meet a direct standard for the assertion of jurisdiction by the Board.

It is admitted, and I so find, that Respondent America, Respondent Agostino, Respondent Kenney, Respondent Stone, and Respondent Van Tag are now and have been at all times material here, employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times, the Union has been and is a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

The General Counsel's sole witness in its proceeding was Russ Shaw, manager of the agreement department for the Charging Party. His testimony established that the Union has collective-bargaining agreements with a number of employer associations, as well as with approximately 1700 independent contractors. The Union has over 24 types of agreements, covering various specialties within the carpentry trade. Normally, the Union bargains with the particular association covering the type of work involved, and then when an agreement is reached, that agreement is submitted to the independent contractor for signature.

About 70 percent of the independent contractors signed up with the Union have signed an Independent Building Construction Agreement (construction agreement). Another type of agreement signed by some contractors is the Independent Heavy Construction Dockbuilding Marine and Foundations Agreement (dockbuilding agreement).

Shaw furnished testimony concerning various documents that he brought from the Union's files that he is in charge of maintaining. Through Shaw, a number of these documents were introduced into evidence, which essentially form the basis for the General Counsel's case. Shaw testified that the Union's practice with regard to its files was to keep a four-or-five page document for each independent contractor that signed agreements with it. These documents contained the cover page of the particular agreement, the signature page, as well as one or two other pages. According to Shaw, although the files only contained these portions of the agreements, in fact in each case, the particular employer involved actually signed a full copy of the agreement, but because of space requirements, the files contain only the shortened version. Shaw furnished no testimony as to the circumstances of the signing of the agreements. However, he asserted that the signed copies were either mailed or brought into the Union by either the contractor or a union agent.

The document introduced into evidence and signed by Respondent America was entitled the "Dockbuilding Agreement," and consisted of the cover page of the agreement between Re-

spondent America at its address in Brooklyn, New York, and the Union, for the period July 1, 1993, to June 30, 1996. The document also contains a page one, which recites that this agreement was made on August 5, 1994, and effective July 1, 1993, between Respondent America and the Union, and sets forth article I, entitled *Purposes-Declaration of Principles*. This document makes no reference to recognition or to the unit. The next page to the document was page 48, which was a signature page, which included signatures from the Union and from someone from Respondent America.²

According to Shaw, the full collective-bargaining agreement, which he believes was included when Respondent America signed the agreement, consisted of pages 1 through 48, a cover page, a two-page table of contents, plus a one-page addendum. This agreement provides that Respondent America recognizes that Union as the exclusive collective-bargaining representative of all employees covered by the jurisdiction of the Union, as described here. The contract clause further defines the Union's territorial jurisdiction by listing various counties in New York State and New Jersey, and also sets forth a detailed description of various work functions and classifications covered by the agreement.

With respect to Respondents Stone and Van Tag, five documents were received in evidence, based on Shaw's testimony, which included a title page of the construction agreement which set forth the name and address of the Respondent, and the Union, and dates of the agreement as July 1 1993, to June 30, 1996. It also included page one, which recites that the agreement was made and entered into on July 1, 1993, between the Respondent and the Union, and includes article I entitled, "Objectives" and article II entitled "Jurisdiction." This section states that the various job titles listed, "are understood to include all employees performing jobs referred to in Section 2 below." Then section 2 reads "The Employer is desirous of employing carpenters," and page one ends. The next page in the document from the Union's files is page 46, which is the signature page, and contains signatures from all parties. Respondent Stone signed the document on November 3, 1993, and Respondent Van Tag on November 16, 1993. The document also contains two additional unnumbered pages, entitled Dry-wall Industry Promotional Fund of New York, which contained additional signatures of representatives of the two Respondents on the same dates.

Once again, Shaw testified that each of these Respondents as per the Union's practice, received and signed the full construction agreement, which was also introduced into the record, through Shaw. This document consisted of a cover page, a one-page index, and pages 1 through 46. Page one is the same page of the previous document, and page two of which continues the previous jurisdiction article to include a number of other job titles or classifications, such as millwrights, cabinet makers, or floor layers. The agreement then goes on to list detailed descriptions of the types of work covered by the agreement.

Unlike the dockbuilders agreement, as described above, which defines the Union's territorial jurisdiction I the same

article that referred to jurisdiction, the construction agreement does not do so. On page 11 of the agreement, article III is entitled union recognition section 2 provides that the "Employer recognizes the Union as the exclusive bargaining representative for all the employees referred to in article II above." Again there is no mention of territorial Jurisdiction in this Article. However, on page 16, article VII is entitled geographical jurisdiction. This article provides that the "Agreement shall cover work performed by Carpenter Employees within the territorial jurisdiction" of the Union. It then defines the Territorial Jurisdiction of the Union. The document also includes page 46 as the signature page.

As for Respondents Agostino and Kenney, Shaw testified that the documents in the Union's files for these Respondents, included one of four pages, with a cover page setting forth an independent construction agreement between the Respondents at their respective addresses in Brooklyn, New York, and Bronx, New York, and the Union, with dates of July 1, 1993—June 30, 1996. The next page of the document is page three, which is same as page one of the documents introduced with respect to Respondents Van Tag and Stone. For Respondent Agostino, page three states that the agreement was entered into on July 1, 1993, and effective April 11, 1996, and for Respondent Kenney it states effective September 9, 1996. The next page in the document from the Union's files is page 49, which is the signature page. The document also contains an additional page, without a number, entitled, "AJREIF FUND Additional Contributions." It is not the same additional language as in the last two pages of the documents signed by Respondents Van Tag and Respondent Stone. These documents contained signatures from representatives of Respondents Agostino and Kenney on both the signature page and the last page, dated April 11, 1996, and September 9, 1996, respectively.

Shaw testified that the document previously described with respect to Respondents Van Tag and Stone, entitled "Independent Building Construction Agreement," pursuant to the Union's practice, was also part of the contract signed by Respondents Agostino and Kenney as well. However, it is noted that this document consisted of 46 pages, with page 46 being the signature page. Also this document did not contain any additional pages after the signature page,³ as did the documents signed by these Respondents which came from the Union's files. Shaw provided no testimony in explanation of these discrepancies.

As of June 30, 1996, the dockbuilding and construction Agreements were due to expire. Since the Union was still in the process of negotiating contracts with the various Associations it sought to "bridge the gap" until a new agreement was executed, by sending out "Compliance Agreements" or "Interim Compliance Agreements," to be signed by the contractor employers. These agreements provided essentially that the prior agreements between the parties remained in effect until a new agreement was negotiated, and that the parties agreed to be bound by a successor agreement negotiated between the Union and the Association. Additionally, the Employer agreed to execute the successor agreement within 5 days of receipt of the Union's request.

² Respondent America conceded that its representative signed p. 48 on August 10, 1994.

³ The page referring to the AJREIF FUND.

These compliance agreements were signed by all of the Respondents here. Respondents America, Agostino, Stone and Van Tag signed the document entitled "Interim Compliance Agreement," on April 15, 11, 8, and 7, 1996, respectively. Specifically, this agreement states that the prior agreement shall remain in force until the Union "negotiates the successor agreements with the Associations whose members perform work similar to the work performed by this firm." Further it states that when the Union concludes "negotiations with the Associations, all terms and conditions of the newly negotiated Agreement "shall be binding on our firm retroactive to July 1, 1996." Finally, the agreement states that the employer "shall execute successor agreements within five days of the receipt of the Union's request."

Respondent Kenney executed a document entitled "Compliance Agreement for Newly Organized Employer" in September 1996. This document states that the Employer has agreed to sign the most current independent contract, and that said agreement shall remain in effect until a successor agreement is negotiated with the associations. Further, the Employer agrees that on the conclusion of negotiations with the associations, all terms and conditions of employment agreed to by the Union and the associations, "shall be binding on this company, retroactive to July 1, 1996," and the Employer shall within 5 days of the Union's respect, sign and abide by the agreement.

The Union reached agreements with the associations involved for the construction agreement in July and August of 1996 and for the dockbuilders agreement in May and June of 1997.

The Union subsequently sent copies of the dockbuilding agreement to Respondent America on August 15, 1997, and a copy of the construction agreement to Respondents Agostino, Kenney, Stone, and Van Tag on August 28, 1996. All of these agreements, except for Agostino, contained cover letters, requesting that the various Respondents sign the attached agreements. None of the Respondents executed or sent back the signed agreements. The Union thereafter sent followup letters to all Respondents, including Respondent Agostino, dated November 12, 1997, reflecting that each Respondent had previously received a copy of an association agreement to sign, and the Union had not received signed copies as requested. The letter again requests that the agreements be signed. None of the Respondents sent back signed copies of the agreements sent to them by the Union.⁴

Cosimo Agostino, president of Respondent Agostino, testified concerning the circumstances of his signing the above-described documents. This testimony is unrefuted and believable and is therefore credited. Sometime in 1989, Respondent Agostino was working on a job at Wagner Community College. At that time he was told by a representative of the Union, that Respondent Agostino had to sign a one-job agreement with the Union, or else it could not send in the benefits. Therefore he, on behalf of Respondent Agostino, signed a "one job agreement," which was an agreement confined to union representa-

⁴ I agree with the General Counsel that Respondent Agostino is precluded by its answer from denying that it received a copy of the negotiated construction agreement from the Union to be signed.

tion at that particular jobsite. In that connection, Shaw admitted that the Union had in the past allowed one-job agreements for certain employers but at some point, undisclosed by the record, made a decision to no longer sign or permit such agreements.

Respondent Agostino received a subcontract for work at the Coney Island Water Treatment Plant for the City of New York. Shortly after it began work on that job, in late 1995, Agostino was approached by the shop steward⁵ for the Union. The shop steward informed Agostino that the job was a union job and that Respondent Agostino could not do any work there unless it belonged to the Union. Agostino replied that Respondent Agostino was approved by the City to work there, and it did not have to be in the Union. Therefore Agostino continued to perform work on the job. However, on several subsequent occasions, form work that Respondent Agostino had performed was destroyed. Agostino reported these incidents to the project manager, who in turn reported the problem to the City Inspector. The project manager reported to Agostino, that the City Inspector had informed the project manager that if this happened again, he would throw everyone off the job. Agostino admitted that he did not see who destroyed the form work, and that he did not notify the police about the matter. Further in another conversation, the shop steward for the Union told Agostino that if he did not sign an agreement with the Union, the Union would put up a picket line on the job.

Therefore based on the foregoing events, Agostino decided to sign what he believed to be a one-job agreement with the Union. He therefore notified the shop steward, who in turn scheduled an appointment for Agostino to meet with Raj Moitran an employee in the Union's agreement department. Agostino informed Moitran that he was there to sign an agreement for that particular job, so he could proceed to work on that job. Moitran handed Agostino a bunch of papers for him to sign, and told him that these papers are the standard form that everybody normally signed. Agostino informed Moitran that Respondent Agostino could not afford a bond. Moitran replied that he did not need a bond, because it was "only one short term job." On that day, which was April 11, 1996, Agostino, without reading either document, signed the "Interim Compliance Agreement," that was introduced through Shaw. Agostino also admitted signing the document entitled "Independent Construction Agreement," introduced through Shaw on the same date. Agostino indicated referring to the compliance agreement, that there were more pages than shown in the document, but he did not know how many pages there were. He did not testify whether the "Building Construction Agreement" that he signed contained any more pages than in the document that Shaw authenticated.

However, Agostino testified unequivocally and credibly that he believed that he was signing a one-job agreement only, as he had signed previously in 1989 with the Union. After signing these documents, Respondent Agostino had no further prob-

⁵ While the transcript on pp. 157, 158, and 160 uses the word "chapter" to describe this individual, this is clearly a transcription error, and the transcript is hereby corrected to substitute shop steward for chapter on those pages.

lems at the jobsite. While working on the job, Respondent Agostino sent in benefits to the Union. After the job ended sometime in late 1997, Respondent Agostino ceased sending in any benefits to the Union.

Respondent Agostino recalled receiving a letter from the Union sometime in late 1997, indicating that Respondent Agostino had not signed a contract with the Union to continue the hours for fringe benefit contributions.

The estimated job duration and men set forth in the agreement was 2 days per week for 8 weeks, and one man, and a total of \$2500 to be paid in escrow. Other documents introduced into the record indicate that Respondent Kenney deposited the \$2500 in escrow to the Union's Benefit Funds.

However, the job lasted well past the 8 weeks set forth in the agreement, as Respondent Kenney could only send in men to work, when other trades finish their portion of the job. Therefore in September 1996, the job was still going on. At that time, one of Respondent Kenney's employees informed Belmont that the shop steward had told the employee that Respondent Kenney could not put the men on unless Respondent signed new agreements.

Belmont agreed, and signed the documents that were given to him by this employee, believing that he was merely signing an extension of the previous one-job agreement which was signed in May 1995. The document that Belmont signed dated September 9, 1996, entitled "Building Construction Agreement," was actually four pages in agreement.

Jim Belmont furnished similar unrefuted and credited testimony, concerning his actions in signing agreements with the Union on behalf of Respondent Kenney. Thus in May 1995, Respondent Kenney began a job as subcontractor for a Canadian Company, installing drapery pockets at an advertising agency on a jobsite at 1 Dag Hammarskjold Plaza, New York, New York, Respondent Kenney needed to employ carpenters to perform this work. At that time Belmont spoke with the shop steward for the carpenters, who informed Belmont that he would supply carpenters to Respondent Kenney, and Respondent Kenney would have to sign a one-job agreement with the Union, and agree to pay stamps and union wages. Accordingly, such a one-job agreement was executed by the comptroller of Respondent Kenney, and by the union representatives on May 5, 1995. The agreement provides that Respondent Kenney need not sign a formal collective-bargaining agreement with the Union, but to use union labor and pay all fringe benefits for the duration of the job which is referred to as of *very short duration*. The agreement also obligates Respondent Kenney to sign a contract with the Union if it performs future work in this geographical area within the Union's jurisdiction. Finally, it obligates Respondent Kenney, in lieu of a surety bond, to send in a certified check for the estimated amount of carpenter length, a cover page, page 3, page 49, and a last page, without a number, which reflected additional contributions to the industry promotion fund.⁶ Belmont also signed the document entitled "Compliance Agreement" on that date. According to Belmont he

"perused" these documents before he signed them but believed that he was signing a continuation of the previously signed one job agreement.

After signing these documents, Respondent Kenney continued to use carpenters on this job, and to pay benefits to the Union's Funds, until the job was completed at the end of 1996. Since that time, according to Belmont, Respondent Kenney employed no carpenters, and performed no work, which in his view fell under the coverage of the contract. In that regard, Belmont asserts that in his opinion, the carpenter's contract covers only commercial work, and not residential jobs. Further Respondent Kenney has not performed any commercial jobs since the job at Dag Hammarskjold Plaza.

However, the full building construction agreement, specifically covers all employees performing various jobs, which includes "installation of hardware for draperies and blinds," which is work that Respondent Kenney performs, but only on residential jobs. The contract makes no distinction between residential or commercial jobs.

On March 26, 1998, Respondent Kenney sent a letter to the Union, in response to one of the Union's letters, which asserts that Respondent Kenney has "not worked on any union construction jobs nor have we hired any union carpenters, nor do we intend to do so in the future." The letter concludes, "it is our firm belief that we have not renewed our contract with the District Council of Carpenters."

The Union's benefit funds thereafter sent a letter to Respondent Kenney, dated April 15, 1998. The letter indicated that Respondent Kenney had failed to submit monthly remittance reports for various months, from September 1995 through April 1998. The letter also asserts that according to the contract "to which your firm is bound," these reports must be submitted each month whether or not carpentry work is performed. Further the letter requests that such reports be submitted, or else an audit will be scheduled.

Respondent Kenney replied to this letter, by letter dated May 26, 1998. It states "we are not sure that we owe you any reports as there is a question of whether we have a collective bargaining agreement." Further the letter indicates, "we had no Union employees during the period stated in your letter."

On August 5, 1998, an arbitration hearing was held before Arbitrator Roger Maher. Respondent Kenney, according to the award, which was issued on August 14, 1998, did not appear at the hearing, or request a postponement, although duly notified of the proceeding.

The award further reflects that the arbitrator found Respondent Kenney to be in default, and proceeded to hear testimony and take evidence. The arbitrator concluded that "the uncontested testimony and evidence established that the Respondent was bound to a Collective-Bargaining Agreement with the New York City District Council of Carpenters and said Agreement became effective July 1, 1996." The decision also found that an accountant employed by the Union performed an audit of Respondent Kenney's books and records, and discovered delinquencies in fund contributions during the period July 16, 1996, to December 31, 1997.

The arbitrator's award provided for the payment by Respondent Kenney of \$3,875.78 plus interest, to the funds, which

⁶ This is the document authenticated by Shaw. Belmont credibly denied that this document contained additional pages, and denies ever seeing or signing a full copy of the Construction Agreement.

included the delinquencies plus court costs, attorney's fee, and arbitrator's fee.

On October 26, 1998, the audit manager of the Union's benefit funds sent a letter to Respondent Kenney, referring to and enclosing a copy of the arbitrator's award detailed above. The letter also demanded immediate payment of the amount ordered, or in the alternative a proposed installment payment schedule from Respondent Kenney. Respondent Kenney replied by letter of November 6, 1998, stating that "our firm has no current agreement with the carpenters and your default award is inappropriate."

The record does not reflect any further contacts or communications between the parties relative to this matter. The record also does not indicate what efforts, if any, the Union or the funds have made to enforce or confirm the arbitration award issued on August 14, 1998.

III. ANALYSIS AND CONCLUSIONS

A. Respondents America, Stone, and Van Tag

It is well settled that an employer violates Section 8(a)(1) and (5) of the Act by refusing to execute a written agreement incorporating the terms that it had previously agreed to *H. J. Heinz Co. v NLRB*, 311 U.S. 514 (1941). Such a refusal is equally violative of the Act in the context of an 8(f) relationship. *National Roof Systems*, 305 NLRB 965, 970 (1991).

It is also clear that where an employer signs an agreement to be bound by the terms of an association agreement, which had not yet been fully negotiated, said employer is bound by such an agreement, even though it does not know the full terms of the association agreement, when it agrees to be bound by such agreement. *Canyon Coals*, 316 NLRB, 448, 452-453 (1995), *enfd.* 108 F.3d 1377 (6th Cir. 1997); *Adobe Walls*, 306 NLRB 25, 27-28 (1991); *Inland Cities*, 241 NLRB 374, 378-379 (1979); *Ted Hicks & Associates*, 232 NLRB 712, 713 (1977).

Here the evidence adduced by the General Counsel established that Respondents America, Van Tag, and Stone each executed interim compliance agreements, which obligated them to execute and abide by collective-bargaining agreements still to be negotiated with Associations.⁷ Further the evidence establishes that the Union thereafter reached agreement with the two associations involved, and subsequently sent copies of the agreements to the various Respondents, along with requests that these documents be executed, pursuant to the terms of the interim agreements previously signed by each of these Respondents.

In this regard, Respondent America argues that the General Counsel had failed to establish a prima facie case against it, because Shaw's testimony was insufficient to establish that the Union sent or Respondent America received a copy of the association agreement, that the General Counsel asserts that Respondent America is obligated to sign. I do not agree. Shaw's credible and undisputed testimony established that based on the Union's practice in his office, it sent out copies of the full agreement to each Respondent, and that by letter dated August

⁷ Respondents Van Tag and Stone agreed to sign the construction agreement, and Respondent America agreed to execute the dockbuilding agreement.

15, 1997, it requested Respondent America to execute the dockbuilding agreement, a copy of which was enclosed. I find this testimony sufficient to establish that the full document was sent,⁸ and based on the presumption of mailing, which has not been rebutted, was also received by Respondent America. I note also in this respect, that the Union sent a followup letter dated November 12, 1997, to Respondent America, again requesting that the dockbuilding agreement, previously sent to Respondent America be executed. I also find that this document was received by Respondent America for the same reasons.

I note that Respondent America made no response to either of the Union's letters. Thus even if it had not received a copy of the agreement as Respondent America appears to contend, it was obligated to respond to the letter and request a copy of the agreement from the Union. Further, Respondent America presented no witnesses or any other evidence in support of its assertion that it did not receive a copy of the dockbuilding agreement to sign. It is therefore appropriate to draw an adverse inference from the failure of Respondent America to call any witnesses on this subject, and conclude, which I do, that had such a witness been called by Respondent America, the witness would have testified adversely to Respondent America on this issue, and that Respondent America had received a copy of the negotiated agreement. *International Automated Machines*, 285 NLRB 1122, 1128 (1987).⁹

I therefore conclude that all three Respondents have, as alleged in the complaints issued against them, failed and refused to execute the association agreements, to which each of them had previously agreed to be bound.

All three Respondents raised various affirmative defenses in their answers, including fraudulent misrepresentation, duress, coercion, and the assertions relative to the issue of alleged statements made to officials of these Respondents when the interim agreements were signed. However, none of these Respondent's presented any witnesses or any other evidence in support of these affirmative defenses. Therefore, they are all rejected. In that regard, Respondent America argues that since it raised the affirmative defense in its answer of fraudulent misrepresentation, that the General Counsel was required to present evidence to disprove that assertion. Thus since the General Counsel presented no evidence detailing the circumstances of the execution of the compliance agreement, it is argued that the General Counsel has not proved that Respondent America entered into a legally binding contract. I disagree.

Respondent America is simply incorrect in its assertions as to burdens of proof. It is well established, and needs no cita-

⁸ The testimony referred to in Respondent's brief by Shaw which indicated some confusion concerning whether the full agreement or only three pages of the agreement were sent to various Respondents, related not to the negotiated 1996 agreement, but to the prior agreements executed by the Respondents in 1996. However, notwithstanding this confusion, I find the evidence sufficient to establish a prima facie case that Respondent executed a full copy of the prior dockbuilders agreement.

⁹ It is also appropriate to draw an adverse inference against Respondent America for its failure to testify concerning signing a complete copy of the dockbuilders agreement in 1994.

tions, that affirmative defenses must be established and proven by the party asserting such defenses. The General Counsel has established a prima facie case by proving that Respondent America executed the compliance agreement, obligating it to sign and be bound by the association agreement subsequently agreed on and received by Respondent America. It is then Respondent America's burden to establish any affirmative defenses to this prima facie case, such as fraudulent misrepresentation. Respondent America cannot shift the burden to General Counsel to disprove such a defense, by merely raising it in its answer. It must present evidence to prove its defense, and its failure to do so requires that such defense be rejected. I so find.

In that regard, I note that even if I were to find the General Counsel's evidence insufficient to establish that Respondent America executed the full independent dockbuilders agreement in 1994, my ultimate conclusion would not change. Thus in that event Respondent America obligated itself to execute the dockbuilder's association agreement, and admittedly failed to do so. Thus whether it ever signed or saw a complete prior agreement in 1994, when it executed the prior document is not significant. While Respondent America alleged in its answer that it executed a document in 1996 believing it to be applicable to a single job only, it presented no record evidence in support of this assertion. Thus had such evidence been presented, as will be described more fully below, the question of whether it had seen the entire prior document that it purportedly signed in 1994, would have been relevant. However, in the absence of such evidence, which would or might permit parole evidence to help assess whether or not a meeting of minds existed when the compliance agreement was executed, the signing of the compliance agreement by Respondent America is sufficient to obligate it to sign the agreement negotiated with the association.

Accordingly, based on the foregoing analysis and authorities, I conclude that Respondents America, Van Tag, and Stone have violated Section 8(a)(1) and (5) of the Act by refusing to execute and abide by the association agreements.

B. Respondents Agostino and Kenney

The analysis with respect to Respondents Agostino and Kenney is similar. Once again, a prima facie case has been established that each Respondent executed interim compliance agreements, which on their face, obligated them to execute the building construction agreements, which was subsequently agreed to in bargaining between the Union and the association.

However, in the case of these Respondents, evidence was presented detailing the circumstances of the execution of the compliance agreement, as well as the prior collective-bargaining agreement with the Union. This evidence, according to Respondents is sufficient to establish several defenses, including particularly that there was no meeting of the minds between the parties with respect to the execution of the compliance agreement, or the prior construction agreement.

The resolution of the latter contention, depends on the application of the parole evidence rule to the instant case. In that regard, the Board does not permit a party to use parole evidence of oral agreements to vary the terms of a collective-bargaining agreement. *Don Lee Distributor, Inc.*, 322 NLRB 470, 484

(1996); *Adobe Walls*, supra at 27; *NDK Corp.*, 278 NLRB 1035 (1986); *Gaitliff Coal v. Cox*, 152 F.2d 52, 55 (6th Cir. 1945).

However, where the agreement is ambiguous, it is appropriate to resort to parole evidence or other extrinsic evidence to determine its meaning. *Sansla, Inc.*, 323 NLRB 107, 109 (1997); *Operating Engineers Local 3 (Joy Engineering)*, 313 NLRB 25 (1993), *Timberland Packing*, 261 NLRB 174, 176 (1982). Here, both Respondents contend that there was no meeting of minds, because they believed that they were signing a "one job agreement," similar to what they had signed in the past. Thus, if sufficient ambiguity exists as to the scope of the unit, parole evidence can be used to determine whether the meeting of the minds existed when these Respondents executed their agreements. *Sansla*, supra, and *RPM Products*, 217 NLRB 855 (1978); see also 30 Am.Jur.2d § 1069 (1967).

Whenever the terms of a written contract or other instrument are susceptible of more than one interpretation, or an ambiguity arises, or the intent or object of the instrument cannot be ascertained from the language employed therein, parole or extrinsic evidence may be introduced to show what was in the minds of the parties at the time of the making of the contract or executing the instrument, or to determine the object for or on which it was designed to operate.

Thus, it must be determined whether the agreements signed by the Respondents are sufficiently ambiguous as the scope of the unit, to permit the consideration of the parole evidence introduced by Respondents to establish that no meeting of the minds existed at the times that these documents were signed. I conclude that sufficient ambiguity exists concerning the documents executed by Respondents to allow parole evidence to be evaluated.

Both Respondents' admittedly executed "compliance agreements" with similar wording. Both documents state that the current collective-bargaining agreement with the Union shall be extended, and remain in force until the Union negotiates a successor agreement "with the Association whose members perform work similar to the work performed by this firm." This document makes no reference to the scope of the unit or to whether it applies to any jobs performed by Respondents within the Union's territorial jurisdiction, or to the single jobs that the Respondents were working on at the time that they each signed their agreements. Therefore reference must be made to the independent construction agreements, that each Respondent signed simultaneously with their execution of the compliance agreements. However, the evidence from Shaw, the General Counsel's witness, established only that these Respondents signed the four-page document, which included a signature page. While Shaw also testified that the Union's practice normally required each Employer to sign the entire construction agreement, such testimony cannot be relied on in the case of Respondent Agostino and Kenney. While I did rely on such testimony in the cases of Respondents America, Van Tag, and Stone, I note that no contrary testimony was adduced from any of these Respondents as to what they each had executed. Moreover, the document subsequently introduced into the record as the complete construction agreement, conformed to the documents executed by those Respondents.

However, with respect to Respondents Kenney and Agostino, credible testimony, as related above from Belmont and Agostino indicated that they did not sign the full construction agreement, but only the four-page document which Shaw testified came from the Union's files. More importantly, the only complete construction agreement introduced into the record, does not conform page wise to the four-page documents signed by Respondents Agostino and Kenny. Thus, this agreement consisted of 46 pages with page 46 being the signature page. In contrast the documents signed by Respondents Kenney and Agostino were signed on page 49, and contained an additional page, not included in and different from the complete contract introduced by Shaw as the contract that these Respondents should have signed. In these circumstances, it cannot be determined with certainty precisely what these Respondents signed in 1996. The General Counsel has clearly not established that either Respondent signed the complete construction agreement, which defines the recognition of the Union, and then goes on to describe that the agreement covers work performed by carpenter employees within the territorial jurisdiction of the Union.¹⁰ Therefore, the record contains a substantial ambiguity as to what documents these Respondents signed and whether such documents obligated them to recognize the Union for all carpenter work within the territorial jurisdiction of the Union, as the full agreement states, or merely for the one job that these Respondents were working on when they signed their respective agreements. Thus it is permissible, under the authorities cited above, to consider the parole evidence adduced to determine the intent of the parties.

Consideration of such evidence leads to the unmistakable conclusion that no meeting of the minds existed when these documents were executed as to the scope of the unit. Thus in both cases, each Respondent had previously signed one-job agreement with the Union. In Respondent Kenney's case, an agreement had been signed for the same job that it was working on, when it was asked to sign another agreement.¹¹ It was therefore reasonable to believe that both Respondents were being asked to sign another one-job agreement. I note that General Counsel's position represents a substantial change in the prior bargaining unit, from one job to all employees employed in the Union's jurisdiction, and requires probative evidence to establish that the Respondents consented to such a change. No such evidence was adduced by the General Counsel.

In Respondent Agostino's situation, its president specifically informed Moitran, the Union's agent, that Respondent Agostino intended to sign a one-job agreement so he could proceed to

work on that job. Moitran handed Agostino papers to sign, and told him that they were standard forms. After Agostino mentioned that he could not afford a bond, Moitran replied that he did not need a bond because it was "only a short term job." The General Counsel argues that the above evidence does not establish a "fraudulent misrepresentation" by Moitran, since Moitran did not himself say anything that misrepresented what was being signed, and his remark about the bond is at most a temporary waiver of the Union's bond requirement. Although I am not in agreement with the General Counsel's characterization of Moitran's conduct or comments,¹² I need not make any finding that he fraudulently misrepresented any facts to Agostino. What I do find however, is that Moitran's conduct and statements were relevant to an assessment of Agostino's state of mind when he executed on behalf of Respondent Agostino in April 1996 a "compliance agreement." I conclude, consistent with Agostino's testimony, that he only signed the agreement with the Union, in order to complete the work on that particular jobsite, and that he believed, quite reasonably, that it applied only to carpenters work performed only at that jobsite, a one-job agreement, as he had signed with the Union in the past. In such circumstances there has been no meeting of the minds established, and the complaint must be dismissed in Case 2-CA-31097. *Sansla*, supra (parole evidence considered and established that Employer believed that he was signing a one-job agreement).¹³

As for Respondent Kenney, the parole evidence adduced is not as compelling, inasmuch as Belmont had no direct conversations with any union officials prior to signing the agreements, and at no time indicated to anyone from the Union (unlike Agostino), that he was interested in signing a one-job agreement. Nonetheless, I find the evidence sufficient to establish that Belmont did not believe that he was agreeing to sign a contract which obligated Respondent Kenney to recognize the Union for any carpenters work within the Union's territorial jurisdiction, and that therefore no meeting of the minds existed. In that regard, I again note that such an agreement would represent a significant change in the unit from the prior one job that Respondent Kenney signed for the very same job. It is therefore reasonable for Belmont to conclude, which I find that he did, that when he was informed through his employee (a union carpenter) that the carpenter shop steward had said that Respondent Kenney needed to sign another agreement in order to continue working on that job, that another one job agreement was being executed. Therefore, when Belmont signed a compliance agreement, agreeing to be bound by the association

¹⁰ I would note that an argument can be made that even this full agreement is somewhat ambiguous as to unit scope, since the above clause is not included in the recognition article, but appears several pages and articles later. I note in that connection, that ambiguities in contracts are to be construed against the drafter. *Inta-Roto, Inc.*, 252 NLRB 764, 770 (1980); *Taft v. NLRB*, 441 F.2d 1302, 1384 (8th Cir. 1971). I need not and do not so find, however, since as I have found above ambiguity has clearly been established based on what documents both Respondents were shown at the time that they signed the compliance agreements.

¹¹ In that connection, the previous agreement by its terms was supposed to last for only 8 weeks from its execution.

¹² In that regard, in my view Moitran's silence in the face of Agostino's statement, coupled with his remark concerning the bond at the very least must be considered misleading and having contributed to Agostino's misunderstanding as to what he signed.

¹³ The General Counsels argues that Agostino's failure to read a contract prior to signing does not excuse the party from the contract's obligations. *Morton Electric*, 314 NLRB 466, 468 (1994). However, that contention though true, is misplaced in the instant case. The evidence here does not establish that either Respondent was ever given a copy of the full construction agreement to read, which would have defined the unit, at any time either before or after each Respondent signed the compliance agreements.

agreement still to be negotiated, he believed that he was binding Respondent Kenney to that agreement only for work performed at the one job that Respondent Kenney was working on at the time.

Respondent Kenney's actions subsequent to the signing of the agreements was consistent with that position. It resisted the Union's subsequent attempts to bind it to a contract, by maintaining the view that it had not agreed to a contract with the Union for work other than that at the one job. Although the Union was successful in an arbitration award, finding inter alia that Respondent Kenney was a party to a contract with the Union, which it violated, this award has no significance on the issues before me. This was a default judgment, and the issue of whether there was a meeting of the minds was not raised, litigated, or decided by the arbitrator. Indeed, if anything the failure of Respondent Kenney to appear or defend the arbitration is not inconsistent with its position that it had no contract with the Union at the time. Once again, as with Respondent Agostino, the General Counsel's argument that Respondent Kenney should have read the agreements before it signed, is not persuasive. The General Counsel has not established, and in fact Belmont credibly denied that he had ever been shown a full copy of the association agreement, which might have alerted him to the fact that by signing these agreements, he was obligating Respondent Kenney to a substantial expansion of the bargaining unit.

Accordingly, based on the foregoing, I conclude that no meeting of the minds existed at the time that Respondent Kenney signed the compliance agreement, because Belmont believed that he was again signing a one job agreement. *Sansla supra*. Therefore, I shall recommend dismissal of the complaint in Case 2-CA-31123.¹⁴

THE REMEDY

Having found that Respondents American, Van Tag, and Stone have engaged in unfair labor practices within the meaning of the Act, I shall recommend that they cease and desist therefrom, and take certain affirmative action to effectuate the purposes and policies of the Act.

I shall recommend that Respondents be required to execute and abide by the association agreements to which each of them agreed to be bound. They shall also be ordered to make whole all unit employees for any loss of wages or other benefits. Such amounts shall be computed as prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970),¹⁵ with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1983). Reimbursements to the benefit funds shall be made in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979).

¹⁴ In view of my findings above, I need not and do not consider the other affirmative defenses raised by these two Respondents.

¹⁵ Employee reimbursement for expenses shall be made in accordance with *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), *enfd.* 661 F.2d 940 (9th Cir. 1981).

CONCLUSIONS OF LAW

1. Respondents America, Agostino, Kenney, Van Tag, and Stone and each of them are and have been employers within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. On or about April 15, 1996, Respondent America and the Union agreed to execute and be bound by the terms of a collective-bargaining agreement, to be negotiated between the Union and the General Contractors Association of Dockbuilders.

4. On or about April 8 and 17, 1996, respectively, Respondent Stone and Respondent Van Tag agreed to execute and be bound by the terms of a collective-bargaining agreement to be negotiated between the Union and the Building Contractors Association, Inc.

5. By refusing since on or about August 15, 1997, to execute and abide by the agreed-on collective-bargaining agreement, despite subsequent requests by the Union to do so, Respondent America has violated Section 8(a)(1) and (5) of the Act.

6. By refusing since on or about October 28, 1996, to execute and abide by the agreed-on collective-bargaining agreement, despite subsequent requests by the Union to do so, Respondents Van Tag and Stone have violated Section 8(a)(1) and (5) of the Act.

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

8. Respondents Agostino and Kenney have not violated Section 8(a)(1) and (5) of the Act as alleged in the complaints in Cases 2-CA-31097 and 2-CA-31123.

On the foregoing conclusions of law and on the entire record, I issue the following recommended¹⁶

ORDER

The Respondent, America Piles, Inc., Brooklyn, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to execute or abide by the terms of the Independent Heavy Construction Dockbuilding Marine and Foundation Agreement (the agreement) effective by its terms from July 1, 1996, to June 30, 2002.

(b) 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 bargaining representative of the employees in the unit set forth in the agreement described above.

(b) Sign and abide by the agreement, effective from July 1, 1996, to June 30, 2002.

(c) Make whole employees and the benefit funds for any losses suffered as a result of Respondent America's unlawful

¹⁶ If 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.

conduct, with interest, in the manner set forth in the remedy section of this decision.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copy, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Brooklyn, New York facility copies of the attached notice marked "Appendix A."¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 2, 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 August 15, 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.

The Respondent Stone Systems, Inc. d/b/a Century Wood Floors, Fairfield, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to execute or abide by the terms of the Independent Building Construction Agreement (the agreement) effective by its terms from July 1, 1996, to June 30, 2001.

(b) 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 bargaining representative of the employees in the unit set forth in the agreement described above.

(b) Sign and abide by the agreement, effective from July 1, 1996, to June 30, 2001.

(c) Make whole employees and the Benefit Funds for any losses suffered as a result of Respondent Stone's unlawful conduct, with interest, in the manner set forth in the remedy section of this decision.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all pay-

roll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Fairfield, New Jersey facility copies of the attached notice marked "Appendix B."¹⁸ Copies of the notice, on forms provided by the Regional Director for Region 2, 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 28, 1996.

(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.

The Respondent Van Tag Corporation Yonkers, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to execute or abide by the terms of the Independent Building Construction Agreement (the agreement) effective by its terms from July 1, 1996, to June 30, 2001.

(b) 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 bargaining representative of the employees in the Unit set forth in the agreement described above.

(b) Sign and abide by the agreement, effective from July 1, 1996 to June 30, 2001.

(c) Make whole employees and the benefit funds for any losses suffered as a result of Respondent Van Tag's unlawful conduct, with interest, in the manner set forth in the remedy section of this decision.

(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 payments records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form,

¹⁷ 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."

¹⁸ 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."

necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Yonkers, New York facility copies of the attached notice marked "Appendix C."¹⁹ Copies of the notice, on forms provided by the Regional Director for Region 2, 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 tendency 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 28, 1996.

(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 comply.

IT IS FURTHER ORDERED that the complaints in Cases 2-CA-31097 and 2-CA-31123 be dismissed.

APPENDIX A

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 refuse to execute or abide by the terms of the Independent Heavy Construction Dockbuilding Marine and Foundation Agreement (the agreement) effectively by its terms from July 1, 1996, to June 30, 2002.

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.

¹⁹ 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, on request, recognize and bargain with the Union as the exclusive bargaining representative of our employees in the unit set forth in the agreement described above.

WE WILL sign and abide by the agreement, effective from July 1, 1996, to June 30, 2002.

WE WILL make whole our employees and the benefit funds for any losses suffered as a result of our unlawful conduct, plus interest.

APPENDIX B

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 refuse to execute or abide by the terms of the Independent Building Construction Agreement (the agreement) effectively its terms from July 1, 1996, to June 30, 2001.

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 bargaining representative of our employees in the unit set forth in the agreement described above.

WE WILL sign and abide by the agreement, effective from July 1, 1996, to June 30, 2001.

WE WILL make whole our employees and the benefit funds for any losses suffered as a result of our unlawful conduct, plus interest.

APPENDIX C

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

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

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 refuse to execute or abide by the terms of the Independent Construction Agreement (the agreement) effective by its terms from July 1, 1996, to June 30, 2001.

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 bargaining representative of our employees in the unit set forth in the agreement described above.

WE WILL sign and abide by the agreement, effective from July 1, 1996, to June 30, 2001.

WE WILL make whole our employees and the benefit funds for any losses suffered as a result of our unlawful conduct, plus interest.

AMERICA PILES INC., AGOSTINO QUALITY
CARPENTRY INC., KENNEY DRAPERY
ASSOCIATES INC., STONE SYSTEMS INC.,
AND VAN TAG CORPORATION