

Reese M. Garab d/b/a South Alabama Plumbing and United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local Union 119, AFL-CIO. Case 15-CA-14352

January 18, 2001

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS
LIEBMAN AND HURTGEN

On October 16, 1998, Administrative Law Judge Richard J. Linton issued the attached decision. The Respondent filed exceptions and a supporting brief; the General Counsel filed cross-exceptions, a supporting brief, and an answering brief; and the Charging Party filed cross-exceptions, a supporting brief, and 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 as explained below, and to adopt the judge's recommended Order as modified² and set forth in full below.

The judge found that the Respondent violated Section 8(a)(5) and (1) of the Act by repudiating an 8(f) contract in April 1997, and by withdrawing recognition from the Union. We agree with the judge, but find that the Respondent's affirmative defenses warrant further discussion.

The Respondent asserted two affirmative defenses, which the judge dismissed with the observation that Respondent should have filed unfair labor practices charges but had not. The Board has held, however, that the Board must consider a party's affirmative defense notwithstanding that the General Counsel has considered the same evidence and refused to issue complaint. *Chicago Tribune Co.*, 304 NLRB 259, 259-260 (1991). Further, this rule "is equally applicable to situations in which the party alleging an unfair labor practice in an affirmative defense has not previously filed a charge. . . . *Id.* at 260.

¹ We disavow the judge's unnecessary remarks about the possibility of indexing the Board's discretionary jurisdictional standards to the rate of inflation.

² We amend the judge's remedy to provide that the Respondent is liable for honoring the July 15, 1996-July 14, 1998 collective-bargaining agreement for its term, as well as any automatic renewal or extension of that contract. See, e.g., *McKenzie Engineering Co.*, 326 NLRB 473 (1998). In its cross-exceptions, the Charging Party contends that neither the Respondent's April 2, 1997 letter nor its March 26, 1998 letters properly terminated the contractual relationship between the parties, and, therefore, that the Respondent is bound to the successor contract expiring on July 14, 2000. Because the record is not clear on this point, we leave the issue for resolution at the compliance stage of this proceeding.

Accordingly, we shall proceed to consider the affirmative defenses on their merits.

The Respondent alleges that the contract contains an illegal union-security provision, establishes a virtual closed shop, and is, therefore, unenforceable. Without deciding whether the contract establishes a closed shop, we note that article XV of the agreement provides: "Any provisions of the Agreement which are in contravention of any federal, state, or local laws or regulations will be invalid only to the extent that they are in violation of such laws or regulations." The Board has found that where a party agreed to be bound to a contract containing an invalid union-security clause, but also a saving and separability clause, that party may not avoid its obligation to honor the other terms of the agreement. See *Liberty Cleaners*, 227 NLRB 1296 fn. 2 (1977).³ Accordingly, we reject the Respondent's first affirmative defense.

We also find without merit the Respondent's claim that the contract does not comply with Section 8(f) because it is not limited to construction industry work. The "Trade or Work Jurisdiction" clause of the contract refers, among many other things, to "manufacture," "drawings, "adjusting," and "fabrication" of plumbing work. The Respondent asserts that these words clearly encompass nonconstruction work. Therefore, according to the Respondent, the contract does not comply with the limitations set forth in Section 8(f) and should be found invalid.

We find the Respondent's assertion totally unsupported by the record. The Respondent is an employer engaged "primarily" in the building and construction industry. The Respondent "explains" in its brief the meaning of each of the above-quoted words, but there is no testimony that is even remotely related to the Respondent's claim about the meaning of these words. We do not agree with the Respondent's assertion that the use of these words establishes that the contract covers work that cannot be considered construction work by any standard. Thus, assuming arguendo the Respondent is correct that an 8(f) contract would be invalid if it encompassed any nonconstruction work, we find the Respondent has failed to show that the contract at issue here covered such work. In any event, the Respondent has not shown that the Union is attempting to apply this contract to nonconstruction work performed by the Respondent.

³ At the compliance stage of this proceeding, the Respondent will be permitted to show that the contract contains an illegal union-security clause that should be excised. While we make no final determination on this issue, we question whether the clause is in fact a union-security provision, especially since the Respondent is located in a right-to-work State.

Accordingly, we conclude that the Respondent did not establish its affirmative defenses, and therefore adopt the judge's unfair labor practice findings.

ORDER

The National Labor Relations Board orders that the Respondent, Reese M. Garab d/b/a South Alabama Plumbing, Atmore, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Repudiating and failing to honor the 1996–1998 collective-bargaining agreement with the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local Union 119, AFL–CIO, as the exclusive collective-bargaining representative of employees in the following unit, during the term of the contract and any automatic renewal or extension of it:

All employees employed by South Alabama Plumbing, excluding office clerical employees and supervisors as defined in the Act.

(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) Honor the 1996–1998 collective-bargaining agreement with the Union during the term of the contract, and any automatic renewal or extension of it, including paying contractual wage rates, making contractually required contributions to fringe benefit funds, making dues deductions pursuant to checkoff authorizations and remitting amounts deducted to the Union, and complying with all other terms for all employees in the bargaining unit.

(b) Make whole all employees, the Union, and fringe benefit funds, with interest, for any losses they may have suffered as a result of the failure to honor the collective-bargaining agreement, and any automatic renewal or extension of it, in the manner prescribed in the remedy section of the decision.

(c) 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.

(d) Within 14 days after service by the Region, post at its Atmore, Alabama facility, copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms

provided by the Regional Director for Region 15, 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 April 2, 1997.

(e) 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 repudiate and fail to honor the 1996–1998 collective-bargaining agreement with the United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local Union 119, AFL–CIO, as the exclusive collective-bargaining representative of employees in the following unit, during the term of the contract and any automatic renewal or extension of it:

All employees employed by South Alabama Plumbing, excluding office clerical employees and supervisors as defined in the Act.

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 Na-

tional 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 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 honor the 1996–1998 collective-bargaining agreement with the Union during the term of the contract, and any automatic renewal or extension of it, including paying contractual wage rates, making contractually required contributions to fringe benefit funds, making dues deductions pursuant to checkoff authorizations and remitting amounts deducted to the Union, and complying with all other terms for all employees in the bargaining unit.

WE WILL make whole all employees, the Union, and fringe benefit funds, with interest, for any losses they may have suffered as a result of the failure to honor the collective-bargaining agreement, and any automatic renewal or extension of it.

REESE M. GARAB D/B/A SOUTH ALABAMA PLUMBING

Tracie J. Jackson, Esq., for the General Counsel.
Willis C. Darby Jr., Esq. and Elizabeth D. Rehm, Esq. (Willis C. Darby Jr.), of Mobile, Alabama, for the Respondent, South Alabama Plumbing.
Francis J. Martorana, Esq. and Irene N. Pantelis, Esq. (O'Donoghue & O'Donoghue), brief only, for the Charging Party, Plumbers Local 119.

DECISION

STATEMENT OF THE CASE

RICHARD J. LINTON, Administrative Law Judge. This is a refusal-to-bargain case arising under Section 8(f) of the Act. The Company here, South Alabama Plumbing (S.A.P.), signed a March 31, 1997 “Letter Of Assent” form to be bound by the collective-bargaining agreement in effect with Plumbers Local 119. Two days later, the Company, by Reese M. Garab, sent its April 2 letter to the Union withdrawing the Company’s consent to be bound by that agreement. Because S.A.P. refused, during the period of March 31, 1997, through July 14, 1998, to recognize and bargain with the Union pursuant to its signed Assent agreement, and to pay the wage rates and benefit plan contributions required under the collective-bargaining agreement, this case has resulted. Finding for the Government, I order S.A.P. to make whole the affected employees and also the Union’s contractual benefit plans.

I presided at this 2-day trial in Mobile, Alabama, on May 6–7, 1998. Trial was pursuant to the December 29, 1997 complaint, as amended at the hearing.¹ Issued by the General Counsel of the National Labor Relations Board through the Regional Director for Region 15 of the Board, the trial complaint is based on a charge filed June 2, 1997, in Case 15–CA–14352 by United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and

Canada, Local Union 119, AFL–CIO (Union, Local 119, or Charging Party) against Reese M. Garab d/b/a South Alabama Plumbing (S.A.P., Respondent, or Company).

The pleadings establish that Reese M. Garab owns and operates S.A.P. as a sole proprietorship. S.A.P. denies that it does business as a “retail and non-retail plumbing contractor.” Board jurisdiction over S.A.P. is a major issue.

Danny Price, the business manager of Local 119, testified that the Union is an organization in which employees participate and that the Union exists, in part, for the purpose of dealing with employers about employee concerns such as wages, rates of pay, and conditions of work. (1:159–160).² I therefore find that Plumbers Local 119 is a labor organization within the meaning of 29 USC § 152(5).

The pleadings also establish that the following employees of S.A.P. constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by South Alabama Plumbing, excluding office clerical employees and supervisors as defined in the Act.

[I make the foregoing unit finding even though, in its amended answer of May 6, 1998 (RX 1), S.A.P. contends that the correct reference in the complaint allegation should be to Section 9(a) of the Act. The complaint correctly alleges Section 9(b). S.A.P.’s difference, I find, does not go to the merits of the allegation. Accordingly, I find that S.A.P. admits the appropriate unit allegation.]

About March 31, 1997, the pleadings further establish, S.A.P. entered into a “Letter of Assent” whereby S.A.P. “agreed to be bound by the collective-bargaining agreement between the Union and the Mobile Mechanical Contractors Association, Inc., effective from July 15, 1996, until July 14, 1998, and agreed to be bound to such future agreements unless timely notice was given.” Denying that it is an employer engaged, as alleged, “in the building and construction industry,” S.A.P. further denies that it, as alleged, recognized (by the Letter of Assent and the collective-bargaining agreement) the Union as the exclusive collective-bargaining representative of the unit employees “without regard to whether the majority status of the Union had ever been established under the provisions of Section 9(a) of the Act.”

Complaint paragraph 10 alleges, and S.A.P. admits, that about April 2, 1997:

Respondent withdrew its recognition of the Union as the exclusive collective-bargaining representative of the Unit and repudiated the “LETTER OF ASSENT” and the collective-bargaining agreement described above in paragraphs 8 and 9.

By the conduct described in paragraph 10, complaint paragraph 11 alleges, S.A.P. has failed to bargain with the exclusive collective bargaining of its employees in violation of Section 8(a)(5) and (1) of the Act. S.A.P. denies and advances several defenses. S.A.P.’s chief defense is that, although the implied

² References to the two-volume transcript of testimony are by volume and page. Exhibits are designated GCX for the General Counsel’s and RX for those of Respondent S.A.P.

¹ All dates are for 1997, unless otherwise indicated.

gist of the complaint is that S.A.P. renege on a Section 8(f) contract, that single unfair labor practice allegation of the complaint fails because S.A.P. is not “primarily” engaged in the building and construction industry within the meaning of Section 8(f) of the Act. Second, S.A.P. is engaged in the service industry. Thus, because S.A.P.’s gross income does not meet the Board’s discretionary retail standard of \$500,000 per year, the complaint must be dismissed on this basis alone.

For the first of the Government’s nine witnesses the General Counsel, under FRE 611(c), called Company’s owner, Reese M. Garab. His testimony was interrupted in order to accommodate the seven nonparty witnesses, and Danny Price also testified before Garab resumed the stand. Eventually, on the second day, Garab completed his testimony and the General Counsel rested. (2:339). After I denied S.A.P.’s motion to dismiss (2:339–340), S.A.P. called Garab as its own witness and also Danny Price [under, in effect, FRE 611(c)], before it rested (2:430). There was no rebuttal.

On the entire record, including my observation of the demeanor of the witnesses, and after consideration of the briefs filed by the General Counsel (who included provisions for a proposed order), the Union (not represented by counsel at trial), and by S.A.P. (who attached a proposed order of dismissal and submitted a two-page July 8, 1998 supplemental brief), I make these

FINDINGS OF FACT

A. Overview of S.A.P.’s Operations

A long time member of Plumbers Local 172, South Bend, Indiana, Reese M. Garab moved to Atmore, Alabama, about 1972. (2:341–342). About 50 to 60 miles northeast of Mobile, 6 or 7 miles south of Interstate 65, and about 45 miles north of Pensacola, Florida, Atmore is a small town in Escambia County. [*Road Atlas–1998* at 4 (Rand McNally)]. That county, Union Representative Price testified (1:180), is within the geographical jurisdiction of Plumbers Local 119. The Union [someone besides Price was the business manager then] would not accept Garab’s travel card from Local 172 for work within Local 119’s jurisdiction. (2:342). Garab apparently began work anyway as a plumber in the Atmore area, for in 1987 (1:25; 2:396) he opened his own plumbing business there (2:342).

During the jurisdictional year alleged, June 3, 1996, through June 2, 1997,³ S.A.P. employed about four permanent regular employees, S.A.P.’s usual number. (2:349). Three of the four performed service work and the fourth did construction work. (2:349–350, 391, 400, Garab). Garab testified that the only construction work S.A.P. does is that which it does at the request of S.A.P.’s regular service customers. (2:350, 362). In short, Garab tries to confine his company’s work to the service market, the niche he has carved out for himself, and he really does not want to do the construction work. He does it because of the service work those regular customers call him for. (2:362–363, Garab).

The 12-month jurisdictional year is not S.A.P.’s fiscal year, but apparently was selected by the Government as ending the

date on which the charge was filed in this case. See *J & S Drywall*, 303 NLRB 22, 30 (1991). Under Board law, the 12-month jurisdictional year is a flexible period which can be applied to most any recent 12-month period. See *NLRB v. Jerry Durham Drywall*, 974 F.2d 1000, 1002–1003 (8th Cir. 1992), *enfg.* 303 NLRB 22, 29–30 (1991).

Although the percentages are sharply disputed, Garab testified that the nature of his Company’s business is about 75 percent service and 25 percent construction. (1:41–43; 2:381). Ostensibly, one would think that an inspection of the invoices and a review of the testimonial description of the work done would clearly indicate whether S.A.P.’s work is mostly service, or primarily construction. As we shall see, it is not that simple, particularly under the Government’s definition of construction work.

After signing the one-page March 31, 1997 “Letter of Assent” [wage rates and costs of fringe benefits are expressed on a second page] obligating it to apply the existing collective-bargaining agreement (GCX 17), S.A.P., by Garab, repudiated its March 31 action with its April 2 letter (RX 2) to the Union. On June 2 the Union filed the charge in this case, and the complaint issued on December 29, 1997. The text of the “Letter of Assent” reads (GCX 18):

This is to certify that the undersigned firm has examined a copy of the Labor Agreement between the MOBILE MECHANICAL CONTRACTORS ASSOCIATION, INC., and LOCAL UNION 119, PLUMBERS AND STEAMFITTERS, dated the 15 day of July 1996, and effective the 15 day of July 1996. [GCX 17.]

The undersigned firm hereby agrees to comply with all terms and conditions of employment contained in the aforementioned agreement and all approved amendments thereto. It is further agreed that the signing of this Letter of Assent shall be as binding on the undersigned firm as though it has signed the above referred agreement and any approved amendments thereto. In signing this Letter of Assent the undersigned firm does hereby authorize the MOBILE MECHANICAL CONTRACTORS ASSOCIATION, INC., its collective-bargaining representative for all matters contained in this agreement or pertaining to this agreement. This authorization to the MOBILE MECHANICAL CONTRACTORS ASSOCIATION INC. shall remain in effect until terminated by written notice to the parties aforementioned agreement thirty (30) days prior to the notification date provided for therein.

B. Contentions of the Parties

1. Summary

As indicated earlier, the General Counsel contends that S.A.P. entered into an 8(f) contract (by virtue of signing the March 31 letter of assent), and that by its April 2 repudiation letter S.A.P. violated Section 8(a)(5) of the Act. The Union’s position is the same.

Respecting the merits, liability chiefly depends on the outcome of a single issue—whether S.A.P. is “primarily” engaged as a contractor in the “building and construction” industry (“construction” for short) within the meaning of Section 8(f) of

³ As amended at trial. (1:8–9.)

the Act. The Government and the Union argue affirmatively, while S.A.P. argues the negative, contending that it is primarily involved in the retail service industry. The General Counsel observes that S.A.P. performs plumbing services both as a sub-contractor to the general contractor as well as direct to consumers at retail. Accordingly, either the [\$500,000] retail or the [\$50,000] nonretail standard applies. *Man Products*, 128 NLRB 546 (1960). The Government relies on the nonretail standard of \$50,000.

On the principal issue—whether S.A.P. is “primarily” engaged in construction—the Government contends that practically all S.A.P.’s work is “construction” under a definition of “construction” jointly published by the U.S. Department of Commerce and the U.S. Department of Labor and cited and relied on by the administrative law judge in *U.S. Abatement*, 303 NLRB 451, 451 fn. 1, 455–456 (1991) (ALJ’s reasoning adopted by the Board at fn. 1). No evidence was presented before me concerning whether the definition cited in *U.S. Abatement* remains current or whether it has been modified by those federal agencies.

From the definition of “construction” cited by the judge (and adopted by the Board) in *U.S. Abatement*, the General Counsel contends here that even maintenance, such as unclogging drains and running clean-out cables through the sewer lines of residences, constitutes “construction” because such drains and lines are connected to and are an integral part of “immobile structures.” (Br. at 6–7; 1:18–19; 2:193–196, 275–278, 282.) Thus, “It makes no difference that a structure is a house, church, restaurant, day-care center, auto repair shop, electric shop, or a school, because all of these constitute structures within the meaning of building and construction.” (Br. at 21). Therefore, the 37 percent [the General Counsel’s computation] of S.A.P.’s work “that consists of cleaning out drains and toilets” should still be considered construction. (Br. at 22, 25). The Union’s position is essentially the same. As noted earlier, S.A.P. contends that its business is primarily retail service and not construction.

[Rather quietly, the General Counsel, in selecting, for the Government’s brief the entries the Government relies on to show “construction,” frequently has chosen to omit most, perhaps all, drain cleanings, sewer clean-outs, and inspections. Although the General Counsel disdained any explanation for the discrepancy, I understand that to be an unstated position that, even under the reduced numbers, “construction” and jurisdiction are still shown. For the purposes of its brief, the Union expressly (Br. at 11, fn. 2) declines to rely on “repairs” and “minor jobs” as part of “construction” in order to “make its estimate as conservative as possible.”]

Respecting the general numbers, the General Counsel (Br. at 8) contends that, during the jurisdictional year running through June 2, 1997,⁴ S.A.P. received gross revenue of \$241,170.66. The Government reaches this figure by adding (GCX 4(a)—adding machine tape) the sum of \$133,692.16 for the first 7 months (June 3 through December 31, 1996) of the jurisdic-

tional year, as shown on the 17 pages summarizing the transactions for that period (GCX 4),⁵ with the figure of \$107,478.50 for the last 5 months (running through June 2, 1997), as shown by the General Counsel’s adding machine tape (GCX 2a) for the 540 line items. The 540 line items appear on the first 10 pages of the 21–page “Transaction Detail by Date” document (GCX 2) showing transactions for calendar year 1997 through December 2. [The General Counsel inadvertently ends the tape (GCX 4a) at item 539, a figure of \$167.50, but should include the next line item, invoice 606, for the sum of \$30. When the \$30 item is added, the Government’s corrected figure for the 5 months in 1997 would be \$107,508.50.] Adding the sums of the 1996 and 1997 segments, and their total of 1328 line items, yields a total, as contended by the General Counsel, of (corrected) \$241,200.66.

Actually, the 1997 segment of 540 line items includes some 40 lines for finance charges rather than for any work or sales items. I therefore shall use a rounded number of 1300 line items. The data on the 1997 summary (GCX 2) is more detailed than that given on the 1996 summary (GCX 4) because S.A.P. computerized its record system at the beginning of 1997. (1:58). As the prices on GCX 4 indicate, and as some 1996 invoices reveal, a “service call” can mean that the transaction involved a lot more than simply cleaning a drain or unclogging a kitchen line or sewer line.

[The Union focused on the period of January–December 1997 respecting S.A.P.’s business revenues on the 8(f) question of whether S.A.P. is “primarily” engaged in the building and construction industry. I summarize the Union’s position later when I discuss procedural matters.]

As earlier mentioned, the General Counsel (Br. at 21–22) claims that virtually all of the \$241,200.66 is “construction,” but that even if the 37 percent devoted to unclogging drains and sewers should not be included, the remaining 63 percent leaves S.A.P. *primarily* engaged in “construction.”

For its part S.A.P. asserts (Br. at 3, 16) that its total revenue for the jurisdictional year was \$290,992.78 based on the entries in the two summaries (GCXs 2 and 4) and on certain invoices introduced as Government exhibits. [Numbers from the invoices presumably are reflected in the summaries.] Attached to S.A.P.’s brief is a 45–page (“landscape” fashion) listing of the transactions divided (by counsel per brief at 3 fn. 4) into 14 categories beginning with one for cleaning drains and sewers (pages 1–6) and ending with a dozen items on page 44 described as unclassified or unassigned. Schedule B to the brief gives S.A.P.’s code for further classifying the entries into types of work. Under S.A.P.’s classification system, S.A.P. (Br. at 3–4) calculates that \$164,786.74 [56.63 percent of the total] came from cleaning drains and lines and replacing fixtures [selling some new; repairing some old] and therefore “is of a retail and service character as distinguished from construction.” In short (Br. at 4), “The primary business of South Alabama Plumbing is not building and construction whether viewed by occurrences or dollar volume.”

⁴ By FAX dated 9-30-98 to me and counsel for the parties, the General Counsel confirms that the 12-month period runs through June 2, 1997. This clarifies the Government’s brief.

⁵ There are some 788 line items on GCX 4. Nearly all items are classified as “Service Call.”

Finally, the General Counsel filed an unopposed motion, dated June 10, 1998, to correct certain figures on GCXs 9(a), 16(a), 21(a), and 22(a). These are some of the adding machine tapes (the convenience exhibits), and S.A.P. had written (letter part of the motion package) the General Counsel pointing out certain errors. The motion to delete two items [dates beyond the period] from GCX 9(a) is granted, but the new total would be \$1442.45, not \$1382.45. Respecting GCX 16(a), the motion is granted to remove the overage item of \$210. This is one of those instances where the General Counsel's secrecy is misleading and confusing. The exhibit (GCX 16a), even as corrected, counts nearly all the 23 pages of invoices in GCX 16 (Poarch Creek Housing). [Certain pages were struck or removed at trial.] However, although the tape includes four items, or pages, that are charges for unclogging drains or lines (GCX 16 at 2, \$109.50; page 3, \$52; page 7, \$8a.70, and page 22, \$80), such charges are not claimed in the Government's brief at 13. Similarly, a repair listed on the tape (\$116, GCX 16 at 11) is unclaimed on brief at 13. One item claimed on brief at 13, \$194.59, was struck at trial (2:255) and not listed on the tape (GCX 16a).

As to GCX 21(a), the motion to delete two entries of \$48.50, and to designate the total as \$375, is granted. The invoices (GCX 21) consist of only four pages, or four number totals to add. The tape (GCX 21a) lists the four [which total \$375] plus a fifth, \$48.50, then shows the fifth being subtracted (the sixth number on the tape) with the total being \$472 [in fact adding the \$48.50 twice]. The weird total reflected on this tape would raise a question concerning all the tapes were it not for the fact that S.A.P. (or its lawyers) apparently also ran the numbers to verify the totals. [Smart!] As Finley Peter Dunne's "Mr. Dooley" would say, "Trust everybody, but cut the cards!"

For the last item in the motion, the deletion of two entries from GCX 22(a) to conform to their deletion at trial (2:286–287), I grant the motion. I now designate the motion package of six pages as GCX 29 and place it in the official folder for the exhibits of the General Counsel.

2. Jurisdiction

The first question is whether there is jurisdiction at all. I find the answer to be yes. This is so even though the Board has held that employers engaged in the construction and sale of residential homes are considered as being engaged in a retail enterprise. *De Marco Concrete Block Co.*, 221 NLRB 341, 342 and fn. 7 (1975). It therefore would follow that subcontractors, such as S.A.P., are engaged in a retail enterprise when they are, for example, plumbing for residential construction, whether that construction is for new homes or to remodel existing homes.

However, even with most of S.A.P.'s work considered as retail, S.A.P.'s gross revenue still falls far short of the \$50,000 retail standard. Before discussing the \$50,000 nonretail standard, I should note here the possibility that S.A.P. would not be covered under the nonretail standard if that \$50,000 triggering level had been indexed to move with inflation. The Board's discretionary jurisdictional standard of \$50,000, applicable to nonretail firms is a standard which the Board reaffirmed in November 1958—nearly 40 years ago—in *Siemons Mailing Service*, 122 NLRB 81 (1958). If the Board could have raised

its discretionary threshold to adjust for inflation over these last 40 years, the discretionary standard today for nonretail firms probably would be at least \$250,000, and possibly \$300,000. If the latter were the threshold amount, then there would have been a finding at the Regional Office level in this case of no jurisdiction over S.A.P.

However, by an amendment that Congress, after *Siemons*, made to the statute, the Board has been restricted to the discretionary standards which existed as of August 1, 1959. See 29 USC § 164(c)(1). With the ever increasing strain on the Agency's budget, the Board's statutory inability to raise the discretionary jurisdictional thresholds which it applies to various categories of cases will, at some point, result in the \$50,000 standard capturing every "mom and pop" nonretail shop in the nation. Even before that point is reached, the Agency's budget will have reached a financial meltdown. Perhaps Congress will address the matter again and authorize the Board to raise the dollar amounts or even to switch to a standard based on the number of employees, as exists at the EEOC. As to the latter, see *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 fn. 2 (1997).

For now, however, the \$50,000 level applies for the nonretail firm. And where, as here, a firm does both retail and nonretail, the firm's "total operations" are counted in determining whether the company meets the pertinent standard—here, the nonretail standard. *Indiana Bottled Gas Co.*, 128 NLRB 1441, 1441 and fn. 2 (1960); *Appliance Supply Co.*, 127 NLRB 319 (1960).

S.A.P.'s nonretail operations "are more than de minimis." Indeed, during the jurisdictional year S.A.P. received income reaching, even exceeding, \$50,000 from Maxwell Construction Company for work at nonretail. Thus, record evidence shows that, during the jurisdictional year, S.A.P. provided plumbing work (sales and service) to Maxwell Construction Company of \$51,784.93 on just four commercial jobs. These were the Touch One Warehouse for \$17,080.28; Brewton's Day Care (Noah's Ark) for \$20,906.40; the First Presbyterian Church for \$7,938, and the Alto storage warehouse job for \$5,860.25. The record does not show that Maxwell Construction Company is itself operating in interstate commerce. The only evidence as to this is that it had sales of about \$3 million in 1996 and about \$2 million in 1997. (1:133.)

Nevertheless, during the jurisdictional year, S.A.P. purchased items costing at least \$50,000 from Alabama suppliers, and the items were shipped to the suppliers from points outside Alabama. These items include a Chevrolet pickup for nearly \$30,000 that was claimed as a 100-percent business expense on Reese Garab's tax return (GCX 27 at 13), and well over \$50,000 in plumbing supplies (GCX 7).⁶ Moreover, during the relevant year Bogan Supply Co. of Pensacola, Florida (1:114; GCX 8) shipped \$7,884.48 (GCX 8a) of plumbing fixtures

⁶ The adding machine tape (GCX 7a) supplied by the General Counsel for the 96-page listing of items purchased (GCX 7), with most pages having a total, has the page-total numbers in disarray. That is, the numbers on the tape are not in the same sequence as the pages of the exhibit. And for the long tapes, GCX 2(a) and GCX 7(a), the photocopies supplied by the General Counsel to me, and presumably to the parties, were merely of the last fold of the tape displayed.

direct from Florida to S.A.P. in Alabama. (1:119–120). Legal jurisdiction is established, as well.

Jurisdiction possibly also could be deemed established simply from the fact that S.A.P. signed the “Letter of Assent.” (GCX 18). See *Stack Electric*, 290 NLRB 575, 576–577 (1988). It is unclear whether, under *Stack Electric*, the complaint must allege that some member of the bargaining association meets a commerce standard established by the Board, or that the members collectively do. A yes answer is suggested by the General Counsel’s pleadings manual. See Section 300.7 *NLRB Pleadings Manual* 33 and fn. 4 (1991). In any event, I find that jurisdiction over S.A.P. is established under the Board’s nonretail standard based on direct and indirect inflow.

3. Procedural matters

In their briefs the General Counsel and S.A.P. refer to five exhibits (A–E) attached to S.A.P.’s January 13, 1998 original answer and motion to dismiss. One of those exhibits (Exh. B) became GCX 2, but no party offered the others into evidence. In correspondence subsequent to the trial, I advised counsel that pleadings, motions, and any attachments, become part of the record,⁷ but that they are not that evidence which is offered and received, “so far as practicable,” under the Federal Rules of Evidence (FRE)—any more so than motions made orally at trial. [Many lawyers would raise a loud cheer if they learned that their pleadings and motions (aside from the potential of an admission by a party opponent) would be treated as affirmative evidence.] Traditionally, such documents, commonly called the “formal papers,” generally are contained in General Counsel Exhibit 1. That exhibit functions as a portable district clerk’s office in order to have a repository for the pleadings and motions that form part of the record of the case. As the Government’s own casehandling manual indicates, the formal papers are not offered for the truth of their contents. 1 *NLRB Casehandling Manual* Sec. 10384 (June 1989).

As it appeared that at least the General Counsel and S.A.P., and possibly the Union, desired to have the remaining four documents (Exhibits A, C, D, E) received in evidence, I suggested that if they all so agreed then they could stipulate that they be received as, for example, RXs 10, 11, 12, and 13. However, the parties did not agree, for S.A.P. reportedly objects. By letter of October 2, 1998, the General Counsel offers four of the five documents, Exhibits B, C, D, and E (which I have designated as GCX 30, totaling 57 pages). As Exhibit B became GCX 2, that means GCX 30 (which omits Exhibits A and E) duplicates GCX 2 (a 21-page document listing all transactions by S.A.P. during calendar year 1997 by date of transaction and in date sequence). The document Exhibit C is a 13-page listing of all cash sales during 1997 through December 2, 1997. Document D is a 23-page summary of sales during the same period to, as shown by a cover page, 22 named customers. [Exhibit A, not offered, is a one-page listing of employees employed by S.A.P. during 1996 and 1997. Document Exhibit E, not offered, is a one page copy of a yellow page ad by S.A.P.]

S.A.P. reportedly objects to the receipt of GCX 30. GCX 30 combines separate documents, even duplicating one exhibit

(GCX 2, already in evidence). GCX 30 simply would confuse the record. Rejecting the posttrial offer of GCX 30, I shall place GCX 30 in the rejected exhibits file. The Government’s request of October 2 to submit a supplemental brief if GCX 30 were received in evidence is now canceled by its own condition.

By letter dated October 5, 1998, the Union asserts that its selection of the transactions document for all transactions in 1997 through December 2, 1997 (GCX 2), as the base for analyzing whether S.A.P. is “primarily” engaged in the building and construction industry, is correct. This is so, it is argued, because the cases show that a period following the execution of a letter of assent frequently is when a company begins its work. A different period may be, as here, appropriate for determining jurisdiction, but that is a different concept from selecting the appropriate period for determining the primary nature of the company’s business.

The Union’s argument makes sense. However, there is one problem—the case was litigated, both as to jurisdiction and as to 8(f), on the 12 month period of June 3, 1996 through June 2, 1997. For example, there are many instances at trial where S.A.P. objected to the presence of an invoice for a date beyond the period selected by the Government, and the General Counsel, in agreement, removed those invoices. The General Counsel selects the theory of a complaint. Thus, a charging party cannot enlarge on or change the General Counsel’s theory of the case. *Kimtruss Corp.*, 305 NLRB 710, 711 (1991). The Charging Party here (whose counsel were not at the trial) advances its argument far too late. Accordingly, even though the period of time reflected in GCX 2 might be more appropriate than the one litigated, I consider only the period litigated.

C. Discussion

1. Nature of the work

As for repairs, what significance is there in the fact that the specifics of “alteration, painting, or repair of a building, structure or other work” appear in Section 8(e) of the Act, but not in 8(f)? The Board recognizes that the underlying policies, as well as the language, are different for the two sections. See *Carpenters (Rowley-Schlimgen)*, 318 NLRB 714, 715–716 (1995). Thus, repairs at construction sites are covered by Section 8(e). Does the absence of those specific words, such as “repair,” from 8(f) mean that “construction” in 8(f) is directed toward bigger projects than retail servicing of homeowners and small businesses?

It appears that the Board has adopted a broad interpretation of “construction” in Section 8(f) that covers repairs to and replacement of “integral parts” of any immobile structure. Thus, whether it is an 8(e) or 8(f) case, the Board cites the same definitions that pertain to both new and existing structures. See *Carpenters (Rowley-Schlimgen)*, 318 NLRB 714, 715–716 (1995) (8(e) case); *U.S. Abatement*, 303 NLRB 451, 451 fn. 1, 455–456 (1991) (8(f) case); *C.I.M. Mechanical Co.*, 275 NLRB 685, 691 (1985) (8(f) case); and *Painters Local 1247 (Indio Paint)*, 156 NLRB 951, 957–961 (1966) (8(f) case).

As repairs (and replacements as part of repairs) done by S.A.P. are “construction,” then even S.A.P. no doubt would concede that it is engaged “primarily” in the building and con-

⁷ See 29 CFR § 102.45(b).

struction industry. Such a concession would be compelled by S.A.P.'s own numbers (Br. at 3–4) showing that, of the \$290,992.78 it shows for gross revenue during the period, \$190,445.20 (or 65.44671 percent), falls into several categories (the first eight at page 4 of S.A.P.'s brief) pertaining to repairs, replacements, remodeling, roughing in plumbing, installing water, gas, sewer lines, and piping, and new construction. That figure is reached even without trying to determine how a bunch of \$200 to \$500 (and higher) service calls could be limited to merely unclogging drains. [S.A.P. does not suggest that they are so limited. For the most part, the record does not describe the nature because the 1996 records were not computerized.]

In view of the foregoing, and particularly based on my view that the Board has adopted a very broad and inclusive interpretation of the term “construction,” as used in Section 8(f) of the statute, I find that, during the jurisdictional year, S.A.P. was an employer engaged “primarily” in the building and construction industry, and employing employees in that industry.

2. Separate defense

S.A.P. also contends that the collective-bargaining agreement is “facially illegal” (Br. at 18) because certain provisions require the Union to favor union members against nonmembers and would perpetuate a virtual “close shop.” As the Union counters (Br. at 19–23), if the Union is engaging in an unfair labor practice, S.A.P. should file an unfair labor practice charge with NLRB Region 15. No such charge is before me. The charge before me is whether S.A.P. is unlawfully refusing to recognize and bargain with the Union pursuant to Section 8(f) of the Act. I find that, as alleged, it is.

CONCLUSIONS OF LAW

1. The Respondent, S.A.P., is an employer within the meaning of Section 2(6) and (7) of the Act.

2. The Union, United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States and Canada, Local Union 119, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. During the period of June 3, 1996, through June 2, 1997, S.A.P. operated as an employer engaged “primarily” in the building and construction industry.

4. By signing the March 31, 1997 “Letter Of Assent” (GCX 18), S.A.P., by Reese Garab, S.A.P.'s owner, bound itself to the July 15, 1996–July 14, 1998 collective-bargaining agreement (GCX 17) between the Mobile Mechanical Contractors Association and Local 119, the Union.

5. All employees employed by S.A.P., excluding office clerical employees and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

6. By its April 2, 1997 letter (RX 2) revoking its earlier signing of the letter of assent, therefore repudiating the July 15, 1996 collective-bargaining agreement, and consequently withdrawing recognition from the Union during the term of the collective bargaining agreement, S.A.P., as alleged, violated Section 8(a)(5) and (1) of the Act.

7. The unfair labor practice affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

By withdrawing recognition from the Union and repudiating the collective-bargaining agreement, S.A.P. presumably failed to pay bargaining unit employees contractually established wage rates, and presumably failed to make the contractually required contributions to the Union's employee benefit plans. Accordingly, S.A.P. must make whole the employees as prescribed in *Ogle Protection Service*, 183 NLRB 689 (1970), enf'd. 444 F.2d 502 (6th Cir. 1971), the contractual benefit funds as described in *Merryweather Optical Co.*, 240 NLRB 1213 (1979), and the employees for any losses or expenses they may have incurred because of S.A.P.'s failure to make payments to those benefit funds, as prescribed in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf'd. mem. 661 F.2d 940 (9th Cir. 1981), with interest on all amounts owing as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), for the period of March 31, 1997, through July 14, 1998.

[Recommended Order omitted from publication.]