

**Local 282, International Brotherhood of Teamsters,
AFL-CIO and E.G. Clemente Contracting
Corp.** Case 29-CB-10969

September 24, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS
LIEBMAN, TRUESDALE, AND WALSH

On June 21, 2000, Administrative Law Judge Margaret M. Kern issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Party filed an answering brief, to which the Respondent filed a reply brief. The Charging Party filed limited cross-exceptions and a supporting brief, the Respondent filed an answering brief, and the Charging Party filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions only to the extent consistent with this Decision and Order.

The main issue presented in this proceeding is whether Local 282, International Brotherhood of Teamsters, AFL-CIO (the Respondent) violated Section 8(b)(1)(B) or (3) by striking E.G. Clemente Contracting Corp. (Clemente or the Employer) in support of the Respondent's demand that Clemente accept a contract containing the same provisions as the Respondent's contract with a multiemployer association. We find, contrary to the judge, that the Respondent did not violate Section 8(b)(1)(B) or (3) as alleged. We shall accordingly dismiss the complaint.

I. FACTUAL BACKGROUND

The Respondent is the collective-bargaining representative of a unit composed of Clemente's automobile chauffeurs, euclid operators, and turnapull operators. Every 3 years, the Respondent negotiates with a multiemployer bargaining association known as the General Contractors Association (the GCA) for an industrywide agreement in the New York City Heavy Construction & Excavating industry. The most recent collective-bargaining agreement between the Respondent and the GCA is effective from July 1, 1999, until June 30, 2002.

Clemente has followed the practice of signing the GCA-Respondent agreement after negotiations between

the GCA and the Respondent are completed. Clemente thus executed the previous GCA-Respondent agreement, effective from July 1, 1996, to June 30, 1999, and abided by its terms. Clemente has never been a member of the GCA, however, or executed an agreement binding it in advance to the outcome of the GCA-Respondent negotiations.

On April 1, 1999,² the Respondent gave notice to all of the signatories of the 1996-1999 GCA-Respondent agreement, including Clemente, of the impending expiration of that agreement, and the Respondent's intention to seek modification of the agreement. The Respondent and the GCA thereafter engaged in negotiations for a successor contract and on June 3 they entered into a new agreement effective from July 1, 1999, to June 30, 2002. The new agreement consisted of the prior agreement, along with a nine-page memorandum of agreement extending the terms of the prior agreement subject to several modifications.

In mid-June, the Respondent sent a copy of the 1999-2002 memorandum of agreement to all signatories to the previous agreement, including those, like Clemente, who are not members of the GCA. Consistent with the parties' past practice, the Respondent requested that Clemente sign the memorandum of agreement as an independent employer, not as a member of the GCA. The Respondent made the same request to other signatory employers who are not GCA members.

The Employer's president, Garry Clemente, subsequently met with the Respondent's business agent, Lawrence Kudla, and complained about his inability to compete with nonunion contractors who perform private sector work.³ He explained to Kudla that the Respondent had to organize the nonunion contractors in order for Clemente to compete for private sector work, and sought wage relief from the terms of the 1999-2002 memorandum of agreement. Kudla responded that he could not deviate from the 1999-2002 contract and that Clemente would "live and die" by the contract.

On July 29, the parties met for their only bargaining session. The Employer stated that it wanted to expand its business into the private sector market, but was unable to compete with nonunion contractors. It accordingly sought a two-tiered wage scale with a lower rate for private sector jobs, and relief from the 8-hour work guarantee so that it would only be obligated to pay employees for hours actually worked. The Respondent explained its difficulty in organizing the nonunion contractors. The Respondent further explained that the terms of the 1999-

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² All dates hereafter are in 1999 unless otherwise noted.

³ The Employer's business consists entirely of public sector work.

2002 memorandum of agreement could not be varied for Clemente because of the applicability of a most favored nations' clause. The Respondent remained adamant in favor of the terms set forth in the memorandum of agreement, and warned that it could take economic action against Clemente in support of those terms. According to the credited testimony, the Respondent stated that the Employer's goal of obtaining more favorable terms "would never happen."

On August 9, the Respondent commenced picketing at Clemente's yard facility in support of its contract demands. The strike continued until August 11, at which time Clemente signed the memorandum of agreement.

II. THE JUDGE'S DECISION

The judge found that the purpose of the strike was to compel Clemente to execute the 1999–2002 memorandum of agreement. The judge concluded that by that conduct the Respondent compelled Clemente to be bound by an agreement negotiated by a multiemployer association to which it does not belong, and thereby coerced Clemente to select the multiemployer association as its collective-bargaining representative in violation of Section 8(b)(1)(B) of the Act. The judge found further that the Respondent's conduct violated Section 8(b)(3) of the Act by forcing the Employer to agree to a nonmandatory subject of bargaining (the designation of the multiemployer association as its bargaining representative) and by forcing the Employer to be bound by the association agreement.

III. POSITIONS OF THE PARTIES

In its exceptions, the Respondent argues that there is nothing unlawful about a union seeking to establish and maintain the same terms and conditions for all employees within an industry. As long as a union is willing to negotiate in good faith, the Respondent asserts, the union may resort to economic action in support of its goal of uniformity.

Although otherwise in agreement with the judge's decision, the Employer has filed cross-exceptions to the judge's failure to find that the Respondent's conduct at the July 29 bargaining session constituted a violation of Section 8(b)(1)(B) and (3). The Employer argues that this issue is closely connected to the subject matter of the complaint and was fully litigated.

Discussion

1. Before discussing the issues before us, it is important to identify an issue that this case does not present. Specifically, the General Counsel is not alleging that the Respondent bargained in bad faith with the Employer prior to the August 9 strike. In other words, the General Counsel is not claiming that the Respondent's conduct at

the July 29 negotiation session constituted unlawful "take it or leave it" bargaining in violation of Section 8(b)(3). Indeed, at the hearing, the General Counsel specifically disavowed any such allegation, stating: "What we are alleging in our complaint is that the strike was illegal, not that what occurred in the negotiation session on July 29th was illegal. We are not alleging that what occurred on July 29th was unlawful."

As the judge correctly recognized, the "General Counsel, not the Charging Party, determines the theory of the case." *Operating Engineers Local 12 (Sequoia Construction)*, 298 NLRB 657 fn. 1 (1990). Recently, in *GPS Terminal Services*, 333 NLRB 968 (2001), the Board held that a judge has no authority to amend the complaint in a manner that was "neither sought nor consented to by the General Counsel," even where "the record evidence would support the additional allegations." *Id.*, at 969.

Applying these principles here, we find that, in light of the General Counsel's comment on the record that he was not "alleging that what occurred on July 29th was unlawful," the judge correctly declined to consider the Charging Party's argument that the Respondent's conduct at the July 29 bargaining session violated Section 8(b)(1)(B) and (3). Further, due to the General Counsel's disavowal of the Charging Party's theory at the hearing, we cannot say that the additional violations the Charging Party seeks were fully and fairly litigated. For these reasons, we find no merit in the Charging Party's exceptions.

2. We now turn to the question of whether the Respondent violated Section 8(b)(3) by engaging in a strike against the Employer from August 9 through 11. The relevant principles are well established.

Section 8(b)(3) of the Act makes it an unfair labor practice for a labor organization "to refuse to bargain collectively with an employer." Section 8(d) defines the phrase "to bargain collectively" as "the mutual obligation . . . to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession."

Good-faith bargaining "presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract." *NLRB v. Insurance Workers*, 361 U.S. 477, 485 (1960). However, a "refusal to bargain cannot be equated with [a] refusal to recede from an announced position advanced and maintained in good faith." *Church Point Wholesale Grocery Co.*, 215 NLRB 500, 502 (1974), petition denied sub nom. *Oil Workers v. NLRB*, 538 F.2d 1199 (5th Cir. 1976). Although the

Board does not evaluate whether particular proposals are acceptable or unacceptable, the Board “[will] examine proposals when appropriate and consider whether, on the basis of objective factors, a demand is clearly designed to frustrate agreement on a collective-bargaining contract.” *Reichhold Chemicals*, 288 NLRB 69 (1988), affirmed in relevant part sub nom. *Teamsters Local 515 v. NLRB*, 906 F.2d 719 (D.C. Cir. 1990), cert. denied 498 U.S. 1053 (1991). To determine whether a party has bargained in good faith, “[i]t is necessary to scrutinize [the party’s] overall conduct.” *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984).

In this case, however, the General Counsel has eschewed a totality-of-circumstances approach and has focused narrowly on the Respondent’s August 9 decision to strike the Employer. In light of this temporal limitation, we find that the record evidence is plainly insufficient to support a finding of bad-faith bargaining in violation of Section 8(b)(3). We disagree with the judge’s reasoning that because the parties were in the midst of negotiations when the strike was called, the Respondent necessarily must have had no interest in bargaining in good faith with the Employer. The Supreme Court made it clear in *Insurance Workers* that “[t]he use of economic pressure . . . is of itself not at all inconsistent with the duty of bargaining in good faith.” 361 U.S. at 490–491. A union’s exercise of the strike weapon during negotiations is “part and parcel” of the system of collective bargaining. *Id.* at 489. Accordingly, contrary to the judge, we will not infer bad faith simply because the Respondent struck in support of its bargaining demands.

To be sure, the judge found, and we agree, that “the credible evidence establishes overwhelmingly that the purpose of the strike was to compel the Employer to execute the 1999–2002 GCA agreement.” It is well-established, however, that “a union may adopt a uniform wage policy and seek vigorously to implement” it among several employers in an area, and otherwise legitimately can strive “to obtain uniformity of labor standards[.]” *Mine Workers v. Pennington*, 381 U.S. 657, 665–666 and fn. 2 (1965).⁴ As the Supreme Court has declared:

We have said that a union may make wage agreements with a multiemployer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers. [381 U.S. at 665.]

⁴ See, e.g., *Roadway Package System*, 292 NLRB 376, 427 (1989), affd. mem. 902 F.2d 34 (6th Cir. 1990); *Graphic Communications Local 280 (James H. Barry Co.)*, 235 NLRB 1084, 1095 fn. 43 (1978), enf. 596 F.2d 904 (9th Cir. 1979); *Teamsters Local 301 (Merchants Moving & Storage)*, 210 NLRB 783, 787 (1974).

The Respondent’s conduct at issue in this proceeding falls squarely within this principle. The record shows that the Respondent reached agreement with the GCA multiemployer bargaining association and was seeking to obtain those same terms from Clemente and other employers in the industry.

In its answering brief, the Employer acknowledges that “the Union has the legitimate right to seek for its members the same terms and conditions that were negotiated under the area-wide GCA agreement.” The Employer argues that the “crux of the case” is that the Union did not just strive for uniform terms, “but rather had made up its mind prior to and during negotiations that it would require the Employer to accept the same terms that the Union negotiated with the GCA.” The flaw in the Employer’s argument is that the complaint does not place in issue the totality of the Respondent’s conduct “prior to and during negotiations.” Instead, the gravamen of the General Counsel’s complaint is that the Respondent engaged in unlawful conduct by striking to obtain from the Employer the substantive terms contained in the 1999–2002 GCA agreement. Under the precedent cited above, however, the Respondent’s resort to economic action for the purpose of obtaining uniformity in industrywide employment terms does not, without more, amount to a refusal to bargain in good faith. Accordingly, we shall dismiss the complaint insofar as it alleges a violation of Section 8(b)(3).

3. The final issue before us is whether the judge correctly found that the Respondent coerced the Employer to select the multiemployer association as its collective-bargaining representative in violation of Section 8(b)(1)(B).

This case is governed by the principles established in *Teamsters Local 705 (Kankakee-Iroquois)*, 274 NLRB 1176 (1985), petition for review denied sub nom. *Kankakee-Iroquois County Employers’ Assn. v. NLRB*, 825 F.2d 1091 (7th Cir. 1987). In that case, the complaint alleged that the union violated Section 8(b)(1)(B) by insisting that multiemployer association “A” agree to terms and conditions of employment that the union negotiated with multiemployer association “B.” In agreement with the judge, the Board found that the union’s conduct did not violate Section 8(b)(1)(B). Citing, *inter alia*, the Supreme Court’s decision in *Florida Power & Light Co. v. Electrical Workers Local 641*, 417 U.S. 790, 798 (1974), the Board held that Section 8(b)(1)(B) generally “has been treated as a prohibition against a union coercing an employer into foregoing the employer’s choice of its representatives for *future* collective bargaining.” (Emphasis in original.) 274 NLRB at 1180. In *Kankakee-Iroquois*, there was no evidence that the union

insisted that multiemployer association “A” make multiemployer association “B” its representative for *future* collective bargaining. Rather, the record showed only that the union demanded that multiemployer association “A” agree to the same economic terms that multiemployer association “B” had agreed to. In these circumstances, the Board concluded, the proper inquiry is whether the union complied with its duty to bargain in good faith with multiemployer association “A”; to hold that the union’s conduct violated Section 8(b)(1)(B) “would extend the scope of Section 8(b)(1)(B) beyond Congress’ purpose while adding nothing to the Board’s power to police collective-bargaining relationships (given the fact that Section 8(b)(3) covers the situation at hand).” *Id.*

The Seventh Circuit affirmed the Board’s dismissal of the 8(b)(1)(B) complaint. The court reasoned as follows:

In *Florida Power & Light Co. v. International Brotherhood of Electrical Workers, Local 641*, 417 U.S. 790, 803, 94 S.Ct. 2737, 2743, 41 L.Ed.2d 477 (1974), the U.S. Supreme Court explained that the “specific concern of Congress [in enacting section 8(b)(1)(B)] was to prevent unions from trying to force employers into or out of multi-employer bargaining units.” Thus, section 8(b)(1)(B) proscribes a union from coercing an employer into accepting a *particular bargaining representative*, but does not preclude a union from bargaining aggressively with an individual employer over the terms of a union contract even where the contract the union is bargaining for is substantially similar to the contract the union previously negotiated with a multi-employer bargaining unit. [825 F.2d at 1095.] [Emphasis in original.]

Accordingly, the court held that the union did not violate Section 8(b)(1)(B). The court emphasized that the union “only insisted that [multiemployer association “A”] accept a contract containing the same provisions as [the union’s] contract with [multiemployer association “B”] and did not pressure [multiemployer association “A”] into selecting a particular bargaining representative.” *Id.* In sum, the court concluded an 8(b)(1)(B) violation had not been established because “the statute, on its face, . . . does not prohibit unions from seeking agreements substantially similar to those that they have already negotiated with other employers.” *Id.*

Applying the principles of *Kankakee-Iroquois* to the facts of this case, we reverse the judge and find that the Respondent did not violate Section 8(b)(1)(B). Here, as in *Kankakee-Iroquois*, there is no evidence that the Respondent insisted that the Employer make the GCA its representative for purposes of *future* collective bargain-

ing. Rather, the record shows only that the Respondent insisted that the Employer accept a contract containing the same provisions as the contract the Union previously negotiated with GCA. Because Section 8(b)(1)(B) “does not prohibit unions from seeking agreements substantially similar to those that they have already negotiated with other employers,” *Kankakee-Iroquois*, supra, 825 F.2d at 1095, we shall dismiss this complaint allegation.

In concluding that the Respondent violated Section 8(B)(1)(B), the judge relied on three cases. The oldest of these cases, *Retail Clerks Local 770 (Fine’s Food Co.)*, 228 NLRB 1166 (1977), is consistent with the principles of *Kankakee-Iroquois* discussed above but is easily distinguishable from this case. In *Fine’s Food*, the union, by threatening a strike, compelled the independent employer to sign an interim agreement that bound the employer to any agreement thereafter negotiated between the union and a multiemployer association. In other words, in *Fine’s Food*, unlike *Kankakee-Iroquois* and this case, the union coerced the employer to agree to be bound by the terms of a *future* collective-bargaining agreement to be negotiated by a multiemployer association to which the employer did not belong. In those circumstances, the Board concluded that the union had forced the employer to designate the multiemployer association as its collective-bargaining representative in violation of Section 8(b)(1)(B). Here, in contrast, the multiemployer association agreement had already been negotiated at the time the Respondent insisted that the Employer sign it.

The other two cases cited by the judge are not so easily distinguished. See *Commercial Workers Local 1439 (Food City West)*, 262 NLRB 309 (1982); *Laborers Local 652 (Thoner & Birmingham Construction Corp.)*, 238 NLRB 1456 (1978). In *Food City West* and *Thoner & Birmingham*, the unions, by threatening to strike, striking, or picketing sought to compel independent employers to agree to contracts that the unions had already negotiated with multiemployer associations. In both cases, the Board concluded that the “effect” of the unions’ conduct was to coerce the employers to select the multiemployer associations as their collective-bargaining representatives in violation of Section 8(b)(1)(B).

In *Kankakee-Iroquois*, the Board referred to these two cases as “exceptions” to the general rule that Section 8(b)(1)(B) is a “prohibition against a union coercing an employer into foregoing the employer’s choice of its representatives for *future* collective-bargaining.” 274 NLRB at 1180. (Emphasis in original.) In a footnote, the Board attempted to distinguish the two cases on their particular facts. *Id.* at fn. 12. We are no longer convinced, however, that there is any principled basis on

which the decisions can be reconciled with the general rule the Board enunciated in *Kankakee-Iroquois*. In addition, we have taken into account the fact that *Food City West* and *Thoner & Birmingham* were decided prior to *NLRB v. Electrical Workers Local 340*, 481 U.S. 573, 586 (1987), in which the Supreme Court admonished the Board that Section 8(b)(1)(B) is to be given a “limited construction.” For these reasons, we have decided to overrule *Food City West* and *Thoner & Birmingham* to the extent that they are inconsistent with the general rule, established by the Board in *Kankakee-Iroquois* and affirmed by the court of appeals, that it is not a violation of Section 8(b)(1)(B) for a union to seek from an independent employer a contract containing the same provisions as those in an agreement the union has already negotiated with a multiemployer association.

Conclusion

Having found that the Respondent did not violate Section 8(b)(3) or (1)(B), as alleged, we shall dismiss the complaint in its entirety.

ORDER

The complaint is dismissed.

Rosalind Rowen, Esq., for the General Counsel.

Joseph J. Vitale, Esq., for the Respondent.

Alexander A. Miuccio, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARGARET M. KERN, Administrative Law Judge. This case was tried before me on February 28, 2000, in Brooklyn, New York. The complaint, which issued on November 30, 1999,¹ is based on an unfair labor practice charge and an amended charge filed by E.G. Clemente Contracting Corp. (the Employer) on August 26 and November 10 against Local 282, International Brotherhood of Teamsters, AFL-CIO (the Union or Respondent).

It is alleged that beginning on August 9, the Union engaged in a strike with the unlawful purpose of coercing the Employer to execute a collective-bargaining agreement previously negotiated between the Union and a multiemployer association to which the Employer did not belong. Respondent maintains that it engaged in lawful economic picketing sparked by the Employer’s obdurate behavior during bargaining. For the reasons set forth herein, I find the Respondent violated Section 8(b)(1)(B) and (3) of the Act as alleged.

FINDINGS OF FACT

I. JURISDICTION

The Employer is engaged in the business of installing sewers and water mains for the City of New York. Its principal office and place of business is located at 4442 Arthur Kill Road, Staten Island, New York (the main facility). The Employer also

maintains a yard facility at 200 Industrial Loop, Staten Island, New York (the yard facility). During the past year the Employer, in the course and conduct of its business operations, purchased goods, supplies, and materials valued in excess of \$50,000 directly from enterprises located outside the State of New York. I find at all times material herein the Employer has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, it is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Since 1987, the Employer has recognized the Union as the collective-bargaining representative of the following unit of employees: all full-time and regular part-time automobile chauffeurs, euclid operators, and turnpull operators employed by the Employer at its Staten Island, New York facilities. At the time of these events, there were three automobile chauffeurs (drivers) in the bargaining unit.

Every 3 years, the Union negotiates an industrywide agreement with the General Contractors Association (the GCA), a multiemployer bargaining association. The Employer has never been a member of the GCA and has never executed a “me too” agreement in advance of the GCA negotiations. Rather, the Employer has followed the practice of signing the association agreement after negotiations are complete. In 1996, the Union and the GCA entered into an agreement which contained a most favored nations’ clause and a provision guaranteeing employees 8-hours pay for every shift started. The Employer executed the 1996–1999 GCA agreement and abided by its terms.

Garry Clemente, the company president, testified that his business consists entirely of prevailing wage projects in the public sector. He explained that there are a large number of nonunion construction contractors on Staten Island who work in the private sector but because these companies pay approximately one-half the Union’s rates, he has never been able to compete for this business. Prior to signing the 1996–1999 GCA agreement, Clemente told Lawrence Kudla, the Union’s recording secretary and business agent, that the Union needed to organize these contractors in order to level the competitive playing field. Kudla indicated to Clemente that he would work to organize these contractors.

By letter dated April 1, Gary LaBarbera, the Union’s international trustee, gave notice to all of the signatories to the 1996–1999 GCA agreement, including the employer, of the Union’s intention to modify the agreement on its expiration on June 30. The Union and the GCA commenced negotiations and on June 3, the parties entered into a nine-page memorandum of agreement extending the terms of the 1996–1999 GCA agreement with several modifications. The new agreement, consisting of the previous agreement and the memorandum of agreement, is effective by its terms from July 1, 1999, to June 30, 2002. Kudla testified that in mid- to late June, the Union’s office staff sent a copy of the memorandum of agreement to all signatories including the Employer. The letter accompanying the memo-

¹ All dates are in 1999 unless otherwise indicated.

randum of agreement stated that the industrywide agreement had been finalized and requested the employers “sign three copies and send it back to the union.”

In mid-June, Clemente met with Kudla and renewed his complaint about his inability to compete with the nonunion contractors in the area. According to Clemente, he again told Kudla that the union had to organize the nonunion contractors so that the Company could compete for private sector work. Clemente alternatively asked for wage relief under the terms of the collective-bargaining agreement to which Kudla responded that he could not deviate from the contract and that Clemente would “live and die by the contract.” At the hearing Kudla denied making these statements.

Kudla testified that during this same mid-June conversation, Clemente said that Kudla had failed to organize the nonunion contractors on Staten Island and therefore had failed to live up to his end of the bargain. Kudla responded that he had in fact organized a few contractors. Clemente told Kudla he would not sign any contract with the union and Kudla should contact his attorney, Alexander Miuccio. At the hearing, Clemente denied stating that he would not sign a contract with the Union.

In late June or early July, Miuccio was in the Union’s offices on behalf of another client. He met Kudla in the coffee room and they discussed setting a date for negotiations between the Union and the Employer.

Kudla testified that prior to the Employer’s request to bargain in this case, no independent employer had ever requested to bargain with the Union on an individual basis or sought concessions from the GCA agreement. Kudla consulted with LaBarbera and LaBarbera instructed him to meet with Clemente and his attorney and ascertain their needs and concerns. LaBarbera indicated that after that was done, a second meeting could be arranged. LaBarbera did not testify.

B. The July 29 Bargaining Session

1. The Employer’s version

On Thursday, July 29, Clemente, Miuccio, and Kudla met for their only bargaining session which lasted approximately 1 hour. Miuccio testified that Kudla presented the 1999–2002 memorandum of agreement at the meeting. Miuccio, in turn, presented a list of nonunion contractors operating on Staten Island and reiterated Clemente’s position that he wanted to expand his business into the private sector market but was unable to compete with contractors paying approximately one-half the Union’s wage package. The employer was looking for two concessions: (1) a two-tiered wage scale, one rate for prevailing wage jobs and a lower rate for private sector jobs; and (2) relief from the 8-hour work guarantee so that the Employer would only be obligated to pay employees for hours actually worked. Alternatively, Miuccio’s position was that the Employer would be willing to pay the Union rate on all of its jobs provided the Union organized the private sector and leveled the playing field.

Kudla explained it was difficult to organize the nonunion contractors because some were from out of State and others were family-run enterprises. He also stated the Union was not interested in representing employees working in the private sector. Miuccio responded that if the Union was not interested

in the private sector work anyway, the Union should give the Employer the concessions it was seeking. Kudla responded that there was no way the terms of the 1999–2002 GCA agreement could be varied due to the most favored nations clause and that the Employer’s goal of obtaining more favorable terms “would never happen.” He suggested the employer create a double-breasted operation to compete in the private sector to which Clemente responded that at his age, 65, he was not about to invest a half-million dollars in equipment to form another corporation. Miuccio added there was an antidouble breasting clause in the contract. Kudla replied there were ways to do it and he would not take out a magnifying glass and watch everything the employer was doing. At one point during the discussion Kudla said the Union could take economic action to which Miuccio responded the union should do whatever it had to do. Miuccio asked Kudla if he had the authority to negotiate an agreement and to give concessions. Kudla responded he had the authority to negotiate but he did not have the authority to sign an agreement. Miuccio then asked for a meeting with LaBarbera and Kudla said he would set up a meeting and get back to Miuccio.

Sometime during the following week, and no later than Friday, August 6, Kudla called Miuccio with a proposed date for a second bargaining session in August. Miuccio had a court appearance that day and suggested three alternate dates also in August. He did not speak to Kudla again and on Monday, August 9, the union commenced picketing.

2. The Union’s version

Kudla testified that Clemente began the discussion by stating Kudla had not lived up to his end of the bargain to organize the nonunion contractors on Staten Island and he was not going to sign any contract with the union. Clemente presented a list of what he believed to be the nonunion contractors and Kudla pointed out that some of the contractors listed did in fact have collective-bargaining agreements with the Union. Kudla then asked Clemente what his needs and concerns were and Clemente continued to complain about not being able to compete in the private market. Kudla suggested that Clemente speak to his attorney about ways to structure a corporation which could do business on nonunion jobs and Clemente responded he was not going to spend money to buy equipment for a separate company. Kudla reiterated he was willing to address all of the Employer’s needs and concerns and he asked if the problem was an inability to pay. Clemente said it was not an inability to pay. Kudla recalled Miuccio turned to Clemente and told him the union could strike him at any time and Kudla agreed that the Union could take economic action. Miuccio then stated if that happened there would be no need to negotiate. Kudla disagreed and stated if the Union chose to take economic action it would not prohibit the parties from getting together and negotiating an agreement.

As to the specific issue of the most favored nations clause, Kudla testified:

KUDLA: [T]hey asked me that if I could make concessions and [if] I could go outside the industry-wide contract, and I said that, you know, I couldn’t do that but I would sit down and I would address any needs or concerns that they had and

be willing to discuss those needs and concerns. Then Mr. Miuccio said that, “well, if you are not prepared to make concessions or if you don’t have that ability to do that, then we would like to meet with Mr. LaBarbera” . . . I said “Sure. There’s no problem.”

Kudla and Miuccio agreed to schedule a meeting with LaBarbera and the meeting ended.

Kudla testified that his goal in attending the July 29 meeting was to find out what the employer’s needs and concerns were and to reach a contract. He brought a copy of the memorandum of agreement solely as a point of discussion and he denied ever telling Clemente that he had to sign it. Kudla was asked how he could have circumvented the most favored nations’ clause in order to give Clemente the relief he requested and he answered:

KUDLA: Okay. He never said what the relief was. All right? And we never understood what their relief was. If we understood what the relief was, maybe we could have sat down, we could have addressed it, and maybe come up with ways. I don’t know. Okay? But he never said what the relief was.

Later in his testimony, however, Kudla admitted that he was aware of the two concessions the employer was seeking at the July 29 meeting. His testified that his response to the proposed two-tiered wage system was that Clemente should consult with Miuccio who could guide him how on how to compete in the private sector. As to the requested relief from the 8-hour guarantee, Kudla testified that he told Miuccio and Clemente that he considered that proposal “unconscionable.”

Consistent with Miuccio’s testimony, Kudla testified that sometime during the following week he called Miuccio to discuss a date for the next bargaining session. Kudla suggested a date that was good for LaBarbera but Miuccio had a conflict and they agreed to get back to one another to further discuss possible dates. They did not speak again and the union commenced picketing on Monday, August 9.

3. The decision to strike

Kudla testified that sometime after the July 29 meeting but before his conversation with Miuccio the following week, the union received a letter from each of the employer’s employees stating that they desired to become financial core members of the Union.² Each letter was dated August 3 and addressed to LaBarbera. The letters were identical in content and read in relevant part:

² The three letters were marked for identification by the Union’s counsel and shown to Miuccio who acknowledged he prepared the letters and faxed them to Clemente. Miuccio did not know what, if anything, Clemente did with the letters and I rejected counsel’s offer of the letters into evidence at that point in the proceedings. Kudla later testified he received three financial core letters from the Employer’s bargaining unit employees and that he and LaBarbera relied on those letters when they made the decision to strike the Employer. Although the Union’s counsel did not reoffer the letters, I conclude that Kudla’s testimony sufficiently completed the evidentiary foundation for their admission into evidence and that they are material to the issues in this case. I therefore receive them in evidence as R. Exh. 5. This ruling does not in any way prejudice the General Counsel or the Charging Party since the letters only serve to clarify Kudla’s testimony regarding his state of mind when he and LaBarbera made the decision to strike.

This is to notify you that effective immediately I am changing my membership status in Local 282, I.B.T. from that of “full” member to that of a “financial core” member. As such I will continue to pay the appropriate union dues uniformly required of all members for maintaining membership. I am not resigning from the Union. I am only changing my membership status. I am no longer bound by any union constitution, by-laws or rules of any kind.

Kudla testified he and LaBarbera felt the financial core letters were indicative of the Employer’s unwillingness to negotiate in good faith and that it was the right time to take economic action. Kudla could not recall whether the decision to strike was made before or after his last telephone contact with Miuccio. He denied that the purpose of the strike was to convince the Employer to sign the memorandum of agreement.

C. The August 9 Strike

At about 6 a.m. on the morning of August 9, Clemente observed 50 to 60 pickets at the yard facility. Clemente testified he met Kudla on the street and when they spoke they stood apart from the pickets. Clemente said the picketing was not necessary and what he was asking for was not unreasonable. Kudla responded he had to do what he had to do and if Clemente signed the contract the pickets would be gone in 10 minutes.

Kudla testified that Clemente approached him and observed that Kudla had him on strike. Kudla responded that it was an economic action and Clemente repeated it was a strike. Kudla said the Union was prepared to sit down to discuss Clemente’s needs and concerns and to negotiate a contract.

Benny Umbra has been a member of the Union for 19 years and has served on the Union’s industry negotiating committee for the last three rounds of negotiations. He is also the shop steward at Scara Mix, his place of employment. Umbra testified that Kudla called him and told him there was going to be picketing at the employer and Umbra asked Kudla if he could attend. On August 9, Umbra was on the picket line and observed Clemente come out to the street to speak to Kudla. Umbra testified, “[W]ell, since this was really basically my first picket line, I was curious in what kind of conversation they engage in, so I stopped walking and I stood next to Larry.” According to Umbra, Clemente spoke first and said, “[T]his is an ‘effing’ strike,” to which Kudla responded it was an economic action. Clemente repeated it was a strike and stated he would never sign another ‘effing contract until Kudla signed the “500 trucks around the corner.” Kudla responded that it was his choice but the Union was willing to sit down and negotiate a contract. According to Umbra, Clemente repeated that he would never sign another contract.

Neither Clemente nor Kudla made any reference to Umbra being present at the time of their conversation on the morning of August 9.

The Union picketed on August 9, 10, and 11 at the yard facility and at two of the Employer’s jobsites. Umbra picketed on each day although he could not recall the language on the picket signs. Kudla testified that the picket signs read “E.G. Clemente On Strike” and “On Strike—Local 282 does not have

a dispute with any other contractor at the site nor is 282 seeking anyone to cease doing business with E.G. Clemente.” For the first 2 days of the strike, other unions crossed the picket line. On August 11, however, Clemente was contacted by three different union locals and was informed that their members would begin honoring the picket line. Clemente testified that he was “absolutely” influenced by that information. That same day, Clemente saw Kudla on the street and signed the memorandum of agreement on the hood of his car. Kudla told Clemente he was doing the right thing and, according to Clemente, the picketing stopped 10 to 15 minutes later.

According to Kudla, on August 11, he was riding around looking for Clemente and he found him at the yard facility. He told Clemente that the Union was willing to sit down and negotiate and that they should not let the strike go on for too long because it would lead to animosity. Clemente told Kudla to give him about an hour and he would let him know his decision. Kudla went to check on the jobsites where the picketing was being conducted and about an hour later, Clemente approached him and said he should come back to the office. They went to the office and Clemente signed the memorandum of agreement. Kudla then described his actions immediately following Clemente’s execution of the agreement:

KUDLA: I went over to the picketers and I said to the picketers “Look, I want everybody to behave themselves like gentlemen. All right? I don’t want anybody to gloat or to rub anybody’s nose.” And I told them that Mr. Clemente had signed the contract and you know, just respond like gentlemen. I says “It’s over. All right? And that’s the end of it.” And I think a few of them went up to Mr. Clemente and shook his hand or said goodbye to him. There was no taunting or anything and everybody just basically, just parted his job.

Umbra testified sometime on August 11, he received a phone call from Kudla who advised him not to return to the picket line the next day because the employer had signed the contract.

D. The Union’s Newsletter

In the fall 1999 edition of the Union’s newsletter, Kudla authored an article entitled “Local 282 Area Reports—Staten Island.” The article read in relevant part:

Another 282 victory was against a Water Main Contractor, E.G. Clemente. Clemente was a 282 signatory but refused to sign the 1999–2002 New York City Heavy Memorandum of Agreement. After the first session of contract talks Clemente was seeking major concessions from the Industry-Wide-Agreement. Brother Kudla and Trustee LaBarbera made a decision to take economic action against Clemente and struck this employer. Picket lines were assembled at 5:30 each morning at the main yard and at each Clemente job site. Within three days Clemente signed the 1999–2002, New York Heavy Agreement.

Kudla testified this article was merely a “puff piece” and an “exaggeration” designed to make the members “feel good about the Union,” and was not an accurate summary of events. He also attributed inaccuracies in the article to the fact that he had to write as concisely as possible due to limited space. On cross-

examination, Kudla was asked to explain his reference to the “major concessions” sought by the employer and he testified that the concessions referenced were the Employer’s request for wage relief in order to work outside the prevailing wage market and the Employer’s request for relief from the 8-hour guarantee.

IV. ANALYSIS

A. Credibility

I credit the testimony of the General Counsel’s witnesses over the Respondent’s witnesses. Attorney Miuccio was a credible and straightforward witness who possessed excellent recall of events. He was the only participant who took contemporaneous notes at the July 29 bargaining session which served to aid his recollection. Clemente’s testimony was largely corroborative of Miuccio’s testimony although Clemente’s recollection was not as precise and less detailed. He nevertheless impressed me as a straightforward and honest witness.

In comparison to Miuccio and Clemente, I found Kudla to be far less credible. His testimony was inconsistent in two significant respects. First, Kudla testified repeatedly that at the July 29 meeting he was solicitous of the Employer’s “needs and concerns.” When he was asked what those needs and concerns were, however, he first testified that he had no idea because neither Miuccio nor Clemente ever stated what relief they seeking. Later in his testimony, however, Kudla was forced to admit that he, the Employer, had in fact advanced two demands, a two-tiered wage scale and exemption from the 8-hour guarantee. Second, Kudla authored the article in the Union’s newsletter in which he recited, in simple and straightforward language, the following sequence of events: first, the Employer refused to sign the GCA agreement and sought major concessions; second, he and LaBarbera decided to call a strike; and third, 3 days into the strike the Employer signed the GCA agreement. Kudla’s succinct summary, couched in cause and effect language, precisely tracked the version of events given by Miuccio and Clemente. Kudla’s attempt at trial to distance himself from his own words was not believable. Therefore, to the extent that Kudla’s testimony conflicts with the testimony of Miuccio and Clemente’s, I credit Miuccio and Clemente.

I also discredit the testimony of Umbra as it relates to the conversation between Kudla and Clemente on the morning of August 9 on the picket line. Neither Clemente nor Kudla testified that Umbra was present for this conversation. Moreover, Umbra’s testimony that Clemente stated that he would never sign another union contract in the course of this conversation contradicts Kudla’s testimony. Kudla made no reference to any such remark during this conversation. Umbra has been a member of the Union for 19 years, serves on the Union’s negotiating committee, and is a shop steward. I find his testimony was motivated by his desire to aid the Union in its defense of the allegations in this case and not by honest recollection. To the extent that his testimony conflicts with the testimony of Clemente, I credit Clemente.

B. Positions of the Parties

The General Counsel contends that the object of the Union’s 3-day strike was to unlawfully coerce the employer into execut-

ing the 1999–2002 GCA agreement in violation of 8(b)(1)(B) and (3).³ The Union maintains that it engaged in lawful economic picketing brought about by the Employer’s repeated statements that it would not sign any contract with the Union, the Employer’s unreasonable positions taken during bargaining and the Employer’s authorship of “core member” letters signed by its employees.

The credible testimony establishes that in mid-June, after the 1999–2002 GCA agreement was fully negotiated, Clemente broached the idea of a two-tiered wage scale with Kudla. Kudla flatly rejected any notion of deviating from the terms of the agreement, telling Clemente he would “live and die by the contract.” Kudla reiterated this position during the July 29 bargaining session when he stated the terms of the GCA agreement could not be varied due to the most favored nations’ clause and the Employer’s goal of obtaining more favorable terms “would never happen.” It was that remark which prompted Miuccio to request a meeting with LaBarbera who was held out as the person with the authority to fully negotiate the terms of an agreement. By the conclusion of the July 29 meeting, the Parties’ positions were clearly delineated: the Employer was demanding two concession from the GCA agreement, the union was demanding the employer sign the GCA agreement without modification, and the parties agreed to meet again to negotiate further.

Several days after the July 29 meeting, Kudla and Miuccio spoke by telephone and attempted to arrive at a mutually convenient date for their second meeting. Each suggested dates and agreed to get back to one another. Kudla made no mention during this conversation of the Union’s receipt of the core membership letters, nor did he make any reference to a strike.

The Parties were clearly still in a negotiating posture.

By the morning of August 9, the Union made the decision to strike the Company and the credible evidence establishes overwhelmingly that the purpose of the strike was to compel the employer to execute the 1999–2002 GCA agreement. First, at the commencement of the picketing, Kudla told Clemente if he signed the memorandum of agreement the pickets would be gone in 10 minutes. Second, after Clemente signed the agreement, the picketing did in fact stop within minutes. Third, Kudla admitted during his testimony that after the contract was signed he went directly to the picketers and told them the strike was over. Fourth, Kudla told Umbra not to return to the picket line the next day because the employer had signed the contract. Finally, Kudla wrote in the Union’s newsletter of his and LaBarbera’s “victory” in getting the employer to sign the 1999–2002 GCA agreement after a 3-day strike.

Respondent’s argument that it was willing to continue to negotiate with the Employer throughout the strike is contrary to

³ The Charging Party requests that I also find the union’s conduct at the July 29 bargaining to constitute a violation of Sec. 8(b)(1)(B) and (3). The General Counsel, however, does not advance this theory of liability and specifically limited the pleadings to allege only the strike as the unfair labor practice. Since it is the General Counsel and not the Charging Party who determines the theory of the case, I do not consider the Charging Party’s argument. *Operating Engineers Local 12 (Sequoia Construction)*, 298 NLRB 657 fn. 1 (1990).

the credible evidence. The parties were in the midst of continuing negotiations when the strike was called. If the Union truly wanted to address the Employer’s “needs and concerns” as claimed by Kudla, it could simply have continued negotiating. Instead, the Union decided to strike and as a direct result of that economic pressure, the employer signed the agreement.

The General Counsel correctly argues that the Board, in similar circumstances, has found such conduct by a union violative of the Act. By compelling an independent employer to be bound by an agreement negotiated by a multiemployer association to which it does not belong, a union coerces the employer to select the multiemployer association as its collective-bargaining representative in violation of Section 8(b)(1)(B). This conduct also violates Section 8(b)(3) by forcing the employer to agree to a nonmandatory subject of bargaining, i.e., the effective designation of the multiemployer association as its bargaining representative, and by forcing the employer to be bound by the association agreement. *Commercial Workers Local 1439 (Food City West)*, 262 NLRB 309 (1982); *Laborers Local 652 (Thoner & Birmingham Construction Corp.)*, 238 NLRB 1456 (1978); *Retail Clerks Local 770 (Fine’s Food Co.)*, 228 NLRB 1166 (1977). I therefore find that the Union’s conduct violated Section 8(b)(1)(B) and (3) of the Act.

CONCLUSIONS OF LAW

1. The Employer is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Respondent is a labor organization within the meaning of Section 2(5) of the Act.
3. The following employees constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

All full time and regular part time automobile chauffeurs, euclid operators and turnapull operators employed by the employer at its Staten Island, New York facilities.

4. Respondent is the exclusive representative of all employees in the appropriate unit for purposes of collective bargaining within the meaning of Section 9(a) of the Act.
5. Respondent violated Section 8(b)(1)(B) on August 9 through 11, 1999, by engaging in a strike and picketing with an unlawful object of coercing the employer to select the General Contractors’ Association as its collective-bargaining representative.
6. Respondent violated Section 8(b)(3) on August 9 through 11, 1999 by engaging in a strike and picketing with an unlawful object of coercing the employer to involuntarily agree to the designation of the General Contractors’ Association as its collective-bargaining representative, a nonmandatory subject of bargaining, and with the further unlawful object of coercing the Employer to be bound to the agreement negotiated by the General Contractors’ Association to which it did not belong.
7. Respondent has engaged in unfair labor practices affecting 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.

The Charging Party Employer, joined by the General Counsel, seeks a make-whole remedy for the financial expenditures made under the 1999–2002 GCA agreement which it would not have been obligated to make under the expired 1996–1999 GCA agreement. The rationale is to prevent the Respondent from reaping the fruits of its unlawful action and there is substantial Board precedent for the awarding of such relief. *Painters (Northern California Drywall Assn.)*, 326 NLRB 1074 (1998); *Teamsters Local 70 (Emery Worldwide)*, 295 NLRB 1123 (1989); *Graphic Communication Local 280 (Barry Co.)*, 235 NLRB 1084 (1978), *enfd.* 596 F.2d 904 (9th Cir. 1979); *Longshoremen ILWU Local 17 (Los Angeles By-Products Co.)*, 182 NLRB 781 (1970), *enfd.* 451 F.2d 1240 (9th Cir. 1971).

Respondent opposes the granting of this relief claiming that an award could only be based on the terms of a collective-bargaining agreement which might be reached between the Employer and the Union sometime in the future. I agree that a make-whole remedy calculated in these terms would be inappropriate. The correct measure in these circumstances is the

difference in costs to the employer between the agreement it was coerced into signing and the terms of the expired collective-bargaining agreement it was obligated to maintain. This approach would simply restore the Employer to the status quo ante the Union's unfair labor practices.

Respondent's suggestion that the Board lacks the power to order damages under any circumstances is without merit. It is well settled that the Board is empowered to remedy unfair labor practices by requiring compliance with contractual requirements and Section 301 does not supplant the Board's authority to remedy contract breaches. *NLRB v. Strong Roofing Co.*, 393 U.S. 357 (1969); *Teamster Local 70 (Emery Worldwide)*, *supra*.

Finally, Respondent argues that the Employer did not suffer economic loss because it would have been obligated to pay the prevailing wage rate on all of its jobs which is equivalent to the economic package in the 1999–2002 GCA agreement. This issue is properly raised in a compliance proceeding.

Respondent must therefore make whole the employer for any expenditures made on or after August 11, 1999, pursuant to the terms of the 1999–2002 GCA agreement which it would not have been obligated to make under the terms of the expired 1996–1999 GCA agreement.

[Recommended Order omitted from publication.]