JD–43–07
Detroit, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SUPERIOR ELECTRIC COMPANY
OF GREATER DETROIT,

and Case 7–CA–49715

LOCAL 252, INTERNATIONAL
BROTHERHOOD OF ELECTRICAL
WORKERS, AFL–CIO.

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DECISION

Statement of the Case

DAVID I. GOLDMAN, Administrative Law Judge. Superior Electric of Greater Detroit (Superior Electric) performs electrical contracting services in the greater Detroit area and—ever so occasionally—within Ann Arbor and other areas covered by the current and past Inside Wireman bargaining agreements between Local 252 of the International Brotherhood of Electrical Workers (Local 252 or Union) and the Ann Arbor Division, Michigan Chapter, National Electrical Contractors Association, Inc. (Association). In 1992, Superior Electric signed a Letter of Assent agreeing to abide by the current and future Inside Wireman agreements and authorizing the Association to represent it for collective-bargaining purposes in matters pertaining to the Inside Wireman agreements. By its terms, the Letter of Assent provided that it would remain in effect subject to termination upon written notice provided to the Association and Local 252 at least 150 days prior to the anniversary date of the applicable Inside Wireman agreement. After agreeing to the Letter of Assent in 1992, Superior Electric thereafter performed work infrequently within the jurisdiction covered by the Inside Wireman agreement.

On August 11, 2006, Local 252 filed an unfair labor practice charge with the Regional Office of the National Labor Relations Board (Board) alleging that on or about February 16, 2006, Superior Electric repudiated its obligations under the then current 2004 Inside Wireman agreement, which, by its terms, was effective from June 1, 2004, to June 1, 2007. On December 22, 2006, the General Counsel of the Board issued a complaint against Superior Electric alleging that since about February 15, 2006, Superior Electric has refused to comply with its collective-bargaining obligations and repudiated these obligations in violation of Section

8(a)(5) of the National Labor Relations Act (Act), 29 U.S.C. § 158(a)(5).[1] Superior Electric filed a timely answer denying any violation of the Act. The case was tried before me in Detroit, Michigan, on April 24, 2007. Essentially, Respondent concedes that in February 2006 it refused to abide by the 2004 Inside Wireman agreement while performing a job within the jurisdiction covered by the agreement. The substance of Respondent's defense is its claim that it repudiated its obligations under the Letter of Assent and a predecessor Inside Wireman agreement in August 2000 and, therefore, that prosecution of the complaint is barred by the statute of limitations governing unfair labor practices set forth in section 10(b) of the Act, 29 U.S.C. § 160(b).

On the entire record, including my observation of the demeanor of the witnesses and other indicia of credibility, and after considering the briefs filed by the parties, I make the following findings of fact, conclusions, and recommended order.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent further admits and I find that Charging Party Local 252 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's February 2006 Repudiation of the Inside Wireman Agreement

The incident that led to the charge and complaint in this case is not in material dispute. Jim Burns is a business agent for Local 252. His duties include monitoring construction projects that fall within the geographic location covered by the Inside Wireman agreement. Employers bound by the agreement are required, when working within the jurisdiction, to utilize the Local as the referral source for electricians (subject to exhaustion of the Local's registration list) and pay wages and benefits as outlined in the Inside Wireman agreement.

Burns testified that he learned from an internet subscription service—a "dodge report"—of a job coming up at the Briarwood Mall in Ann Arbor that required electrical work covered by the Inside Wireman's agreement. On Friday, February 10, 2006, Burns visited the job and asked the project superintendent if he had selected an electrical contractor for the job. The project superintendent indicated to Burns that he had just missed the contractor and that it was Superior Electric. He told Burns that the electrical contractor would be returning next week. Based on this, the following Monday, February 13, 2006, Burns called Superior Electric and spoke with Stuart Weisblatt, who is the president and owner of Superior Electric. Burns told Weisblatt that he had been out to the project at the Briarwood Mall on Friday and asked if Superior Electric was going to be doing the electrical work there. Weisblatt indicated that he did not yet know if Superior Electric had the project. The next day, Burns went to the Briarwood Mall site, found that construction had started, and saw two electricians from Superior Electric working there. Burns discussed the project with the electricians, their rates of pay, and the expected duration of the work. He knew that the electricians were not Local 252-referred employees. The next day, February 15, Burns called Weisblatt, relayed his experience the day before, and learned from Weisblatt that he intended to use "his two guys, that he didn't need

[1] The complaint also alleged a derivative violation of Sec. 8(a)(1) of the Act.

any from Local 252." Burns told Weisblatt that this was a problem and he would have to consult with his boss at Local 252. Weisblatt complained that "the last guys you sent me . . . weren't any good, and . . . they were non-productive, they cost him money, and they made mistakes." Weisblatt stuck to his position that he was only going to use the two nonunion employees.

After this conversation, Burns reported the situation to Ron Motzinger, the Assistant Business Manager for Local 252. Motzinger volunteered to call Weisblatt.[2] He received a response from Weisblatt similar to that reported by Burns. Weisblatt told Motzinger he was not going to use Local 252 employees on the Briarwood Mall job. Weisblatt made some vague references about not wanting "trouble" and, just as vaguely, threatened that "if you guys cause any trouble for me . . . you won't work at Briarwood Mall again." Motzinger "reminded him that we have a—you know, an agreement with him, a collective bargaining agreement, and, basically, he said he wasn't going to honor it." Motzinger told Weisblatt that "I expected him to honor the collective bargaining agreement, and we'd probably have to file charges, and I think he said, 'Do what you have to do.'"

Although less detailed in his recollection, and offering very brief testimony with regard to the February 2006 interaction with the Union, Weisblatt essentially confirmed the testimony of Burns and Motzinger, and I credit Burns and Motzinger's detailed account of their testimony, but I believe that Weisblatt's testimony added a couple of points that are of some relevance.[3] Weisblatt testified that "I think I referred to the letter of assent and said it was terminated back in 2000, at U of M [University of Michigan]." Weisblatt's reference to the "U of M" job and termination of the Letter of Assent was directed to the last work that Superior Electric performed using Local 252-referred employees. As discussed infra, it is the correspondence and conversations regarding that job in August 2000 on which Respondent bases its statute of limitations defense. I believe Weisblatt mentioned these points in his conversations with the Union in February 2006.[4]

The Union did file charges against Superior Electric. Immediately, it filed a grievance with the Association alleging violations by Superior Electric for violations of article II, section 2.09, and article III, section 3.02 of the Inside Wireman Agreement. An Association-Local 252 labor-management hearing on the grievance was scheduled for April 17, 2006. Superior Electric failed to attend. The grievance was resolved in favor of Local 252. In addition, in August 2006, Local 252 filed an unfair labor practice charge over the February 2006 incident.

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[2]At trial Motzinger recalled a "cordial" past relationship with Weisblatt and testified that this prompted him to suggest to Burns that he contact Weisblatt.

[3]Weisblatt testified very briefly regarding these conversations and, in fact, did not distinguish the conversations or testify that there were two calls.

[4]Although not testified to by Burns or Motzinger, Weisblatt's comments are plausible, indeed likely in context. Thus, Burns testified that during their conversation Weisblatt complained that "the last guys you sent me . . . weren't any good, and . . . they were non-productive, they cost him money, and they made mistakes." This was clearly a reference to the University of Michigan job from August 2000. On cross-examination Motzinger first denied that Weisblatt told him in their February 2006 conversation that there was no valid Letter of Assent, but when confronted with just such a statement in his pretrial affidavit indicated that he would amend his testimony to say that he did not presently recall that the statement had been made. I take no adverse inference regarding Motzinger's overall credibility from this, but it suggests to me that on this point Weisblatt's testimony is the more accurate.

The uncontradicted testimony of Association Representative Michael Crawford was that the Association has never received a notice of termination of the Letter of Assent from Superior Electric. The evidence also shows that as of February 14, 2006, the first known date of Respondent's failure and refusal to follow the Inside Wireman agreement in work at Briarwood Mall, the Respondent had never taken steps to terminate the 2001 or 2004 Inside Wireman agreements that were the successor agreements to the 1988 Inside Wireman agreement in effect between June 1, 1988 and May 31, 2001.[5] The evidence is also undisputed that Superior Electric continued its work at the Briarwood Mall job without the use of union-referred employees and without abiding by the terms of the Inside Wireman agreement. Many of those terms, including of course, pay and fringe benefits, are mandatory subjects of bargaining, and hence Respondent's unilateral repudiation of such provisions during a contract term is a violation of Section 8(a)(5). See *Rapid Fur Dressing*, 278 NLRB 905 (1986). Absent acceptance of Respondent's 10(b) defense, its conduct constitutes a straightforward case of repudiation of its collectively bargained obligations under the Inside Wireman agreement and, accordingly, a violation of Section 8(a)(1) and (5) of the Act.[6]

B. Respondent's 10(b) Defense

In Respondent's view, the outcome of this case turns on an incident that occurred six years (and two labor agreements) prior to the filing of the charge in this case. Respondent contends that the Government's case is time barred based on its view that it repudiated (admittedly unlawfully) the Inside Wireman agreement and the Letter of Assent in August 2000, and that the Union was, or should have been, aware of this repudiation when it occurred.

In mid-August 2000, Motzinger called Weisblatt after the Union received a "tip" from an employee that Respondent was beginning a job at the University of Michigan's bus garage in Ann Arbor. They discussed the job and after the conversation Motzinger "scrambled" to get approximately eight Local 252 employees to the worksite the next day, probably Saturday August 18. The Local 252 employees worked a little over a week on the project. Layoff notices submitted by Respondent (R. Exh. 5) show that at least six of the Local 252 employees were laid off as of August 26 due to a "[r]eduction in workforce."

The project was completed by September 1, however, a few days before that, by letter dated August 28, 2000, Weisblatt wrote to Motzinger complaining about the attitude of the Local 252 supplied employees and accusing these employees of damaging conductors used in the job. His letter concluded:

> The relationship with you and you[r] organization can only continue to our mutual best interests if we use only our people and pay you the appropriate assessments.
>
> We agree to pay into the National Electrical Benefit Fund, both Labor Management Cooperation Funds and the two training Funds.
>
> The vacation and health and welfare monies will be managed by our own organization.

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[5]Although no charge was filed, it is undisputed that Respondent's failure to comply with the 1988 Inside Wireman agreement in 2000 was neither lawful (Tr. 27) nor in accordance with the termination provisions of the Letter of Assent or Inside Wireman agreement.

[6]An employer who violates Sec. 8(a)(5) derivatively violates Sec. 8(a)(1). *ABF Freight System*, 325 NLRB 546 fn. 3 (1998).

> Unless we can come to terms along these guidelines, let this letter serv[e] as our Notice of Termination of our Agreement defined by our Letter of Assent.

When Motzinger received Weisblatt's letter, he investigated the claims that Local 252 employees damaged the conductors. According to Weisblatt, "within a couple of days of the letter" Motzinger telephoned him.

At this point, each parties' account of events diverges. Motzinger recalled that in the phone call prompted by his receipt of the letter Weisblatt told him, "I'll stay union. I'm not going to renege on my letter of assent. I'm going to stay union, but I've got to finish the job with my own employees." Motzinger testified that he acceded to Weisblatt's demand and orally agreed to the terms set forth in Weisblatt's letter. Motzinger explained that he recognized that the job was "wrapping up" and that "there would only be loose ends to tie up, anyway, and not a lot of other work . . . [s]o I basically agreed to his terms and we—he was going to stay union, and we went our separate ways." Motzinger explained his reasoning:

> My goal—of course, he was going to stay a union contractor, and my goal was to keep as many members working as long as I could. A lot of times, the way jobs wind down, there'll be different tasks that people are working on, and they will lay guys off at different days. Sometimes, they'll lay a guy off on Monday and they might lay off a different guy on a Tuesday or a Wednesday. So I wasn't sure if anybody stayed on from the union after that date, but it would have only been a couple days if that was, after that conversation.

In fact, as discussed above, Motzinger was correct that the project was "wrapping up." At least six of the Local 252 employees had already been laid off for two days by the time Weisblatt sent his letter. The record is unclear, but there is no clear evidence that any Local 252 employees worked after August 26.[7]

Weisblatt recalled the conversation differently. He testified to an initially friendly discussion that became "heated" when it became clear that "no way was [Motzinger] going to give in to the terms of my letter." Weisblatt testified that the call ended when Weisblatt "hung up on [Motzinger] while he was still talking."[8]

Here, the parties' divergent narratives merge again, at least to a certain extent. There is agreement—or at least no dispute—that union employees did not work again on the University of Michigan project. There is also no dispute that the job they had been working on—called "phase one" by Weisblatt"—was completed by September 1, just 4 days after the August 28 letter was sent and within 2 days after the disputed telephone conversation. A second phase, which began September 18, involved work on the parking garage next door and continued through mid-December. By all evidence the Union was not aware of phase two, and believed

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[7]Thus, Respondent's assertion that union-supplied employees were laid off contemporaneously with Weisblatt's August 28 letter is unsubstantiated and contradicted as to six of the employees. See R. Exh. 5. I note that R. Exh. 13, which I rejected at trial because of its unreliability and potential incompleteness, does not, for what it is worth, identify any union-supplied employees working after August 26.

[8]At trial, the parties expended significant effort to trying to offer evidence supporting their principal witness' testimony on whether a deal was struck between Motzinger and Weisblatt. Based on my resolution of this case, I need not and do not resolve that dispute.

that Superior Electric's work at the university was limited to the initial job that ended with phase one. After the August 2000 incident, Weisblatt did not recall further discussion with any Local 252 officials until February 2006. On the other hand, Motzinger's notes corroborate testimony that he and Motzinger had a single discussion on October 26, 2001, regarding a job performed by Superior Electric within the jurisdiction in Ann Arbor. According to Motzinger, based on Weisblatt's representation as to the very limited nature of the job, the Union agreed that the labor agreement did not need to apply to the job. There is no indication that any discussion of repudiation or a refusal to abide by the agreement was a feature of these 2001 discussions. In any event, other than the one October 2001 discussion, Motzinger and Weisblatt agree that there was no other interaction between the parties until the February 2006 incident.[9]

In asserting its 10(b) defense, Respondent urges me to credit Weisblatt's version of the late August 2000 conversation. Respondent contends that Motzinger's failure to agree with the terms outlined in what it refers to as Weisblatt's "letter of repudiation" left extant the letter and its notification of termination. This, asserts Respondent, demonstrates a manifest repudiation of the relationship and the Inside Wireman agreement that set the statute of limitations running and renders any claim regarding Respondent's refusal to abide by the Letter of Assent or the Inside Wireman agreement in February 2006 time barred many times over.

Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filling of the charge." 29 U.S.C. § 160(b). The Supreme Court has explained that the policies underlying this section of the Act are intended "to bar litigation over past events 'after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused,' H. R. Rep. No. 245, 80th Cong., 1st Sess., p. 40, fn. 10 and of course to stabilize existing bargaining relationships." *Machinists Local 1424 v. NLRB*, 362 U.S. 411, 419 (1960). The Board has explained that "[t]he intended purpose of this proviso is that, in the absence of a properly served charge on file, a party is assured that on any given day its liability under the Act is extinguished for any activities occurring more than 6 months before." *Chemung Contracting Corp.*, 291 NLRB 773 (1988).

It is true, of course, that "[w]hen the alleged unfair labor practice may be characterized as a contract repudiation, the unfair labor practice occurs at the moment of the repudiation. . . . 'Indeed, it is at the moment of that repudiation that the unfair labor practice—the refusal to bargain—fundamentally occurs.'" *St. Barnabas Medical Center*, 343 NLRB 1125, 1127 (2004) (quoting *A & L Underground*, 302 NLRB 467, 469 (1991)). However, it is also true that when it adopted this standard in *A & L Underground*, 302 NLRB at 469, the Board

> retain[ed] an important protection for the victims of unlawful contract repudiations, as in the case of those injured by an unfair labor practice. We

[9]Based on Motzinger's notes, which I do not believe to have been fabricated, and based on his demeanor as he convincingly recalled this conversation, I credit his testimony that a conversation occurred on October 26, 2001, notwithstanding that Motzinger did not recall the conversation until after coming across his notes regarding the call. Weisblatt firmly denied initiating contact with Motzinger in October 2001, but as to whether the conversation occurred at all, Weisblatt's only testimony, somewhat indirectly, was that the first conversation he could remember with the Union after August 2000 was in February 2006. Weisblatt's memory was not good on a number of incidents involving the Union. I believe the October 2001 conversation with Motzinger occurred. However, I do not reach (and given my decision I need not reach) any conclusion on the issue, hotly disputed at trial, regarding who initiated the call.

> adhere to the Board's long-settled rule that the 10(b) period commences only when a party has clear and unequivocal notice of a violation of the Act. Further, as is the case with the 10(b) defense generally, the burden of showing that the charging party was on clear and unequivocal notice of the violation rests on the respondent [citations omitted].

In *A & L Underground*, the Board overruled prior case law that had applied a "continuing violation" approach to find that a charge alleging repudiation of a collective-bargaining agreement was timely as long as it was filed during the term of the agreement. *A & L Underground*, supra at fn. 4. While holding parties aggrieved by a repudiation to the new more stringent rule requiring that the charge be filed within six months of the act of repudiation, the Board majority in *A & L Underground* emphasized that its holding applied only in cases where the notice of repudiation was unequivocal. *A&L Underground*, supra at 467 (union was charged with notice of the employer's repudiation based on the employer's letter to the union stating explicitly that "any agreements that it might have executed with the Union had 'long since terminated' and that the Respondent 'repudiate[d] any and all Section 8(f) prehire agreements' with the Union 'effective immediately'"). See also *St. Barnabas*, supra (case time barred where employer consistently refused to apply collective-bargaining agreement to disputed position prior to the 10(b) period). The requirement that the notice of the repudiation be unequivocal was an integral part of the Board's reasoning. Indeed, the Board majority in *A & L Underground* stressed this facet of its holding when it rejected concerns of the dissent that the new rule would provoke extensive litigation "regarding who said what to whom" and leave doubt as to whether the actions of the repudiating party required the immediate filing of a charge. *A & L Underground*, supra at 472–473. The majority explained: "Thus, by requiring that a party promptly file a contract repudiation charge, we are not placing any hardship on the party challenging the repudiation. The only parties against whom the bar might be a hardship—those whose delay in filing is a consequence of conflicting signals or otherwise ambiguous conduct by the other party—are not barred by our holding." *A & L Underground*, 302 NLRB at 469. Accordingly, the requirement that in order to trigger 10(b) a repudiation must be unequivocal and, moreover, unconditional, is as much a part of Board precedent as the rule that a clear and unequivocal repudiation starts the 10(b) period running. *Stage Employees IATSE Local 659 (Paramount Pictures)*, 276 NLRB 881, 882 (1985) (rule that Sec. 10(b) begins to run upon date of alleged unlawful act rather than on date its consequences become effective is limited "to unconditional and unequivocal decisions or actions").

Given the limits set by the Board on the assertion of Section 10(b) in repudiation cases, the problem with Respondent's theory of the case is that—accepting, arguendo, Respondent's version of events—Weisblatt's letter and the parties failure to agree on it, do not constitute unconditional or unequivocal notice of an unlawful midterm repudiation of the labor agreement or, for that matter, the Letter of Assent and the Association's right to enter into subsequent Inside Wireman agreements on Respondent's behalf.

First of all, the threat to terminate was, on its face, not a "final [unconditional] adverse employment decision." *Stage Employees IATSE Local 659*, supra at 882 (Board's bracketing) (quoting *Postal Service Marina Center*, 271 NLRB 397, 400 (1984). The threat to terminate was expressly conditioned "only upon the happening of a certain [future] event" (*Stage Employees IATSE Local 659*, supra at 882) (bracketing added), i.e., the subsequent failure of the Union to agree to a modified procedure. That sparked the telephone call, the gist of which is disputed by the parties, but even by Weisblatt's account, ended without express resolution. Notably, as emphasized below, to the extent Weisblatt's letter can be understood as a threat to terminate the Letter of Assent, Respondent never took the steps necessary to terminate the Letter of Assent, which required notice to the Association of such intent. This inaction, in the face of

Weisblatt's letter, constitutes further equivocation. See *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1024 (1996) (subsequent nonaction with regard to announced change renders employer actions equivocal, and therefore Sec. 10(b) does not begin).

Second, and even more telling than the lack of unconditionality, the letter was not an unequivocal threat to take action that was unlawful. Indeed, the letter is most plausibly read as Superior Electric serving notice of a *lawful* termination of the agreement, as provided in the labor agreement and Letter of Assent, upon the expiration of the agreement on May 31, 2001.[10]

In this regard, both the Letter of Assent and the Inside Wireman agreement have provisions for termination of the relationship and agreement, and both require significant advance notice to the Union and the Association. The Letter of Assent provides that,

> This authorization, in compliance with the current approved labor agreement, shall become effective on the 23rd day of March, 1992. It shall remain in effect until terminated by the undersigned employer giving written notice to the [Association] and to the Local Union at least one hundred fifty (150) days prior to the then current anniversary date of the applicable approved labor agreement.

The 1998 Inside Wireman agreement in effect at the time, provided that,

> This Agreement shall take effect June 1, 1998, and shall remain in effect through May 31, 2001, unless otherwise specifically provided for herein. It shall continue in effect from year to year thereafter from June 1, until June 1 of each year, unless changed or terminated in the way later provided herein.
>
> Either party or an Employer withdrawing representation from the [Association] or not represented by the [Association], desiring to change or terminate this Agreement must provide written notification at least 90 days prior to the expiration date of the Agreement or any anniversary date occurring thereafter.

There is nothing in Weisblatt's letter on which to base the assumption that—*unequivocally*—Superior Electric was unlawfully repudiating the agreement midterm or unlawfully repudiating the Letter of Assent. To the contrary, the letter invokes and purports to apply termination provisions for the agreement set forth in the Letter of Assent. Weisblatt's letter states that, "absent an agreement as proposed, let this letter serv[e] as our Notice of Termination of our Agreement defined by our letter of Assent." As set forth above, the Inside Wireman Agreement and the Letter of Assent delineate a method of providing advance notice to the Association and to the Local Union in order to terminate the agreement on a yearly basis and to terminate the Association's bargaining authorization set forth in the Letter of Assent. Such termination, if undertaken in accordance with the Letter of Assent and the 2001 Inside Wireman agreement, would be effective at its earliest on May 31, 2001, the date of the agreement's expiration. Most

[10]The Inside Wireman agreement is an "8(f) agreement," provided for by Sec, 8(f) of the Act, which authorizes unions and employers in the construction industry to enter into collective-bargaining agreements without the union having to establish that it has the support of a majority of the employees in the covered unit. An 8(f) relationship may be terminated by either the union or the employer upon the expiration of their collective-bargaining agreement. However, a party may not lawfully repudiate an 8(f) agreement during its term. *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).

plausibly, Weisblatt's letter can be understood to have served notice under the contract to Local 252 that it was terminating the agreement *in accordance* with the Letter of Assent. It did not indicate, much less unequivocally indicate, an intent to unlawfully repudiate the collective-bargaining agreement prior to the expiration date of the agreement.[11]

In reaching this conclusion, I recognize that while a repudiation must be "clear and unequivocal" the "Board has found that a contract repudiation need not be an express, written repudiation but instead can be manifested by the respondent's conduct." *St. Barnabas*, supra at 1129; *Neosho Construction Co.*, 305 NLRB 100, 102–103 (1991). However, under the circumstances of this case, the fact that Superior Electric operated after August 2000 without abiding by the Inside Wireman agreement does not demonstrate that the Union "knew or should have known" that the Respondent had repudiated the labor agreement.[12] In a traditional 9(a) relationship (and even many 8(f)) relationships), the represented employees come to work regularly for the employer. The Union cannot claim ignorance for years of conduct by the employer that it must have known about, or should have known about. This case involves an Employer and a union with an 8(f) relationship so shallow that over the course of 15 years they can count on one hand the number of interactions they have had. Although the evidence suggests he is wrong, Weisblatt—who has been president of Superior Electric since 1970—could not remember having *any* dealings with Local 252 prior to 2000, even though it is undisputed that the Respondent had been bound by the Letter of Assent since 1992. Indeed, he claimed that until he was shown the Letter of Assent by the Union in conjunction with the University of Michigan contract in 2000 he did not even know about his company's execution of the Letter of Assent turning over collective-bargaining rights to the Association. In fact, the evidence shows that, contrary to Weisblatt's recollection, the parties had at least one interaction in 1999, and his testimony also suggests that he worked within the jurisdiction without the Union's knowledge on an unknown number of times. The point, however, is that the context here is one in which the parties went years without any interactions at all. In this context, where Superior Electric works rarely within the Union's jurisdiction, and even then manages to avoid detection by the Union in some of those instances, it is not appropriate to charge the Union with knowledge that Respondent was flouting the labor agreement based simply on the passage of time. In *every* instance that it was shown that the Union knew of Respondent working within the jurisdiction the Union confronted Weisblatt, arranged or accepted a solution in that instance, or, in the final incident, filed a grievance under the labor agreement and a charge with the Board. But none of these incidents indicate that the Union acted "with impunity [to] ignore an employer or a unit . . . . and then rely on its ignorance of events occurring at the shop to argue that it was not on notice of an employer's unilateral changes." *John Morrell & Co.*, 304 NLRB at 899

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[11] In addition, the letter is equivocal in another way. While Respondent takes the position that Weisblatt's letter notified the Union of its intent to repudiate the Inside Wireman agreement *and* the Letter of Assent, the letter is less than pellucid about what it is terminating. There is an inscrutability to a letter that states, "let this letter serv[e] as our Notice of Termination of our Agreement defined by our letter of Assent." Whether that is a notice of termination of the Inside Wireman agreement *and* the Letter of Assent (as Respondent asserts), or just the current agreement, is not, at all, unequivocal.

[12] *Moeller Bros. Body Shop*, 306 NLRB 191, 193 (1992) ("While a union is not required to , , , police its contracts aggressively in order to meet the reasonable diligence standard, it cannot with impunity ignore an employer or a unit . . . and then rely on its ignorance of events occurring at the shop to argue that it was not on notice of an employer's unilateral changes"); *John Morrell & Co.*, 304 NLRB 896, 899 (1991) (10(b) period begins to run when "aggrieved party knows or should know that his statutory rights have been violated").

(quoted in *St. Barnabus*, supra). Based on Weisblatt's testimony, it is obvious that during Superior Electric's few forays into the Union's jurisdiction it made no effort to alert the Union of its presence and did not concern itself with the Union unless and until "caught" by the Union. The reasonable diligence required of a union to avoid being charged with constructive knowledge of an unfair labor practice does not require hunting for an employer. See, *Neosho Construction Co.*, supra at 102-103 (1991) ("repudiation by conduct" requires noncompliance sufficiently "bald" to put the union on notice of intent to repudiate); *Positive Electrical Enterprises, Inc.*, 345 NLRB No. 67, slip op. at 6-7 (2005) (failure to honor 8(f) agreement over many years does not support 10(b) defense where small contractor, 1 of 75 bound by agreement, took no steps to notify union when it worked nonunion in jurisdiction covered by agreement).[13]

Finally, Respondent's 10(b) defense to its February 2006 actions must fail for another related, but analytically independent reason. As discussed above, in the aftermath of the August 2000 phone call between Weisblatt and Motzinger, and continuing through to February 2006, Respondent did not, in fact, provide notice to the Association that it was terminating the Letter of Assent. This is significant because, as the Board recently affirmed, interpreting essentially identical agreements, in addition to notifying the union of intent to terminate the contract, in order to withdraw future bargaining rights from the bargaining association an employer must notify the association that it is terminating those bargaining rights. *Rome Electrical Systems,* 349 NLRB No. 72 (2007). See also *Cedar Valley Corp.*, 302 NLRB 823, 830 (1991), enfd. 977 F.2d 1211 (8th Cir. 1992), cert. denied 508 U.S. 907 (1993). This means that, apart from the issue of whether it repudiated the 1998 Inside Wireman agreement in August 2000, Respondent was bound, by operation of law, to the 2001 and 2004 successor Inside Wiremen agreements subsequently negotiated by the Association. Had Respondent provided timely notice to the Association of a revocation of the Letter of Assent, as of June 1, 2001, the anniversary date (and it so happens, the day after the expiration date) of the existing agreement, the Letter of Assent would no longer continue to authorize the Association to bargain on behalf of Superior Electric. But Superior Electric never took that step. As explained in *Cedar Valley Corp.*, 302 NLRB at 830:

> When the 8(f) agreement expires and the employer has served timely notice of contract termination, nevertheless, the Board has held the designation of bargaining authority continues. That is, the Board has held that an employer is bound to successive agreements negotiated by the association until the employer withdraws bargaining authority from the association in a timely manner.

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[13] In fact the Union did devote resources to searching the jurisdiction for contractors obligated to follow the Inside Wireman agreement. Approximately 150 employers were subject to the agreement. Burns testified to the methods he used to monitor contractor compliance with the agreement. They had a hit or miss quality to it. Burns relied on third party subscription services, newspaper reports, and on a Local 252 retiree who made the rounds of town building permit offices copying building permit information in the local area. There is no evidence that the Union was anything but diligent in its efforts to track contractor activity. Yet, there is no denying that these methods may have enabled contractors who worked infrequently in the jurisdiction the ability to work without detection by the Union. There is no evidence that the Union ignored contract compliance or failed to exercise reasonable diligence to track contractors.

Respondent was legally bound by the 2004 agreement in effect when the Union confronted Respondent over the Briarwood Mall job. Given that, and given that every event relied upon by the Government to prove the alleged unfair labor practice occurred within six months of the filing of the Union's charge, I cannot find Respondent's claim that it unequivocally repudiated the contract six years earlier is of any moment. Putting aside the question of whether Respondent's conduct in August 2000 was immediately actionable and started the statute of limitations running *as to that violation*, by June 1, 2001, Respondent had—based on its own inaction—become contractually bound to a new 2001 successor Inside Wireman agreement and in 2004 to still another one. This is not, I would stress, based on a "continuing violation theory," rejected in *A & L Underground*, under which a separate violation of a contract within six months of a charge is timely notwithstanding a prior repudiation of *that* contract. That a finding of a separate violation arising under *the same* contract that was previously repudiated is foreclosed by *A & L Underground*, does not mean an employer is protected by 10(b) from prosecution for violations of the Act based on contracts effective and effectively entered into *after—in this case four years after—*an unlawful repudiation of a prior agreement. See *Cedar Valley Corp.*, 302 NLRB at 823 (assuming there was unlawful repudiation during term of a contract it was ineffective to invalidate future contracts where party bound itself to comply with successor agreements). That Superior Electric's relationship with the Association, and hence obligation to successor Inside Wireman agreements, was structured to renew through inaction, i.e., absent specified steps that Superior Electric admittedly did not take, is an arrangement of its own undertaking. In asserting its 10(b) defense based on unlawful action it took in 2000 to protect it from a contractual arrangements effective in 2004 Respondent is asking too much of a regulatory regime committed to allowing employers and unions to negotiate their own contractual arrangements.

CONCLUSIONS OF LAW

1. Respondent, Superior Electric of Greater Detroit, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Charging Party, Local 252, International Brotherhood of Electrical Workers, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has, at all times material, authorized the Ann Arbor Division, Michigan Chapter, National Electrical Contractors Association, Inc. (Association) as its collective-bargaining representative for all purposes set forth in a Letter of Assent executed by Respondent on March 23, 1992.

4. The 2004 Inside Wireman agreement is a collective-bargaining agreement entered into between the Charging Party and the Association to which Respondent is bound.

5. Charging Party, at all material times has been the limited exclusive collective bargaining representative, based on Section 8(f) of the Act, of an appropriate unit for such purposes as defined by Section 9(b) of the Act, composed of the employees described as the bargaining unit in the 2004 Inside Wireman agreement.

6. By refusing to comply with the 2004 Inside Wireman agreement at all times since on or about February 14, 2006, the Respondent has repudiated the agreement and thereby has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that 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.

Having found that Respondent violated Section 8(a)(5) by repudiating the Inside Wireman agreement on or about February 14, 2006, Respondent shall abide by the terms of the current Inside Wireman agreement negotiated by the Union and the Association, including hiring provisions, and Respondent shall offer full and immediate employment to those individuals who, on and since February 14, 2006, were denied an opportunity to work for Respondent because of its failure and refusal to comply with the hiring provisions in the Inside Wireman agreement. *J.E. Brown Electric*, 315 NLRB 620 (1994). Additionally, for the period beginning February 14, 2006, Respondent shall make whole, with interest, employees in the bargaining unit, as well as those employees who were denied the opportunity to work, for any losses suffered as a result of its failure to abide by the applicable Inside Wireman agreement as provided for in *Williams Pipeline Co.*, 315 NLRB 630 (1994). All payments to employees are to be computed in the manner set forth in *Ogle Protection Service,* 183 NLRB 682 (1970)*,* enfd. 444 F.2d 502 (6th Cir. 1971), as well as *F.W. Woolworth Co.*, 90 NLRB 289 (1950), as appropriate,[14] with interest, as prescribed in *New Horizions for the Retarded*, 283 NLRB 1173 (1987).[15]

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[14]The *Ogle Protection* formula applies in cases when the Board is remedying "a violation of the Act which does not involve cessation of employment status or interim earnings that would in the course of time reduce backpay." *Ogle*, supra at 683. The *Woolworth* formula is otherwise appropriate in backpay cases. In this case, the backpay remedy may involve either type of backpay remedy, or both (or, conceivably, neither), depending on the specifics of who is found to have suffered losses on account of Respondent's conduct. That determination is appropriate for resolution in a compliance hearing. *J.E. Brown Electric*, 315 NLRB at 623.

[15]In its brief, Respondent contends that, in the event a violation is found, the remedy should not include an award of back pay. This follows, in Respondent's view, (1) from acceptance of Motzinger's testimony that he and Weisblatt struck an agreement in 2000 to permit Respondent to use its own employees (and pay its own wages) and make only appropriate contributions to the union benefits funds, and (2) from the assertion by Respondent that "no specific employee(s) can be identified who actually lost wages in this case [and, therefore,] such an award would be purely speculative." (R. Br. at 12–13). I reject both contentions. As to the first, my decision does not assume an agreement was reached along the lines testified to by Motzinger. Whether Respondent can attempt to prove there was such an agreement, and that it was intended to apply to the work performed in 2006, is an issue that, if appropriate at all, must be pursued in a compliance hearing. I note, however, that Respondent has consistently denied that any such agreement was reached. As to the second contention, backpay is a fundamental component of a make-whole remedy which has long been a part of the remedy provided in construction industry repudiation cases. See *J.E. Brown Electric*, 315 NLRB 620, 622–623 fn. 8 (1994). The precise determination of who (if, indeed, anyone) is entitled to backpay is properly reserved for a compliance hearing. *J.E. Brown Electric*, 315 NLRB at 623 (quoting and adopting with regard to both reinstatement and backpay remedies in 8(a)(5) cases the reasoning of *Dean General Contractors*, 285 NLRB 573, 574 (1987) ("'as in other industries, reinstatement and backpay issues in the construction industry ordinarily will be resolved by a factual inquiry during the compliance process rather than by resorting to a presumption that may or may not accurately reflect the realities of the employment relationship or by resorting to a shift of evidentiary burdens from the adjudicated wrongdoer to the aggrieved employee'").

The Respondent shall make all contractually required contributions to benefit funds that have not been made since on or about February 14, 2006, including any additional amounts due the plan, in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979).[16] The Respondent shall also reimburse unit employees, with interest, for expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981). Such amounts are to be computed in the manner set forth in *Ogle Protection Service*, supra. The Respondent shall reimburse the Union, with interest, for lost dues and/or assessments that should have been paid contractually but were not paid to the Union because of the employer's repudiation of the labor agreement, in the manner set forth in *Ogle Protection Service*, supra. All interest due and owing in accordance with this paragraph shall be computed as prescribed in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

The Respondent shall further be ordered to refrain from in any like or related manner abridging any of the rights guaranteed to employees by Section 7 of the Act.

The Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in the Employer's facility or wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. When the notice is issued to the Employer, it shall sign it or otherwise notify the Region what action it will take with respect to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, Superior Electric Company of Greater Detroit, Detroit Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

   a. Repudiating or failing and refusing to comply with the applicable Inside Wireman Agreement.

   b. Failing and refusing to recognize the Union as the limited exclusive collective-bargaining representative for a bargaining unit of employees described in the applicable Inside Wireman agreement.

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

[16] To the extent that an employee has made personal contributions to a benefit or other fund that have been accepted by the fund in lieu of the Respondent's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action which is necessary to effectuate the purposes of the Act

a. For the period beginning February 14, 2006, make whole, with interest, employees in the bargaining unit, as well as those employees who were denied the opportunity to work, for any losses suffered as a result of its failure to abide by the applicable Inside Wireman agreement since on or about February 14, 2006, in the manner set forth in the remedy portion of this decision.

b. Within 14 days from the date of this Order, the Respondent shall offer full employment to those individuals who, on and since February 14, 2006, were denied an opportunity to work for Respondent because of its failure and refusal to comply with the hiring provisions in the applicable Inside Wireman agreements, in the manner set forth in the remedy portion of this decision.

c. Make all contractually required contributions to benefit funds that have not been made since on or about February 14, 2006, including any additional amounts due the plan, in the manner described in the remedy portion of this decision.

d. Reimburse unit employees, with interest, for expenses ensuing from its failure to make the required contributions, in the manner set forth in the remedy portion of this decision.

e. Reimburse the Union, with interest, for lost dues and/or assessments that should have been paid contractually but were not paid to the Union because of the Employer's repudiation of the Inside Wireman agreement, in the manner set forth in the remedy portion of this decision.

f. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

g. Within 14 days after service by the Region, post at its facility in Oak Hills, Michigan, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places 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 on or about February 14, 2006.

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

h. 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.

Dated, Washington, D.C. June 29, 2007

_____
David I. Goldman
U.S Administrative Law Judge

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 Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT repudiate or fail to comply with the provisions of the applicable Inside Wireman agreement.

WE WILL NOT refuse to recognize the Union as the limited exclusive collective-bargaining representative for a bargaining unit of employees described in the applicable Inside Wireman agreement.

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

WE WILL make whole, with interest, employees in the bargaining unit, as well as those employees who were denied the opportunity to work, for any losses suffered as a result of our failure to abide by the applicable Inside Wireman agreement, since on or about February 14, 2006.

WE WILL within 14 days from the date of the National Labor Relations Board's Order offer full employment to those individuals who, on and since February 14, 2006 were denied an opportunity to work because our failure and refusal to comply with the hiring provisions in the applicable Inside Wireman agreement.

WE WILL reimburse the Union, with interest, for dues we were required to withhold and transmit under the Inside Wireman agreement.

WE WILL make all contributions to benefit plans that we were required to make under the Inside Wireman agreement, including any additional amounts due the plan on account of our failure to make these contributions at the time they were owed.

WE WILL reimburse unit employees, with interest, for any expenses they have incurred because of our failure to make required contributions to benefit plans under the Inside Wireman agreement.

SUPERIOR ELECTRIC OF GREATER DETROIT

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

477 Michigan Avenue, Federal Building, Room 300

Detroit, Michigan 48226-2569

Hours: 8:15 a.m. to 4:45 p.m.

313-226-3200.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 313-226-3244.