United Steel Workers of America, Local 14693, AFL–CIO–CLC *and* Skibeck, P.L.C., Inc. Cases 9–CB–10982 and 9–CB–11007

August 27, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On September 13, 2004, Administrative Law Judge John T. Clark issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed answering briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified below and adopt the recommended Order as modified and set forth in full below.[1]

We agree with the judge, for the reasons discussed below, that the Respondent violated Section 8(b)(3) of the Act by disclaiming interest in representing certain employees in an existing bargaining unit. We do not pass on the issue of whether the Respondent's conduct also violated Section 8(b)(1)(A.)

I. FACTUAL BACKGROUND[2]

Since 1994, the United Steelworkers of America (USWA) and the Building and Construction Trades Department of the AFL–CIO (BCTD) have been parties to a jurisdictional agreement, called the Harmony Agreement. That agreement defines the relationship of the USWA and the unions that are members of the BCTD, as well as the organizing rights of each organization in the other's core jurisdictions. The Harmony Agreement precludes the USWA from organizing employees of construction employers, except in heavy and highway construction (including pipeline construction) industries in Pennsylvania, West Virginia, and Kentucky. The Harmony Agreement provides for final and binding arbitration of any disputes arising out of its interpretation or application.

The Charging Party, Skibeck, P.L.C., is engaged in the building and construction trade as a pipeline contractor. Since May 29, 2003, the Respondent, Steelworkers Local 14693, has been the certified Section 9(a) representative of a bargaining unit of Skibeck's employees defined as "[a]ll employees . . . engaged in heavy and highway construction and utility work, excluding all guards, and watchmen, and all professional employees and supervisors as defined in the Act and all other employees."

Skibeck is a member of a multiemployer association (Association) that conducts collective bargaining with the USWA. The Association bargains on behalf of Skibeck and other construction contractors, while the USWA bargains on behalf of its locals. Since at least the 1970s, the agreement between the USWA and the Association has stated that it covers all heavy construction and highway work, including utility work, performed in Pennsylvania, Ohio, and New York. Following the adoption of the Harmony Agreement in 1994, the USWA sought to limit the geographic jurisdiction clause of the agreement to work performed by USWA-represented units in Pennsylvania. The Association refused the USWA proposal and demanded that it be withdrawn as a permissive subject of bargaining. The geographic jurisdiction clause of the agreement therefore remains unchanged.

In March 2003, a public utility providing gas and electrical power to several counties in Ohio, Indiana, and Kentucky awarded Skibeck a pipeline construction job in Ohio. Shortly thereafter, the USWA notified the International Union of Operating Engineers (IUOE)—which is a party to the Harmony Agreement by virtue of its membership in the BCTD—that if Skibeck chose to do work in Ohio, it would do so as a "non-protected" contractor pursuant to the Harmony Agreement.

In May 2003, Skibeck commenced work on the Ohio job using 40 to 50 of its employees, all of whom were represented by the Respondent and most of whom were also members of the Respondent. As a result, the IUOE initiated proceedings against the Respondent for violating the Harmony Agreement. In August 2003, arbitrator Patrick Hardin ruled in favor of the IUOE and ordered the Respondent to disclaim all right and interest in representing Skibeck's employees at its pipeline project in Ohio, and to cease and desist from all representational activity with respect to those employees. Neither Skibeck nor the Association was a party to the arbitration proceeding.

Immediately thereafter, the Respondent's president sent a letter to Skibeck, disclaiming any interest in representing the employees working on the Ohio project. The sole reason for taking this action was the arbitrator's ruling. Although some of the unit employees working on the Ohio project learned of the disclaimer, they did not agree or consent to it. The Respondent neither disclaimed an interest in representing, nor failed to represent, any other employees in the unit. Skibeck completed its Ohio pipeline project in September 2003.

[1] We shall substitute the Board's standard language for certain provisions of the judge's recommended Order and notice.

[2] This case was submitted on stipulated facts.

II. ANALYSIS

A. Section 8(b)(3)

We agree with the judge's conclusion that the Respondent violated Section 8(b)(3) by purporting to disclaim interest in representing Skibeck's Ohio employees. Our reasoning, however, differs somewhat from that of the judge.

The judge focused largely on whether the Respondent's actions constituted an effective disclaimer of interest in representing employees. As our decisions recognize, an effective disclaimer will relieve a union of its obligation under Section 8(b)(3) to bargain with the employer. See *Chicago Truck Drivers Local 101 (Bake-Line Products)*, 329 NLRB 247 (1999). To be effective, a union's disclaimer must be clear, unequivocal, and in good faith. Id. Relying on these background principles, and on *Teamsters Locals, 3, 28, 37, 42* (*Lanier Brugh Corp).,* 339 NLRB 131, 142 (2003), the judge reasoned that any disclaimer that is not coextensive with the entire recognized or certified unit is equivocal. He therefore concluded that the Respondent's partial disclaimer was ineffective in relieving it of the obligation to bargain with Skibeck with respect to the employees performing work in Ohio.

In finding this violation, we find it unnecessary to pass on the judge's discussion of *Lanier Brugh Corp.* and his conclusion that the Respondent's purported disclaimer of interest was equivocal. Instead, we rely on the nature of the Respondent's conduct that constituted its refusal to bargain. The Respondent unilaterally asserted that it would no longer represent certain employees in the contractual bargaining unit and implied that the collective-bargaining agreement would no longer apply to those employees. By such conduct, the Respondent, in essence, effectuated a unilateral change in the scope of the unit, which has long been recognized as a matter that may not be unilaterally altered by either party. See *Arizona Electric Power Corp.*, 250 NLRB 1132, 1133 (1980); see also *Douds v. International Longshoremen's Assn.*, 241 F.2d 278, 283 (2d Cir. 1957). As a result, the Respondent engaged in an unfair labor practice within the meaning of Section 8(b) (3). See *Duane Reade, Inc.*, 342 NLRB 1010, 1012–1013 (2004); *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 834 (1991), enfd. 973 F.2d 230 (3d Cir. 1992).[3]

B. Section 8(b)(1)(A)

We find it unnecessary to resolve the issue of whether the Respondent's conduct also violated Section 8(b)(1)(A). Such a violation would not add materially to the remedy. The remedy for the 8(b)(3) violation here includes the requirement that the Union bargain for all of the unit employees and effectively restores the status quo. The remedy for a Section 8(b)(1)(A) violation would add that the Union must cease and desist from restraining or coercing employees by engaging in the conduct of refusing to represent some of them. We do not see that this adds anything of substance.

ORDER

The National Labor Relations Board orders that the Respondent, United Steel Workers of America, Local 14693, AFL–CIO–CLC, its officers, agents, and representatives, shall

1. Cease and desist from refusing to bargain in good faith with Skibeck, P.L.C., Inc. (the Employer) as the representative of its bargaining unit employees, and abrogating the terms and conditions of employment contained in the collective-bargaining agreement with the Employer with respect to unit employees employed by the Employer at its State of Ohio jobsite.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, advise Skibeck, P.L.C., Inc., in writing that all unit employees working in the State of Ohio are covered by the collective-bargaining agreement between United Steel Workers of America, AFL–CIO–CLC and the Pennsylvania Heavy Highway Contractors Association.

(b) Within 14 days from the date of this Order, request in writing an immediate accounting from any unit employee benefit fund of the amounts necessary to make whole those accounts in order that those accounts will be restored to their full value as if all periodic contributions had been timely made and, upon receiving the accounting, pay to the employee benefit funds the sums of money in the manner set forth in the remedy section of this decision.

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[3] In exceptions, the Respondent generally argues that there exist compelling policy reasons to excuse it from an otherwise clear violation of Sec. 8(b)(3). The Respondent's basic contention is that the Board should yield to the arbitrator's decision because the public has an overriding interest in the maintenance of labor peace created by interunion jurisdictional agreements such as the Harmony Agreement. While we cannot gainsay the importance of such agreements, see *Iron Workers Local 597 (Linbeck Construction)*, 208 NLRB 524, 531 (1974), we do not agree that this case truly implicates the broad policy concerns suggested by the Respondent. Rather, this appears to be no more than an instance in which a party has entered into conflicting contractual obligations to two other parties. The Board has held that it will not use its authority to rescue those who have made such conflicting promises. See *McKenzie Engineering Co.*, 333 NLRB 905, 907 (2001), enf. denied on other grounds 303 F.3d 902 (8th Cir. 2002); see also *NLRB v. Howard Immel, Inc.*, 102 F.3d 948, 953 (7th Cir. 1996) ("[N]o legal authority supports the proposition that [one party's] actions in entering into two conflicting bargaining agreements alter the rights of [another] party.").

(c) Make whole the unit employees employed by the Employer at its State of Ohio jobsite, with interest, for any losses they may have suffered as a result of the Respondent's action, in the manner set forth in the remedy section of this decision.

(d) Within 14 days after service by the Region, post at its union office in Cannonsburg, Pennsylvania, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to members 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.

(e) Sign and return to the Regional Director sufficient copies of the notice for posting by Skibeck, P.L.C., Inc., if willing, at all places where notices to employees are customarily posted.

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

MEMBER LIEBMAN, dissenting in part.

Every disclaimer of interest deprives bargaining unit employees—whether all of them or only some—of their chosen representative. Unions nevertheless are free to disclaim interest as to the entire unit without violating Section 8(b)(1)(A). The result should be the same in this case, involving a partial disclaimer, not least because it is settled that a violation of Section 8(b)(3) does not give rise to a derivative violation of Section 8(b)(1)(A). Although I agree with the majority that the Respondent Union's disclaimer of interest in representing *part* of the existing bargaining unit violated the duty to bargain in good faith under Section 8(b)(3), I would dismiss the allegation that the disclaimer also violated Section 8(b)(1)(A) because it somehow tended to restrain or coerce employees.[1]

The parties stipulated that the Respondent Union's sole reason for abandoning part of the existing bargaining unit was to comply with an arbitrator's ruling ordering it to do so. There is no evidence that the Union disclaimed interest in order to retaliate against employees for engaging in protected activities, unlike the union in *Teamsters Locals, 3, 28, 37, 42* (*Lanier Brugh Corp).,* 339 NLRB 131 (2003). Nor did the Union tell the Ohio employees that it would continue to be their representative, but that it would not properly represent them. Cf. *Chicago Truck Drivers Local 101 (Bake-Line Products)* 329 NLRB 247, 248 (1999).

Instead, it simply purported to cease to be their representative altogether. As the Board's cases make clear, however, employees do not have a protected right to insist that a union continue to represent them without disclaiming interest. Otherwise, contrary to our decisions, a union would be required to continue representing a bargaining unit that it no longer desires to represent. See id.; *Electrical Workers Local 58 (Thomas Edison Club)*, 234 NLRB 633, 634 (1978).

It is well settled that a *lawful* disclaimer of interest and withdrawal from representation does not coerce employees in the exercise of their rights under Section 8(b)(1)(A). See *Bake-Line Products*, supra, 329 NLRB at 248; *Teamsters Local 42 (Grinnell Fire Protection)*, 235 NLRB 1168 (1978), enfd. sub nom. *Dycus v. NLRB*, 615 F.2d 820 (9th Cir. 1980). The only difference between this case and the cited decisions is that the disclaimer here violated the Union's duty to bargain. But a violation of Section 8(b)(1)(A) cannot be established derivatively, by finding a violation of Section 8(b)(3). See *Demolition Workers Local 95*, 330 NLRB 352 fn. 3 (1999); *California Nurses Assn. (Alta Bates Medical Center)*, 326 NLRB 1362 fn. 1 (1998). See also *National Maritime Union of America*, 78 NLRB 971, 982–987 (1948).

Thus, even though the Union's disclaimer of interest in this case violated Section 8(b)(3), that violation cannot support a finding that Section 8(b)(1)(A) was also violated. No Union conduct other than disclaimer—e.g., a specific refusal to represent an Ohio employee in connection with some identifiable issue—is implicated here. Accordingly, the Board should dismiss the Section 8(b)(1)(A) allegation.

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.

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

[1] Contrary to the majority, I believe that the Board cannot avoid passing on this allegation. The 8(b)(3) violation (refusal to bargain with the Employer) is distinct from the alleged 8(b)(1)(A) violation (coercion toward employees) and the remedies for them are likewise distinct.

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 refuse to bargain in good faith with Skibeck, P.L.C., Inc., as the representative of its bargaining unit employees, and abrogate the terms and conditions of employment contained in the collective-bargaining agreement with the Employer with respect to unit employees employed by the Employer at its State of Ohio jobsite.

WE WILL, within 14 days from the date of the Board's Order, advise Skibeck, P.L.C., Inc., in writing, that all unit employees working in the State of Ohio are covered by the collective-bargaining agreement between the United Steel Workers of America, AFL–CIO–CLC and the Pennsylvania Heavy Highway Contractors Association.

WE WILL, within 14 days from the date of the Board's Order, request in writing an immediate accounting from any unit employee benefit fund of the amounts necessary to make whole those accounts in order that those accounts will be restored to their full value as if all periodic contributions had been timely made and, upon receiving the accounting, pay to the employee benefit funds the sums of money, with interest.

WE WILL make whole the unit employees employed by the Employer at its State of Ohio jobsite, with interest, for any losses they may have suffered as a result of our unlawful action, in the manner set forth in the remedy section of the Board's decision.

UNITED STEEL WORKERS OF AMERICA, LOCAL 14693, AFL–CIO–CLC

Naima R. Clarke, Esq., for the General Counsel.
Melvin P. Stein and *Paul L. Edenfield, Esqs.,* of Pittsburgh, Pennsylvania, for the Respondent-Union.
Norman I. White, Esq. (McNees, Wallace & Nurick), of Harrisburg, Pennsylvania, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN T. CLARK, Administrative Law Judge. On charges filed by Skibeck, P.L.C., Inc. (the Employer or the Charging Party), the General Counsel of the National Labor Relations Board (the Board) issued a consolidated complaint and notice of hearing on March 24, 2004.

The consolidated complaint alleges that the United Steel Workers of America, Local 14693, AFL–CIO–CLC (the Respondent), violated Section 8(b)(1)(A) and (3) of the National Labor Relations Act (the Act), by unilaterally changing the scope of the unit and refusing to represent the unit employees employed in Ohio. The Respondent filed a timely answer to the complaint denying any violation of the Act and raising an affirmative defense. The case was assigned to me for hearing. The hearing was scheduled for June 8, 2004, but was ordered postponed indefinitely to permit the parties to submit the case on a stipulated record.

Pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations all of the parties to this proceeding entered into a stipulation of facts (the stipulation). The parties agreed to submit this proceeding, without a hearing, directly to an administrative law judge for issuance of findings of fact, conclusions of law and recommended order. The parties also agree that the stipulation, with the attached exhibits, including the charges, the consolidated complaint, and the answer, as well as the statement of issues presented and each party's position statement, should constitute the entire record in this case and that no oral testimony is necessary or desired by any of the parties. Thereafter, the parties filed the stipulation of facts and joint motion with the Division of Judges on June 28, 2004. The case was duly assigned to me and on June 29 (erroneously dated July), I issued an order granting the joint motion, approving the stipulation, and setting a time for the filing of briefs. Thereafter, all parties submitted briefs which have been duly considered.

On the entire record, I make the following

FINDINGS OF FACT

I. JURISDICTION

The consolidated complaint alleges that at all material times the Employer, a corporation, with an office and place of business in Randolph, New York, has engaged in the building and construction trade as a pipeline contractor at the Natural Gas Pipeline Construction Project, Line C–314 jobsite located in Warren and Butler counties, Ohio, the only jobsite involved herein. During the 12-month period ending June 15, 2004, the Employer, in the course and conduct of its business operations, performed services valued in excess of $50,000 for customers located outside the State of New York. The Respondent admits, and I find, that at all material times the Employer has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent also admits, and I find, that at all material times it has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Stipulated Facts

Since May 29, 2003,[1] the Respondent, based on an April 4 petition it filed in Case 3–RM–777, has been certified as the exclusive collective-bargaining representative of the Employer's employees in the following unit appropriate for the

[1] All dates are in 2003, unless otherwise indicated.

purposes of collective-bargaining within the meaning of Section 9(b) of the Act:

> All employees of [the Employer] engaged in heavy and highway construction and utility work, excluding all guards, and watchmen, and all professional employees and supervisors as defined in the Act and all other employees.

At all times since May 29, the Respondent, based on Section 9(a) of the Act has been the exclusive collective-bargaining representative of the unit. Since 1996, the Employer has been a member of the Pennsylvania Heavy Highway Contractors Association (Association), an association that represents employers when bargaining with unions. Since 1996, the Employer has authorized the Association to represent it and conclude contracts on its behalf.

The United Steelworkers Workers of America, AFL–CIO–CLC (USWA) has entered into a series of collective-bargaining agreements with the Association on behalf of its various local affiliates, including the Respondent. The most recent collective-bargaining agreement (the Agreement) was effective from April 11, 2001, to December 31, 2003. Article I, section 6 of the agreement states, and has stated since at least the 1970s, that it covers all heavy construction and highway work, including utility work, performed in the States of Pennsylvania,[2] Ohio, and New York. The Agreement, by its terms, is an agreement within the meaning of Section 8(f) of the Act. However, after the Respondent was certified as the 9(a) representative of the Employer's employees, the parties applied the terms of the Association Agreement to the unit.

In March, Cinergy, a public utility providing gas and electrical power to several counties in Ohio, Indiana, and Kentucky, awarded to the Employer the pipeline construction job at the Natural Gas Pipeline Construction Project, Line C–314 jobsite located in Warren and Butler counties, Ohio, the only jobsite involved in this proceeding.

About April 30, the USWA wrote a letter to the International Union of Operating Engineers (IUOE) stating that the Employer had an agreement to do gas line work only in the State of Pennsylvania. The letter further stated that if the Employer chose to do work in the State of Ohio, it would do so as a "nonprotected" contractor pursuant to the Harmony Agreement between the USWA and the Building and Construction Trades Department of the AFL–CIO (BCTD), of which the IUOE is a member. The USWA and the BCTD entered into the Harmony Agreement on February 24, 1994. The Harmony Agreement defines the relationship of the USWA and the BCTD as well as the organizing rights of each organization in each other's core jurisdictions. The Harmony Agreement restricts the USWA from organizing employees of construction employers, except in heavy and highway construction (including pipeline construction) industries in the States of Pennsylvania, West Virginia and Kentucky. The Harmony Agreement provides for final and binding arbitration of any disputes arising out of its interpretation or application.

In negotiations with the Association following adoption of the Harmony Agreement, the USWA sought to alter the language of the geographic jurisdiction clause of the Association Agreement. Specifically, the USWA proposed language to limit to Pennsylvania the USWA's representation of contractors admitted to Association membership post-February 1994. The Association refused the USWA proposal and demanded that it be withdrawn as a permissive subject of bargaining. Thus, the geographic jurisdiction clause of the Association Agreement remains unchanged. Nevertheless, the USWA's position on the subject is known to and understood by the Association.

The Employer has its own employee complement that it transfers from job to job. On May 27, the Employer commenced work on the Cinergy job using its own work force. The Employer had 40 to 50 employees on the job, all of whom were represented by the Respondent and most of whom were members of the Respondent.

On June 20, the USWA sent a second letter to the IUOE, stating, among other things, that the Employer is a "nonprotected" contractor when working in the State of Ohio. The USWA did not send either the April 30 or the June 20 letter to its members.

On August 7, based on a complaint filed by the IUOE against the Respondent under the Harmony Agreement, Arbitrator Patrick Hardin ruled that by representing employees of the Employer engaged in the pipeline project in Macon, Ohio (the Macon project is the same project that is mentioned above as the Natural Gas Pipeline Construction Project, Line C–314 jobsite located in Warren and Butler Counties, Ohio), the Respondent violated articles 1 and 3 of the Harmony Agreement. The arbitrator ordered the Respondent to disclaim all right and interest in the representation of the Employer's employees at its pipeline project in Ohio, and to cease and desist from all representational activity with respect to those employees.[3] Neither the Employer nor the Association was a party to the arbitration proceeding.

At all material times, Mark Cummings has held the position of Respondent's president and has been an agent of the Respondent within the meaning of Section 2(13) of the Act. On August 11, the Respondent, via a letter from Cummings to the Employer's president, William C. Schettine, disclaimed interest in representing the Employer's employees engaged in the pipeline project in Ohio and generally with respect to construction work in the State of Ohio. Soon thereafter, some of the unit employees working on the pipeline project in Ohio learned of the August 11 disclaimer. As indicated in the August 11 letter, the Respondent's sole reason for taking this action was Arbitrator Hardin's August 7 ruling. The Respondent neither disclaimed an interest in representing, nor failed to represent, any other employees in the unit. The Employer did not agree or consent to the Respondent's August 11 actions set forth above. About September, the Employer completed its Ohio pipeline project.

[2] It is understood that Pennsylvania and Kentucky are commonwealths, although the parties refer to them as states.

[3] The parties further stipulated that the Arbitrator's Award, a copy of which is attached to the stipulation as Exh. I, is not being presented for the truth of the stipulated facts recited therein.

B. Issue

The parties agree that the issue is whether the Respondent violated Section 8(b)(1)(A) and (3) of the Act by disclaiming interest in representing certain unit employees in a geographically unlimited certified bargaining unit only when such employees are working in the State of Ohio, where the Employer's work in Ohio is specifically covered by its contract with the Respondent, but where an arbitrator's ruling pursuant to a jurisdictional agreement between two labor organizations ordered the Respondent to disclaim Ohio work.

C. Contentions of the Parties

Counsel for the General Counsel contends that a certified 9(a) representative is legally obligated to meet and bargain collectively with the employer of the employees whom it represents. Although a union may disclaim interest in representing a bargaining unit, thereby avoiding the duty to meet and bargain collectively, such disclaimer must be unequivocal and made in good faith. *Chicago Truck Drivers Local 101 (Bake-Line Products),* 329 NLRB 247, 248 (1999). In order for a disclaimer to be "unequivocal" and lawful it must be coextensive with the recognized or certified unit. *Joint Council of Teamsters 3, 28, 37, 42 (Lanier Brugh Corp.),* 339 NLRB 131 140–142 (2003). Here, the Respondent's disclaimer was not coextensive with the certified unit. The Respondent effectively refused to bargain with the Employer regarding unit members employed in Ohio only; however, the Respondent is certified as the representative of unit employees without any geographic limitation. Moreover, the contractual agreement between the parties specifically covers construction work performed in Ohio. Thus, by disclaiming interest in unit employees employed only in Ohio, the Respondent unilaterally changed the scope of the unit in violation of Section 8(b)(3). See *Joint Council of Teamsters 3, 28, 37, 42,* supra. Further, because the Respondent was otherwise obligated by its certification to represent the unit employees wherever they were employed, its disclaimer also violates Section 8(b)(1)(A).

The Charging Party contends that it, through its lawfully designated bargaining representative, the Pennsylvania Heavy and Highway Contractors Bargaining Association, and pursuant to the certification referenced above, is bound by the collective-bargaining agreements referenced above, as is the USWA and the Respondent. It contends that no agreement entered into by the Charging Party and a third party can bind the Respondent any more than the Respondent can claim that the Charging Party and the Association are bound by its Harmony Agreement.

The award of Arbitrator Hardin was rendered pursuant to the Harmony Agreement. Neither the Charging Party nor the Association was a party to that Agreement or the arbitration proceeding. At no time did the Charging Party or the Association ever agree to or adopt the Harmony Agreement. The position of the Charging Party and the Association was never even presented to or considered by the arbitrator. The award can have no binding effect upon the Charging Party and the Association.

In addition, the award, by its very nature is inconsistent with the precepts of the Act and the Respondent's certification, which is geographically unlimited. Any effort to engage in what amounts to a partial disclaimer must be and is a violation of Section 8(b)(3) of the Act. Accordingly, the basis upon which a union is recognized and certified cannot be unilaterally altered by one party alone.

The Respondent contends that it did not violate the Act by withdrawing recognition of Skibeck, P.L.C., Inc., in the State of Ohio. It argues that it acted pursuant to a binding arbitration award issued pursuant to the 1994 "Harmony Agreement" between the USWA and the Building and Construction Trades Department of the AFL–CIO. Although neither the Employer, nor the employer association are parties to the Harmony Agreement, both were aware of the Harmony Agreement and that the USWA considered itself bound by the Harmony Agreement in relation to the Pennsylvania Heavy and Highway Contractors' Bargaining Association collective-bargaining agreement. For the Respondent's actions to be considered violative of the Act undermines national labor policy in that it subverts the process of arbitration. It also jeopardizes the continued vitality of the Harmony Agreement, which has made a significant contribution toward the elimination of physical violence and the establishment of industrial peace in areas where BCTD and USWA representation of construction representation overlap.

D. Discussion

Counsel for the General Counsel contends that by disclaiming interest in representing a part of the bargaining unit, i.e., employees engaged in pipeline and construction work in the State of Ohio, while continuing to represent the remaining employees in the unit, the Respondent effectively refused to bargain with the Employer with respect to only certain unit employees, and by its actions unilaterally changed the scope of the unit thereby violating Section 8(b)(3) of the Act.

"Unit scope is not a mandatory bargaining subject," *Bozzuto's Inc.,* 277 NLRB 977 (1985), and the Respondent acknowledges as much in its brief. The Respondent also acknowledges that a union may not partially disclaim a segment of a bargaining unit. The Respondent contends that "[a]lthough mutual consent is normally required before the parties may alter the recognized unit, the instant case raises unique policy considerations." The unique policy considerations appear to be that the Respondent was acting pursuant to an arbitrator's award finding that the Respondent violated the Harmony Agreement by representing the Employer's employees in Ohio and ordering the Respondent to disclaim all right and interest in representing them.

The Respondent, correctly, does not argue that the Board should defer to the arbitrator's award. See generally *Spielberg Mfg. Co.,* 112 NLRB 1080 (1955); *Olin Corp.,* 268 NLRB 573 (1984). The Respondent instead argues that the Board should accord the Harmony Agreement special status because it defines the relationship of the USWA and BCTD as well as the organizing rights of each within each organization's core jurisdictions. The Respondent submits that the Harmony Agreement has ended a long period of conflict between the USWA and the BCTD and thus should override other rights and interests under the Act.

The Board has had a longstanding policy that an exclusive bargaining agent's disclaimer of its statutory duty to bargain on behalf of a unit must be unequivocal and in good faith. E.g., *Electrical Workers (Texlite, Inc.),* 119 NLRB 1792, 1798–1799 (1958), enfd. 266 F.2d. 349 (5th. Cir. 1959). I have found no case support, and the Respondent cites to none, that even suggests that the Board would be inclined to reconsider this policy.

The Respondent submits that the disclaimer here is "certainly unequivocal," citing *VFL Technology,* 332 NLRB 1443, 1444 (2000). The disclaimer in *VFL,* as in every case cited by the Respondent, disclaimed interest in representing all the employees in the entire unit. The disclaimer in the instant case cannot be unequivocal because any disclaimer must be coextensive with the recognized or certified unit. *Joint Council of Teamsters 3, 28, 37, 42 (Lanier Brugh Corp.),* 339 NLRB 131, 142 (2003). By giving effect to disclaimers that are unequivocal and in good faith the Board has stated that "we are giving full expression to the Board's dual purposes of fostering labor relations stability and employee freedom of choice." *VFL,* above at 1444 (footnote omitted). Although the Respondent correctly notes that the Board in *Joint Council of Teamsters,* above, found a 8(b)(3) violation based on a partial disclaimer, it contends that the finding was premised on animus against nonmembers, unlike here where the Respondent contends that the partial disclaimer was intended to promote labor peace. I disagree. The vice in *Joint Council of Teamsters,* as in all cases where the Board has found a partial disclaimer, is that the disclaimer is not unequivocal. The issue of motive, or good faith, relates to the fact that the disclaimer in *Joint Council of Teamsters*, was also found not to have been made in good faith, an issue not present here.

Unit scope is not a mandatory bargaining subject in order to prevent either party from using its bargaining power to restrict, or extend, the scope of union representation in derogation of employees' guaranteed right to representatives of their own choice. See generally *Idaho Statesman v. NLRB,* 836 F.2d 1396, 1400 (D.C. Cir. 1988). Thus, "[a]dherence to a bargaining unit, once it is fixed, is central to Congress' purpose of stabilizing labor–management relations in interstate commerce." See *Boise Cascade Corp. v. NLRB,* 860 F.2d 471, 475 (D.C. Cir. 1988), enfg. 283 NLRB 462 (1987).

I do not find the Respondent's argument that the Employer's interest in maintaining the scope of the unit is slight, and that the Employer's administrative burden minimal, of sufficient weight to trump a policy that is central to national labor management relations. Accordingly, I find as alleged in the complaint that the Respondent violated Section 8(b)(3) of the Act when, on August 11, 2003, it partially disclaimed interest in representing unit employees working in Ohio.

The complaint also alleges that the conduct described above, has restrained and coerced employees in the exercise of their rights guaranteed in Section 7 of the Act in violation of Section 8(b)(1)(A) of the Act.

In support of this allegation the counsel for the General Counsel contends that the unit employees in Ohio had a continuing legal right to representation and that the Respondent had a corresponding duty, pursuant to its Board certification, to provide representation. Accordingly, when the Respondent's refusal to represent the unit employees in Ohio, became known to those employees, they were unlawfully coerced in violation of Section 8(b)(1)(A). Counsel for the General Counsel relies on language contained in *Teamsters Local 42 (Grinnell Fire Protection),* 235 NLRB 1168 (1978), enfd. sub nom. *Dycus v. NLRB,* 615 F.2d. 820 (9th Cir. 1980). That case involved two locals that had lawfully disclaimed interest in representing a unit. The Board, responding to Member Jenkins' dissent, stated that, "[d]epriving the unit of the benefits of the collective-bargaining agreement by withdrawing as representative can be coercive as a matter of law only if the unit has a continuing right to those benefits." Id. at 1169. Counsel for the General Counsel argues that the unit employees in Ohio had a continuing right to representation and that the Respondent had a duty to provide the representation. Counsel for the General Counsel also observes that in *Chicago Truck Drivers Local 101 (Bake-Line Products),* 329 NLRB 247, the Board indicated that while it was lawful for a union to inform employees that it would consider disclaiming representation if it decisively lost a reauthorization election, it would be unlawful to tell unit employees that it would remain as their representative but then fail to properly represent them. Id. at 249. In *Chicago Truck Drivers Local 101* the Board, in agreement with former Chairman Stephens' concurrence in *Hospital Employees 1115 Joint Board (Pinebrook Nursing Home),* 305 NLRB 802 (1991), specifically noted that Chairman Stephens found a violation "because the union had threatened employees that it would remain as their bargaining representative but would not properly represent them." Id. 247–248. It follows that if threatening to take an action is a violation, doing the action is also a violation. In essence the Respondent remained the bargaining representative for the employees working in Ohio, but refused to represent them, a fact which was conveyed to the employees. Accordingly, I find that the Respondent violated Section 8(b)(1)(A) by failing and refusing to represent the Employer's Ohio unit employees.

CONCLUSIONS OF LAW

1. Skibeck, P.L.C., Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Steel Workers of America, Local 14693, AFL–CIO–CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. United Steel Workers of America, Local 14693, AFL–CIO–CLC is the exclusive collective-bargaining representative of the following appropriate unit:

> All employees of [the Employer] engaged in heavy and highway construction and utility work, excluding all guards, and watchmen, and all professional employees and supervisors as defined in the Act and all other employees.

4. By failing and refusing to represent the Employer's unit employees, working in the State of Ohio the United Steel Workers of America, Local 14693, AFL–CIO–CLC violated Section 8(b)(1)(A) of the Act.

5. By failing and refusing to bargain in good faith with the Employer as the representative of its bargaining unit employ-

ees, and by abrogating the terms and conditions of employment contained in their collective-bargaining agreement with the Employer with respect to unit employees employed by the Employer at its State of Ohio jobsite, the United Steel Workers of America, Local 14693, AFL–CIO–CLC has violated Section 8(b)(3) of the Act.

REMEDY

Having found that the Respondent, the United Steel Workers of America, Local 14693, AFL–CIO–CLC 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.

I also recommend that the Respondent be required to remit to any employee benefit fund all payments required under the collective-bargaining agreement, if any, in order to restore the employee accounts as required in *Merryweather Optical Co.,* 240 NLRB 1213 (1979), and to make whole the employees for all losses suffered, if any, as a result of the Respondent's action, in the manner set forth in *Kraft Plumbing & Heating,* 252 NLRB 891 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). All payments to employees shall be computed in the manner set forth in *Ogle Protection Service,* 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest computed in the manner set forth in *New Horizons for the Retarded,* 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]