

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Sheet Metal Workers International Association Local #18—Wisconsin, AFL–CIO and Everbrite, LLC.
Case 30–CB–075815

May 13, 2013

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN
AND BLOCK

On July 27, 2012, Administrative Law Judge Arthur J. Amchan issued the attached decision. The Respondent filed exceptions and a supporting brief, the Acting General Counsel filed an answering brief, and the Respondent filed a reply brief.

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 and findings only to the extent consistent with this Decision and Order.

The judge found that the Respondent violated Section 8(b)(3) of the Act by refusing to bargain over a successor agreement to the collective-bargaining agreement between the parties effective March 1, 2009–February 29, 2012 (the 2009 agreement). Because we find that the judge erred in failing to defer to the parties’ contractual grievance-arbitration procedure, we reverse.¹

For over 25 years, the Charging Party, Everbrite, LLC, and the Respondent, Sheet Metal Workers International Association Local #18—Wisconsin, AFL–CIO, have been parties to a series of collective-bargaining agreements, the latest of which—the 2009 agreement—contained grievance and arbitration provisions. Specifically, article 10, section 3 of the 2009 agreement provided: “[I]n the event that any grievance or interpretation of this Agreement arises which [affects] more than one (1) employee in the bargaining unit, either party may request a meeting of the ‘Joint Board’.” In article 11, section 1, the agreement stated:

If the grievance has not been satisfactorily settled by the Joint Board or otherwise resolved by the parties; ei-

¹ Accordingly, we do not pass on the merits of the complaint allegations. Although we conclude that the case is appropriate for deferral, the Charging Party is not precluded from raising the question of arbitrability in arbitration. See *Norfolk, Portsmouth Wholesale Beer Distributors Assn.*, 196 NLRB 1150, 1151 (1972) (whether a dispute the Board defers to arbitration is itself arbitrable may appropriately be raised in arbitration).

ther party may submit the dispute to arbitration The failure of the Joint Board to meet as scheduled shall not preclude either party from proceeding, at its option, directly to arbitration.

In early January 2012, a dispute arose between the parties concerning whether the 2009 agreement had, by its terms, rolled over for an additional year. Article 32, section 2 of the agreement provided:

This Agreement, and any amendments hereto as provided above, shall remain in full force and effect through **February 29, 2012**. Thereafter, this Agreement shall continue in effect on a year to year basis, unless either party notifies the other of its intent to modify, or terminate this Agreement, and does so in writing at least sixty (60) days prior to the expiration date.

(bold text in original).

On January 7, 2012, the Respondent informed the Charging Party that the agreement had rolled over for an additional year because neither party provided timely written notice of an intent to modify or terminate the agreement. In response, the Charging Party asserted that it had in fact notified the Respondent of its intent to modify or terminate the agreement and that the parties had already begun bargaining.

After the Respondent refused to enter into bargaining for a successor collective-bargaining agreement, the Acting General Counsel issued the instant complaint, alleging that the Respondent’s refusal to bargain violated Section 8(b)(3) of the Act, and a hearing was scheduled. Five days before the date of the hearing, the Respondent amended its answer to assert as an affirmative defense that the case should be deferred to the parties’ contractual grievance-arbitration procedure.

The judge rejected the Respondent’s argument that deferral was appropriate. First, the judge found that because the issue had been fully litigated at the hearing, deferral would result in unwarranted delay. Second, the judge relied on the Respondent’s failure to raise the deferral argument at an earlier stage of this proceeding to find that “the deferral argument is simply a means of further delaying resolution of this matter.” Finally, the judge found deferral inappropriate because the Respondent’s conduct constituted “a rejection of collective bargaining principles.”

Contrary to the judge, we find that deferral is warranted in this case. Under established precedent, which the judge’s decision does not address, the Board finds

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

deferral appropriate when the following conditions are met: the parties' dispute arises within the confines of a long and productive collective-bargaining relationship; there is no claim of animosity to employees' exercise of Section 7 rights; the parties' agreement provides for arbitration in a broad range of disputes; the parties' arbitration clause clearly encompasses the dispute at issue; the party seeking deferral has asserted its willingness to utilize arbitration to resolve the dispute; and the dispute is well suited to resolution by arbitration. *United Technologies*, 268 NLRB 557, 558 (1984); accord: *Collyer Insulated Wire*, 192 NLRB 837, 842 (1971).

We find that the criteria outlined in *Collyer Insulated Wire* and *United Technologies* are satisfied in this case. The Respondent and Charging Party have been parties to a long and productive collective-bargaining relationship dating back to at least 1984. Neither party alleges that the other has exhibited animosity to employees' exercise of Section 7 rights. The grievance-arbitration procedure in the 2009 agreement provides for the resolution of contract interpretation disputes, which can be initiated by either party. The Respondent has expressed its willingness to arbitrate the dispute. Finally, resolution of the substantive question in this case—whether the 2009 agreement was automatically extended for 1 year by its terms because no party provided sufficient and timely written notice of an intent to modify or terminate the agreement—is a question of contract interpretation that is well suited for resolution through arbitration. See *Tri-Pak Machinery, Inc.*, 325 NLRB 671, 673 (1998) (disputes concerning the renewal or termination of an agreement are appropriate for arbitration).

We find no merit in any of the judge's reasons for declining to defer. First, we disagree with the judge's finding that the Respondent's conduct amounts to a rejection of collective-bargaining principles. To the contrary, the Respondent is taking the position that the parties' collectively bargained 2009 agreement remained in effect. Second, the Respondent's request for deferral, 5 days before the hearing commenced, was not untimely. Deferral to arbitration is an affirmative defense that may be raised in the answer or even at the hearing. See, e.g., *Hospitality Care Center*, 314 NLRB 893, 894 (1994). Although we share the judge's concern about potential delay, it does not outweigh our findings that the Respondent timely raised a deferral defense and the long established criteria set forth in *Collyer* and its progeny are satisfied here. Finally, the judge erred in deciding the case on the merits before determining whether deferral was appropriate—and, a fortiori, in basing his refusal to defer in part on his decision on the merits. The Board has long held that while a deferral defense and the merits

may be addressed in the same hearing and the same decision, “[w]hether deferral is appropriate is a threshold question which must be decided in the negative before the merits of the unfair labor practice allegations can be considered.” *L.E. Myers Co.*, 270 NLRB 1010, 1010 fn. 2 (1984).

Accordingly, we find that the complaint allegations in this case should be deferred to the parties' contractual grievance-arbitration procedure.

ORDER

The complaint is dismissed, provided that jurisdiction of this proceeding is retained for the limited purpose of entertaining an appropriate and timely motion for further consideration on a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this Decision and Order, been either resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result that is repugnant to the Act.

Dated, Washington, D.C. May 13, 2013

Mark Gaston Pearce,	Chairman
Richard F. Griffin, Jr.,	Member
Sharon Block,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Andrew S. Gollin, Esq., for the General Counsel.
Matthew R. Robbins and Andrew J. Smith, Esqs. (Previant, Goldberg, Uelmen Gratz, Miller & Brueggeman), of Milwaukee, Wisconsin, for the Respondent.

Robert W. Mulcahy, Esq. (Michael Best & Friedrich LLP), of Milwaukee, Wisconsin, for the Charging Party.

DECISION

STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried in Milwaukee, Wisconsin, on June 18–19, 2012. Everbrite, LLC filed the charge initiating this matter on March 2, 2012, and the General Counsel issued the complaint on April 27, 2012. The General Counsel alleges that Respondent Sheet Metal Workers Local 18 has been violating Section 8(b)(3) of the Act in refusing to bargain with the Charging Party Employer for a successor agreement to the parties' March 1, 2009, to February 29, 2012 collective-bargaining agreement. Respondent contends that the Employer failed to give adequate

SHEET METAL WORKERS LOCAL 18—WISCONSIN

notice that it wished to negotiate a successor agreement. Thus Respondent argues that the prior agreement rolled over and is effective until February 29, 2013.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Everbrite, LLC, the Charging Party, a corporation, manufactures and sells lighting products at its facilities in Wisconsin, Illinois, Kansas, and Virginia, including the facility at issue herein in South Milwaukee, Wisconsin. Everbrite annually sells and ships goods valued in excess of \$50,000 outside of the State of Wisconsin from the South Milwaukee plant. Everbrite is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

FINDINGS OF FACT

The Charging Party Employer, Everbrite, LLC, has several manufacturing plants at which it produces signs for customers such as McDonald's Corporation. Some of these facilities are organized, some are unorganized. Its unionized plants at the present time are the one in South Milwaukee, the plant at issue in this case, a facility in Mt. Vernon, Illinois, and one in Par-deeville, Wisconsin. It recently closed a unionized plant in LaCrosse, Wisconsin.

Everbrite has had a series of collective-bargaining agreements with the Union, dating back to 1984 or earlier. Article 32, section 2 of the 2009–2012 agreement provides:

This Agreement, and any amendments hereto as provided above, shall remain in full force and effect through February 29, 2012. Thereafter, this Agreement shall continue in effect on a year to year basis, unless either party notifies the other of its intent to modify, or terminate this Agreement, and does so in writing at least sixty (60) days prior to the expiration date.

Should either party timely notify of its intent to modify or terminate this Agreement, the Agreement shall remain in force and effect subsequent to February 29, 2012 and until either party gives a ten (10) day additional written notice of its intent to terminate the Agreement.

Starting in 2010, Everbrite began to ask mid-term concessions from the unions at South Milwaukee, Mt. Vernon, Par-deeville, and LaCrosse. At the South Milwaukee plant, there are two bargaining units. Approximately 50 employees are represented by the United Electrical, Radio and Machine Workers (UE) and 30 by Respondent Local 18 of the Sheet Metal Workers International Association. Local 18 made it clear to Everbrite that was not amenable to making mid-contract concessions.

In July 2011, Everbrite asked for a meeting with Local 18. These parties met on August 29. Present for Everbrite were

Barbara Schaal, vice president of administration and Neil Fuchs, safety and environmental manager for the South Milwaukee plant. The Union was represented by Earl Phillips, business representative. The first 10 minutes of this meeting was spent discussing the grievance of employee Mark Rumpel, a union steward, who had been laid off while on workers compensation. Afterwards, Fuchs left the meeting and Schaal and Phillips were joined by Richard Sherman, a member of Everbrite's advisory board. Since December 2011, Sherman has been Everbrite's interim president.

Sherman told Phillips that Everbrite needed concessions from Local 18 to stay competitive with foreign competition. Phillips told Sherman and Schaal that he could not discuss this without the presence of Randy Krocka, the secretary/treasurer of Local 18.

The parties met again on October 25, 2011. Schaal and Sherman represented Everbrite. Phillips and Randy Krocka represented the Union. Sherman again asked the Union for concessions, including withdrawal from the Union's pension fund, a change in unit members' health insurance coverage and the elimination of the three floating holidays set forth in the 2009–2012 collective-bargaining agreement. These were set forth in a written proposal given to the Union. (GC Exh. 8.) That proposal was to be effective December 1, 2011, and proposed that it would last for 5 years, until February 28, 2017. Krocka informed Everbrite that if it withdrew from the Union's pension fund, it would be financially responsible for its unfunded liability.

The parties agreed to meet again on November 17, but the Union cancelled this meeting, which was postponed until December 21. However, on December 14, Everbrite electronically filed a notice with the Federal Mediation and Conciliation Service (FMCS) on FMCS Form F-7. (GC Exh. 15.) This notice states that "You [which I take to mean the FMCS] are hereby notified that written notice of proposed termination or modification of the existing collective bargaining contract was served upon the other party to this contract and that no agreement has been reached." There were several boxes on this form: "renegotiation," "reopener," and "initial contract." Everbrite checked the box for "renegotiation." The Union received a copy of this notice from the FMCS on December 27. (GC Exh. 19.)

At the December 21 meeting, Everbrite presented the Union with a revised written proposal which omitted its plan to withdraw from the Union's pension fund. (GC Exh. 16.) This proposal stated that the effective date of the parties' new agreement would be December 1, 2011 (a date that had already passed) and that the agreement would be in force until February 28, 2017 (5 years from the expiration of the current contract). Krocka told Everbrite representatives Schaal and Sherman that the Union was not in the process of bargaining with it. However, Krocka raised the possibility of grandfathering employees who were close to retirement so that they would not be affected by any changes to the collective-bargaining agreement.

On December 21, the parties agreed to meet again on January 9 and 11, 2012, with the Union's full bargaining committee in attendance, which included Everbrite employees. Phillips told Everbrite's representatives Schaal and Sherman that the

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD

Union would pay for the time spent at the meeting by bargaining unit members. (Tr. 65.) However, on January 7, 2012, Krocka sent Everbrite an email stating that in the Union's opinion, the March 1, 2009–February 29, 2012 collective-bargaining agreement had “rolled over.” In a telephone conversation with Schaal during the last week of January 2012, Krocka stated that he had found a “loophole” which allowed the Union to refuse to return to the bargaining table.¹

In an exchange of letters between Everbrite and the Union, the Union stated on June 13, 2012, that any dispute over whether Everbrite provided timely notice to the Union to negotiate a successor agreement should be resolved under the arbitration clause in article 11 of the 2009–2012 collective-bargaining agreement. (GC Exh. 2, pp. 8–9.)

Analysis

Section 8(b)(3) deems a Union's refusal to bargain collectively to be an unfair labor practice if that Union is the exclusive bargaining representative of some of the employer's employees pursuant to Section 9(a) of the Act.

The Union's defense in this matter is that Everbrite did not file timely *written* notice of its intent to modify, or terminate the 2009–2012 collective-bargaining agreement 60 days prior to the expiration of the contract. I find that as a matter of fact and law that Everbrite provided the requisite notice in its initial proposals of October 25, 2011 (GC Exh. 8), and December 21 (GC Exh. 16). Both of these documents conveyed to the Union the fact that company was proposing significant changes from the 2009–2012 collective-bargaining agreement. It would be clear to any reasonable person that Everbrite was proposing that these changes be in force until February 28, 2017. The fact that Everbrite proposed that the changes be instituted prior to expiration of the 2009–2012 contract does not detract from the fact that the Union was on notice that Everbrite was unwilling to extend the life of the 2009–2012 contract.

The fact that Everbrite did not dot its i's and cross its t's, by failing to send the Union a letter stating its intent to modify or terminate the 2009–2012 agreement does not mandate a different result. I find that Everbrite's written proposals of October 25 and December 21, 2011, sufficiently conveyed Everbrite's intent to prevent the 2009–2012 contract from rolling over, *Oakland Press Co.*, 229 NLRB 476, 479 (1977), *enfd.* in relevant part 606 F.2d 689 (6th Cir. 1979); *Chemical Workers Local 6-0682 (Checker Motors Corp.)*, 339 NLRB 291, 299 (2003).

Moreover, the Union subjectively understood that Everbrite intended to bargain for a new contract. This is reflected by the Union agreeing to bargaining sessions in January 2012 with unit members of its bargaining committee in attendance.

The Respondent Union's Deferral Argument

The Union argues this matter should be deferred to arbitration pursuant to *Collyer Insulated Wire*, 192 NLRB 837 (1971). In making this argument it relies on articles X and XI of the 2009–2012 collective-bargaining agreement. I reject this argument

for several reasons. First, this issue has been fully litigated in front of me and to defer this matter to arbitration now would only delay resolution of the case. Secondly, the Union first proposed resort to the contract's grievance and arbitration provision on June 13, 2012, 5 days before commencement of the hearing in this matter. Given this fact, I conclude that the deferral argument is simply a means of further delaying resolution of this matter. Further, the Board has held that where a party's conduct constitutes a rejection of the principles of collective bargaining, deferral is not proper, *Rappazo Electric Co.*, 281 NLRB 471 fn. 1 (1986). I find the Union's conduct in the instant case to be such a rejection of collective-bargaining principles.

CONCLUSION OF LAW

Respondent Sheet Metal Workers International Association, Local 18 violated Section 8(b)(3) of the Act in refusing to bargain over a successor collective-bargaining agreement to its March 1, 2009–February 29, 2012 contract with Everbrite, LLC.

REMEDY

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, Sheet Metal Workers International Association, Local 18, Waukesha, Wisconsin, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Failing and refusing to bargain for a successor agreement to its March 1, 2009–February 29, 2012 collective-bargaining agreement with Everbrite, LLC.

(b) In any like or related manner violating Federal labor law.

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

(a) Promptly commence bargaining at the request of Everbrite, LLC, for a successor contract to the March 1, 2009–February 29, 2012 collective-bargaining agreement.

(b) Within 14 days after service by the Region, post at its union office in Waukesha, Wisconsin, copies of the attached notice marked “Appendix.”³ Copies of the notice, on forms provided by the Regional Director for Region 30, after being

² 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.

³ 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 Krocka concedes that he said this, Tr. 168.

SHEET METAL WORKERS LOCAL 18—WISCONSIN

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 bargaining unit members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its bargaining unit members by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Sign and return to the Regional Director sufficient copies of the notice for physical and/or electronic posting by Everbrite, LLC, if willing, at all places or in the same manner as notices to employees are customarily posted.

(d) 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., July 27, 2012

APPENDIX

NOTICE TO MEMBERS
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 on your behalf with your employer

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain with Everbrite, LLC concerning a successor agreement to our 2009–2012 collective-bargaining agreement.

WE WILL NOT in any like or related manner violate Federal labor law.

WE WILL on request, bargain with Everbrite LLC concerning a successor agreement to the 2009 to February 29, 2012 collective-bargaining agreement, and if an understanding is reached, WE WILL sign an agreement embodying the terms agreed upon.

SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION LOCAL #18—WISCONSIN, AFL—CIO