

**James Luterbach Construction Co., Inc. and International Union of Operating Engineers Local 139, AFL-CIO.** Case 30-CA-10989

December 16, 1994

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS STEPHENS,  
DEVANEY, BROWNING, AND COHEN

On October 24, 1991, Administrative Law Judge Leonard M. Wagman issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party each filed an answering 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, findings, and conclusions and to adopt the recommended Order as modified.

The complaint alleges that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing to adhere to a collective-bargaining agreement executed about June 28, 1990, by the International Union of Operating Engineers, Local 39, AFL-CIO (Local 139 or the Union), the Allied Construction Employers' Association (ACEA), and the Associated General Contractors of Greater Milwaukee (AGC). The judge concluded that the Respondent's refusal violated Section 8(a)(5) and (1) of the Act. The Respondent filed exceptions to the judge's decision. We find in agreement with the judge and for the reasons set forth below that the Respondent's refusal to adhere to the agreement violated Section 8(a)(5) and (1) of the Act.

I. BACKGROUND

The facts of this case may be summarized as follows. The Respondent has been a general contractor in the building and construction industry for about 33 years. It employs laborers, cement masons, carpenters, bricklayers, and operating engineers. The Respondent has usually employed about 45 to 50 employees from those trades, including 4 or 5 operating engineers. It has had a collective-bargaining relationship with the Unions representing each of these trades for at least 20 years.

Pursuant to Section 8(f) of the Act, the Respondent has recognized Operating Engineers Local 139 as the exclusive bargaining representative of its operating engineers for more than 20 years. The Union and the Respondent were parties to a series of multiemployer agreements, the most recent of which, the Area I Master Building Agreement (Area I or Area I Agreement), was effective from June 1, 1987, to May 31, 1990.

Before the 1987 agreement, the ACEA negotiated contracts with the Union for the Respondent and other

members of the AGC. The Respondent has been a member of the AGC for about 20 years. William P. Luterbach, president of the Respondent since 1983, has held various offices in the AGC, culminating in the presidency in 1987. Until 1987, AGC was a member of ACEA. Luterbach, as AGC president, represented it on ACEA's board of directors.

Early in January 1987, the AGC decided to withdraw from the ACEA bargaining unit. In letters to Local 139 and other craft unions having collective-bargaining relationships with its members, AGC announced its withdrawal and stated that it was willing to begin negotiating a new agreement to be effective on or after June 1, 1987. Attached to each letter was a list of AGC contractors, including the Respondent, who had authorized the AGC to bargain for a new agreement.

In February 1987, AGC and ACEA agreed that from then on they would negotiate agreements as separate entities and that each one would bargain for its own members. They also agreed to bargain "alongside of, contiguous with, and adjacent to and in conjunction" with each other. In preparation for the 1987 negotiations, AGC and ACEA set up a joint committee. The two associations signed the 1987 Area I Agreement with Local 139 as separate entities.

During the negotiations for the 1987 Area I Agreement among ACEA, AGC, and Local 139, Luterbach became a member of the joint bargaining committee. He participated in the committee caucus on June 18, 1987, and sat with the committee during July 2, 1987 negotiations with Local 139.

In August 1989, the AGC sent letters to its members announcing preparations for the 1990 negotiations. It attached collective-bargaining authorization forms and a list of the AGC bargaining committees. Luterbach was listed as the chairman of the 1990 AGC collective-bargaining committee regarding operating engineers. The authorization form had spaces for an employer to check "yes" or "no" next to the names of the five unions, to show which union, if any, the employer authorized AGC to bargain with on its behalf. On August 15, not having received a reply from Luterbach, the AGC sent the Respondent a followup letter requesting the return of the authorization.

On August 30, 1989, the Respondent returned its form to the AGC, authorizing the association to represent it regarding bricklayers, carpenters, cement masons, and laborers. Concerning operating engineers, the Respondent marked neither "yes" nor "no." The AGC, which did not ask the Respondent to make a specific election, concluded that it was not authorized to bargain with the Union on the Respondent's behalf.

In February 1990, Local 139 sent letters to ACEA and AGC requesting negotiations for a new agreement.

At the first bargaining session,<sup>1</sup> on April 19, Local 139 asked for a list of employers for whom the associations had bargaining authority. The committee gave Local 139 the list, which included the Respondent as an employer for whom AGC had such authority. At the April 19 session, Luterbach chaired the joint bargaining committee and was its main spokesman.

On April 20 Local 139 filed an election petition with the Board seeking certification as the representative of the Respondent's operating engineers. On the same day the Regional Director notified the Respondent of the petition. The Union later withdrew the petition. On May 21 the Union filed a second petition similar to the first one in all material respects. On the same day the Regional Director notified the Respondent of the new election petition.

On May 10, at the next negotiating session, Luterbach again chaired the committee and spoke for the employers. He also served as chairman at the third meeting, on May 22, when the parties negotiated through a Federal mediator.

On May 29 Luterbach learned from Richard Snow, executive vice president of AGC, that the Respondent, Luterbach Construction of which he was president, had erroneously been placed on the list of employers that had authorized AGC to represent them with the operating engineers. Luterbach was absent from the next negotiating session, May 30. At that session, Henry Hunt, AGC's executive director, announced that Bill Emory, an official of another company included on the list of AGC members, was chairman of the committee. Emory continued to function in that capacity until negotiations concluded. Luterbach did not attend the remaining sessions.

In a May 31 letter to Donald Shaw, Operating Engineers Local 139 president and business manager, Luterbach announced to the Union his withdrawal as chairman of the committee and the Respondent's intent to conduct its relations with the Union as an individual employer. He stated that any further role he might play in the negotiations would be as an advisor to the employers whose bargaining authority the associations held, and that the Respondent was not among them. He also wrote:

I am writing in response to recent developments between your union and the James Luterbach Construction Company. You know by now that those developments placed me in a position where I had no choice but to resign as chairman of the negotiating committee in the AGC/ACEA collective bargaining negotiations.

I am referring, in particular, to the recent filing by your union of two election petitions. In evalu-

ating the election issue it became clear to me that the company should exercise its rights under the law, as set forth in the *Deklewa* case. It also became clear to me that your union does not represent an uncoerced majority of our employees in a bargaining unit that is appropriate under the law. Accordingly, we plan to proceed on the basis of an individual relationship with your union, if and when one is required by law.

On May 31, the Respondent filed an RM petition for an election in a unit of its operating engineers, truck-drivers, and mechanics, naming the Union as the labor organization claiming representative status for the unit. On June 26 the committee and the Union reached an agreement, which they executed on June 28. The agreement is effective from June 1, 1990, until May 31, 1993. On July 2 and again on July 3, Luterbach rejected the Union's requests that the Respondent adhere to the agreement. The Respondent has persisted in that refusal.

## II. DISCUSSION

At issue in this case is whether the Respondent violated Section 8(a)(5) and (1) of the Act by failing to adhere to the agreement executed June 28.<sup>2</sup> This case involves the obligations of an 8(f) employer in the context of multiemployer bargaining. To resolve this issue, we shall examine *Deklewa* and post-*Deklewa* cases for guidance.

In *Deklewa*, the Board summarized the framework it was providing for interpretation and application of Section 8(f) as follows:

When parties enter into an 8(f) agreement, they will be required, by virtue of Section 8(a)(5) and Section 8(b)(3), to comply with that agreement unless the employees vote, in a Board-conducted election, to reject (decertify) or change their bargaining representative. Neither employers nor unions who are party to 8(f) agreements will be free unilaterally to repudiate such agreements. During its term, an 8(f) contract will not act as a bar to petitions pursuant to Section 9(c) or (e). In determining the appropriate unit for election purposes the Board will no longer distinguish between "permanent and stable" and "project by project" work forces, and single employer units will normally be appropriate.

In the event of an election, a vote in favor of the signatory union, or a rival union, will result in that union's certification and the full panoply

<sup>1</sup> It appears from the record that these sessions included Local 139, but not the other crafts' representatives.

<sup>2</sup> The judge found that under *Retail Associates*, 120 NLRB 388 (1958), discussed *infra*, the Respondent failed to timely withdraw from multiemployer bargaining and was therefore bound to the contract reached by that bargaining. The Respondent contended, *inter alia*, that its withdrawal was permissible in light of the Board's decision in *John Deklewa & Sons*, 282 NLRB 1375 (1987).

of Section 9 rights and obligations. A vote to reject the signatory union will void the 8(f) agreement and will terminate the 8(f) relationship. In that event, the Board will prohibit the parties from reestablishing the 8(f) relationship covering unit employees for a 1-year period. The purpose of this general prohibition is to preclude an employer and a union both from ignoring the electorally expressed preference of a majority of unit employees and from maintaining an 8(f) relationship during a period when the Act precludes holding another election, the availability of which is the sine qua non safeguard to permitting and enforcing an 8(f) contract. Failure to terminate the 8(f) relationship or its premature reestablishment after an election will subject the parties to 8(a)(2) and 8(b)(1)(A) liability.

Even absent an election, upon the contract's expiration, the signatory union will enjoy no majority presumption and either party may repudiate the 8(f) relationship. The signatory employer will be free, at all times, from any coercive union efforts, including strikes and picketing, to compel the negotiation and/or adoption of a successor agreement. [Footnotes omitted. 282 NLRB at 1385–1386.]

The *Deklewa* Board, at 282 NLRB at 1385 fn. 42, in discussing its rejection of the merger doctrine,<sup>3</sup> noted as follows regarding multiemployer bargaining in the construction industry:

Accordingly, these rules reject the so-called merger doctrine's application to 8(f) cases. Assuming that the merger doctrine fosters a certain amount of stability in labor relations, we believe that in the construction industry the cost of achieving that stability in terms of employee free choice is too high. As we have explained, in this industry the merger doctrine can operate to bind a single employer and its employees to full 9(a) status without providing the employees any opportunity to express their representational preferences because Sec. 8(f) eliminates majority status as a prerequisite for signing a contract. On balance, therefore, we find that the overall objectives of the Act will be better served by abandonment of the merger doctrine in these circumstances. In so doing, we do not imply that multiemployer associations and multiemployer bargaining are no longer appropriate in the construction industry. Rather, we hold that the employees of a single employer cannot be precluded

<sup>3</sup>Under that doctrine a single employer that joins a multiemployer association and adopts its collective-bargaining agreement, is "merged" into the multiemployer unit and the requisite inquiry into majority support is made in that multiemployer unit.

from expressing their representational desires simply because their employer has joined a multiemployer association.

Generally, under this framework, an employer, on expiration of an 8(f) agreement, is free to withdraw recognition of the union and avoid any obligation to bargain for a successor contract.<sup>4</sup> Such an employer may, however, *obligate itself* to abide by a successor agreement and the Board—in varying contexts—has so found.

In *Kephart Plumbing*, 285 NLRB 612 (1987), the employer had authorized the association to negotiate on its behalf with the union. The employer did not withdraw its authorization until after a new agreement had been negotiated, executed, and ratified. Applying *Deklewa*, the Board found that the new agreement was binding and not subject to unilateral repudiation. The Board also noted, however, that the union enjoyed no presumption of majority status after the new agreement's expiration and that the employer would be free to repudiate the 8(f) relationship at that time.

In *Reliable Electric Co.*, 286 NLRB 834, 836 (1987), the Board held that an 8(f) employer who had not withdrawn bargaining authority previously given to an association was bound to the association contract:

[T]he Respondent's authorization to NECA did not terminate at the end of the then current commercial agreement, but bound it to succeeding agreements as well. Authorization continued unless the Respondent subsequently took some action effectively withdrawing the multiemployer group's authority to bargain on the Respondent's behalf. As found by the judge, no such notice had been given at the time the 1983–1986 successor commercial agreement was executed or the following winter when the Respondent repudiated that agreement. Under the *Deklewa* principles, the successor commercial agreement was "binding, enforceable, and not subject to unilateral repudiation by the Respondent." Thus, the Respondent's unilateral repudiation of the contract violated Section 8(a)(5). [Footnotes omitted.]<sup>5</sup>

<sup>4</sup>See, e.g., *Sheet Metal Workers Local 9 (Concord Metal)*, 301 NLRB 140 (1991) (the Board found that where the parties were bound by an 8(f) agreement but the union was not a 9(a) representative, there was no duty to bargain for a successor agreement); *Yellowstone Plumbing*, 286 NLRB 993 (1987) (though an employer subject to Sec. 8(f) unlawfully encouraged a decertification effort, employer did not violate Sec. 8(a)(5) by refusing to bargain and making unilateral changes because it was under no obligation to bargain over a successor agreement). See also *Garman Construction Co.*, 287 NLRB 88 (1987) (an 8(f) employer that timely withdrew from multiemployer bargaining may, on expiration of the 8(f) agreement, lawfully withdraw recognition from the union).

<sup>5</sup>The Board, citing *Deklewa*, stated that it would not extend the make-whole remedy for noncompliance with the 1983–1986 contract beyond that contract's expiration date. 286 NLRB at 836.

The Board similarly has held that an employer, which had agreed to a settlement binding it to a July 1, 1981, to June 30, 1984 union association contract and also, “clearly,” to the successor contract, violated Section 8(a)(5) in February 1984 by withdrawing recognition and repudiating the existing contract. The Board also found that the employer’s March 30, 1984 withdrawal of bargaining authority from the association did not relieve the employer of its obligation to comply with its existing contractual obligations. *Carthage Sheet Metal Co.*, 286 NLRB 1249 (1987).

An 8(f) employer that signs an agreement to adhere to an association contract is also bound to that contract for its term under *Deklewa*. In *Twin City*,<sup>6</sup> the employer notified the union during the term of the association contract, that it was repudiating “any agreement” it had with the union. The Board held that the employer was bound to its Section 8(f) relationship with the union until the contract expired.

In each of these cases, the 8(f) employer (i.e., the employer who has an 8(f) relationship with the union) was free to refuse to bargain for a new contract. However, in each case, the 8(f) employer clearly and unmistakably bound itself to a successor contract.

The issue posed here is whether an 8(f) employer, in a multiemployer unit, is bound, by inaction, to the successor multiemployer contract. In a Section 9 context, the inaction of the employer, during the multiemployer negotiations, would bind it to the successor multiemployer contract. In *Retail Associates*, supra, 120 NLRB at 395, the Board set forth certain guidelines governing the withdrawal from multiemployer units:

We would accordingly refuse to permit the withdrawal of an employer or a union from a duly established multiemployer bargaining unit, except upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations. Where actual negotiations based on the existing multiemployer unit have begun, we would not permit, except on mutual consent, an abandonment of the unit upon which each side has committed itself to the other, absent unusual circumstances.

The *Retail Associates*’ rule was developed, and has been applied, to multiemployer union collective-bargaining relationships governed by Section 9 of the Act. That is, each of the employers has a Section 9 bargaining relationship with the union, and the multiemployer group (consisting of those employers) has a Section 9 bargaining relationship with the union. Accordingly, at the expiration of the multiemployer contract, the employers have a statutory obligation to bargain for a

successor contract. The only issue is whether they must bargain on a multiemployer basis *or* on a single employer basis. The *Retail Associates*’ rule addresses that issue. The rule requires that if an employer wishes to abandon multiemployer bargaining and wants to bargain on a single employer basis, that employer must withdraw from the multiemployer unit in advance of multiemployer negotiations.

By contrast, employers who have an 8(f) relationship with a union do *not* have an obligation to bargain for a successor contract.<sup>7</sup> Accordingly, if a multiemployer group consists wholly of such employers, neither the multiemployer group nor any of its employer-members would have an obligation to bargain for a successor contract. Hence, the underlying premise for the *Retail Associates*’ rule—an obligation to bargain in *some* unit—does not exist in the context of an 8(f) relationship. Since the underlying premise for *Retail Associates* does not exist with respect to 8(f) relationships, we decline to apply the *Retail Associates*’ rule to such a relationship.

Nonetheless, as previously discussed, an 8(f) employer may obligate itself to be bound by a successor agreement. Indeed, *Deklewa* recognized that the policy of labor relations stability generally favors requiring parties to abide by their agreements. Thus, the question becomes under what circumstances will we find that an 8(f) employer—in a context of multiemployer bargaining—has agreed to be bound by the results of that bargaining?

In the 8(f) context, we conclude that in order for an employer to obligate itself to be bound by multiemployer bargaining, there must be more than inaction, i.e., the absence of a timely withdrawal. Thus, unlike in *Retail Associates*, supra, mere inaction during the multiemployer negotiations will not bind an 8(f) employer to a successor contract reached through those multiemployer negotiations.<sup>8</sup> Rather, the following two part test will be used to decide whether an 8(f) employer has obligated itself to be bound by the results

<sup>7</sup> *John Deklewa & Sons*, supra, 282 NLRB at 1377–1378.

<sup>8</sup> Our concurring colleague asserts that *the association* can take action to bind the employer. However, where, as here, the employer has not renewed the agency relationship between itself and the association, the association does not have the power to bind the employer. Thus, the association’s claim that it represents the employer is essentially without foundation. Nor can it be said that the association has apparent authority to act for the employer. In 8(f) multiemployer relationships, the expiration of the contract means that the bargaining obligation itself has ended. The parties may create a new relationship by entering into bargaining for a new multiemployer contract. However, inasmuch as an individual employer has a right not to bargain at all, and a right to bargain individually if it wishes, we would not find a waiver of these individual rights based on actions of a nonagent association. Compare *Kephart*, supra, 285 NLRB 612, where the association, because of the language of the authorization previously signed by the employer, remained the agent of the employer and thus had the power to bind that employer to a new contract.

<sup>6</sup> *Twin City Garage Door Co.*, 297 NLRB 119 (1989).

of the multiemployer bargaining. First, we will examine whether the employer was part of the multiemployer unit prior to the dispute giving rise to the case. If this first inquiry is answered affirmatively, then we will examine whether that employer has, by a distinct affirmative action, recommitted to the union that it will be bound by the upcoming or current multiemployer negotiations.

The first part of the test is similar to the sort of inquiry pursued in *Retail Associates*. That is, a union would typically rely—absent notice to the contrary—on an employer's prior membership or participation in multiemployer bargaining, or both, as demonstrating that the employer would be bound by the results of the upcoming multiemployer bargaining.

The second part of the test recognizes the differences between bargaining in the 9(a) context and bargaining in the 8(f) context. As noted, an employer, under *Deklewa*, supra, on expiration of an 8(f) agreement, is not generally obligated to negotiate a successor agreement and is free to withdraw recognition from the union. In these circumstances, mere inaction by an employer during the multiemployer negotiations is not sufficient to show that the 8(f) employer has reaffirmed its intention to be bound by the results of multiemployer bargaining. If, however, that 8(f) employer affirmatively agrees to be bound by the results of group bargaining, we will, consistent with *Deklewa*, hold that employer to its obligations. Thus, an 8(f) employer that engages in a distinct affirmative act that would reasonably lead the union to believe that the employer intended to be bound by the upcoming or current negotiations will be deemed to have agreed to be bound by the results of that bargaining. Ultimately, that employer—meeting both parts of our test—will be deemed to have clearly and unmistakably waived both its right to withdraw recognition on contract expiration from the union and its right to bargain as an individual.<sup>9</sup>

We differ substantially with the views of Members Devaney and Browning. Their full application of *Retail Associates* to 8(f) employers and signatory unions suggests, contrary to *Deklewa*, that 8(f) signatory unions are in fact vested with all the rights and privileges of a 9(a) union. As discussed, the Board in *Deklewa* struck a delicate balance in applying the principles of Sections 8(a)(5), 8(b)(3), 8(d), and 9(a) to 8(f) relationships. Applying *Retail Associates* to 8(f) relationships would upset that delicate balance by imposing new

postcontract obligations on 8(f) employers. That is, the application of *Retail Associates* would impose on such employers the duty to bargain in a multiemployer unit as well as the duty to honor any contract resulting therefrom, unless the employer takes steps to avoid that result. Under *Deklewa*, an employer's inaction does *not* bind it to bargain at all, much less to bargain in a multiemployer unit. Members Devaney and Browning would stretch Sections 8(a)(5) and (f) to achieve this result. Further, by binding an individual 8(f) employer to a multiemployer contract simply because of a failure to timely withdraw from multiemployer bargaining, Members Devaney and Browning would impose on that employer an obligation whose source is *not* that employer's agreement to an 8(f) contract but rather the individual 8(f) employer's prior relationship with an association.

Members Devaney and Browning speak of the virtues of multiemployer bargaining and of the need for stability in connection with such bargaining. We do not necessarily disagree. However, we believe that our colleagues have failed to take cognizance of two important limitations on such bargaining. Since both of these limitations are statutory, they cannot be ignored.

The first limitation is that an employer has a right to bargain for itself.<sup>10</sup> Thus, in our view, absent a clear and unmistakable consent to be bound to multiemployer bargaining, an employer has a right to eschew such bargaining.

Secondly, an employer who has only an 8(f) contract with a union has a right to refuse to bargain for a successor contract. Thus, in our view, absent a clear manifestation of consent, the 8(f) employer can eschew such bargaining.

These principles assume importance in connection with the issues concerning an employer's effort to withdraw from multiemployer bargaining. If an employer has a Section 9 relationship with a union, the obligation to bargain is a continuing one. Thus, if that employer is part of a multiemployer unit, it is therefore appropriate to hold that the employer's obligation to bargain in that unit will likewise continue, unless the employer timely chooses to bargain on a single employer basis. See *Retail Associates*, supra, 120 NLRB 395.

However, if the employer has only an 8(f) relationship with the union, there is no obligation to bargain for a successor contract. Thus, at the end of each contract, the employer has an opportunity to decide anew whether to bargain for a successor contract. And, if the employer chooses to bargain, it will also decide whether to bargain in a multiemployer unit. The fact that an employer chose to bargain a *past* contract on a multiemployer basis does not establish that the employer has agreed to bargain a *successor* contract, much less

<sup>9</sup> Thus, an individual 8(f) employer meeting our two part test will be bound by the actions and the bargaining undertaken by the multiemployer association. Our holding does not preclude a multiemployer association, consisting solely of 8(f) employers, from exercising its rights under *Deklewa*. That is, absent agreement to the contrary, the *employer association* may exercise the rights granted employers under *Deklewa* and withdraw recognition from the union on expiration of the collective-bargaining agreement.

<sup>10</sup> See Secs. 8(b)(1)(B) and (4)(A) and 9(b) of the Act.

that the employer has consented to bargain a successor contract on a multiemployer basis. Some affirmative act is necessary to establish that consent.<sup>11</sup>

Applying our two part test to the facts of this case, we find that the Respondent was obligated to abide by the contract that resulted from the 1990 negotiations. First, the Respondent had historically been a member of the AGC and had been bound by the previous agreements reached through multiemployer bargaining. Indeed, in 1987 William Luterbach served as president of the AGC. Also, during the 1987 bargaining, Luterbach played a role in the negotiations with the Union that led to the 1987–1990 contract—a contract that the Respondent honored. Without doubt, the Respondent meets the first part of our test.

Second, as noted previously, William Luterbach, the Respondent's president, served as chairman of the AGC's bargaining committee for the first three 1990 negotiating sessions.<sup>12</sup> Concededly, William Luterbach could have been wearing only an "AGC hat" and not a "Luterbach Construction hat." However, even were this so, it was not told to the Union. Luterbach's overt affirmative actions reasonably conveyed a commitment by the Respondent to continue, as it had in the past, to participate in, and be bound by, group negotiations.<sup>13</sup>

Based on the foregoing, we find that the Respondent obligated itself to abide by the results of the 1990 negotiations between the AGC and the Union. Accordingly, the Respondent's refusal to abide by and honor

the collective-bargaining agreement reached during those negotiations violated Section 8(a)(5) and (1) of the Act.<sup>14</sup>

#### ORDER<sup>15</sup>

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, James Luterbach Construction Co., Inc., New Berlin, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

1. Substitute the following for paragraph 2(b):

"(b) Pay to the appropriate fringe benefit trust funds the contributions required under the 1990–1993 Area I Master Building Agreement, between the ACEA, the AGC, and the Union, retroactive to June 1, 1990, to the extent such contributions have not been made, including any additional amounts due the funds in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Respondent shall reimburse unit employees for any 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 to 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 as

<sup>11</sup> Concededly, there can be cases where the employer has expressly given continuing consent to bargain a successor contract on a multiemployer basis. See *Kephart*, supra, and *Reliable*, supra. However, there is no such consent here.

<sup>12</sup> In this regard, we note the following. At the first negotiating session held April 19, the Union requested and received a list of employers for whom the ACEA and the AGC had bargaining authority. The Respondent's name was on the list. According to William Luterbach, the Respondent's inclusion on the list was an error and he did not learn of the error until May 29. As William Luterbach's active participation in the first three sessions of the 1990 bargaining constituted distinct affirmative acts demonstrating a commitment to be bound by group bargaining, we do not rely on the Respondent's inclusion on the list in reaching our decision.

<sup>13</sup> In deciding whether an 8(f) employer has engaged in a distinct affirmative act that recommitts it to group bargaining, we note, as did the judge, *Custom Colors Contractors*, 226 NLRB 851, 853 (1976). There, the Board held:

The manifestation of an "unequivocal intention" to be bound requires something less, however, than a solemnly executed document signed and sealed with hot wax. A commitment to bargaining on a multiemployer basis will not be made to depend on the presence of a formal associational structure among the bargaining participants or on the formal delegation of authority from the individual employer to the multiemployer group. Nor will the Board, faced with outward manifestations of intent to engage in group bargaining, consider as controlling an employer's private manifestation of dissent. An employer who, through a course of conduct or otherwise, signifies that it has authorized the group to act in its behalf will be bound by that apparent creation of authority. [Footnotes omitted.]

<sup>14</sup> We assume that under our analysis there will be, as in a *Retail Associates'* analysis, "unusual circumstances" that may justify an 8(f) employer's withdrawal from group bargaining even after its reaffirmance that it will abide by that bargaining. Here, we find, as did the judge, that no unusual circumstances exist.

<sup>15</sup> The Board, Chairman Gould, and Members Stephens, Devaney, and Browning, agree as follows. We shall modify par. 2(b) of the judge's recommended Order to provide that any additional amounts due the trust funds shall be computed in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, we shall provide for reimbursement of employee expenses ensuing from the Respondent's failure to make the required contributions. Finally, we shall modify par. 2(b) to make clear that the Respondent's payment of the employees' medical and other expenses has no effect on its obligation to make the trust fund contributions. Employees not only have a right to receive the benefits the Union negotiated for them; they also have a clear economic interest in the viability of the funds. *Stone Boat Yard v. NLRB*, 715 F.2d 441, 446 (9th Cir. 1983) ("the diversion of contributions from the union funds undercut[s] the ability of those funds to provide for future needs"). Therefore, the Respondent's payment of employee expenses does not offset its obligation to make the fund contributions.

Member Cohen would not at this time order the Respondent both to reimburse employees for expenses and reimburse the trust funds. Assuming the employees are made whole for expenses resulting from the Respondent's failure to make benefit funds payments, the Respondent, in Member Cohen's view, may be additionally ordered to make the funds whole if, and only if, the General Counsel demonstrates with concrete evidence that the employees on whose behalf payments are ordered have an economic interest in the future of those funds. See *Manhattan Eye, Ear & Throat Hospital v. NLRB*, 942 F.2d 151 (2d Cir. 1991); *Ron Tirapelli Ford v. NLRB*, 987 F.2d 433 (7th Cir. 1993).

prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).”

2. Substitute the attached notice for that of the administrative law judge.

CHAIRMAN GOULD, concurring.

I write separately because although I agree with much of the opinion authored by Members Stephens and Cohen, I am unable to endorse the test articulated by them. Like them, I find the *Retail Associates*<sup>1</sup> rule inapplicable to multiemployer bargaining in the construction industry, and I agree that in an 8(f) context an affirmative showing is required to bind an individual employer to a multiemployer successor contract.

I part company with them, however, in delineating what this affirmative requirement entails. They require that *the 8(f) employer*, “by a distinct affirmative action, recommit[] to the union that it will be bound by the upcoming or current multiemployer negotiations.” I find this requirement too restrictive.

The facts presented in a prior Board case illustrate this point. In *Kephart Plumbing*,<sup>2</sup> Kephart, an 8(f) employer, in 1977 and again in 1979 signed an authorization for a multiemployer association to negotiate on its behalf with the union. The 1979 authorization contained no time limitation. Before negotiations began in 1980 for a successor contract, the association notified Kephart of a general membership meeting to discuss the upcoming negotiations. Kephart did not respond. At the first negotiating session the association gave to the union copies of the authorization forms of the employers on whose behalf it was negotiating, including that of Kephart. The association continued to keep Kephart informed of the status of the negotiations, and when a new 3-year contract was finalized, it mailed a copy of it to Kephart. The next month Kephart informed the union for the first time that it was not a member of the association, and it repudiated the contract.

The Board found that Kephart’s authorization in the multiemployer association continued until it took some action effectively withdrawing the association’s authority to bargain on its behalf and that since Kephart did not take any action until after the contract was negotiated, executed, and ratified, the contract under *Deklewa*<sup>3</sup> principles was binding and enforceable on Kephart.

Members Stephens and Cohen would effectively overrule the principles underlying *Kephart*, supra, and allow the employer to repudiate the contract after ratification since it never recommitted to the union that it would be bound by the 1980 multiemployer negotiations. Such a result would, in my opinion, substantially

undermine the stability of multiemployer bargaining in the construction industry because any employer, although historically a member of an association, could, by remaining silent throughout the association negotiations, choose at any point during or after the negotiations simply to walk away if the deal being struck was not to its liking. Surely such a scheme was not contemplated by the Board in *Deklewa*, supra, when it stressed that multiemployer associations and multiemployer bargaining remained appropriate in the construction industry.

To strike a proper balance between an individual employer’s *Deklewa* rights and the promotion of stability of multiemployer bargaining in the construction industry, I would require an affirmative expression from *the association* to the union at the beginning of negotiations specifying the individual employers on whose behalf it was negotiating. From that point forward, I would find that the union is entitled to rely on the association’s representation, and the individual employer is bound by the results of the multiemployer negotiations.

This scheme comports with the expectations of the parties. Absent notification to the contrary, the association can reasonably expect that it continues to represent its members in future negotiations. And once notified by the association that it represents specified employers, the union, which has also not been notified to the contrary, can reasonably assume the accuracy of the association’s representation. Nor does this scheme create an undue burden for an individual member of the association wishing to escape liability under a successor contract since it remains free to notify the association and the union prior to the beginning of negotiations that it has withdrawn from the association.

Here, at the first negotiation session on April 19, 1990, the AGC submitted to the Union a list of employers for whom it had bargaining authority, and the Respondent was specifically included. Thus, I find the Respondent thereafter bound by the AGC negotiations, and I agree with my colleagues that the Respondent’s subsequent refusal to abide by and honor the multiemployer contract violated Section 8(a)(5) and (1) of the Act.

MEMBERS DEVANEY AND BROWNING, concurring.

We join our colleagues in affirming the judge’s finding that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to adhere to the collective-bargaining agreement executed on June 28, 1990, by the International Union of Operating Engineers, Local 139, AFL–CIO (Local 139), the Allied Construction Employers’ Association (ACEA), and the Associated General Contractors of Greater Milwaukee (AGC). Although we join our colleagues in the result they reach, we do not agree with their conclusion that the rules set forth in *Retail Associates*, 120 NLRB 388 (1958), for

<sup>1</sup> 120 NLRB 388 (1958).

<sup>2</sup> 285 NLRB 612 (1987).

<sup>3</sup> 282 NLRB 1375 (1987).

withdrawal from multiemployer bargaining do not apply to 8(f) relationships, and thus we do not rely on their rationales for finding the violation. Instead, we find the violation for the reasons that follow.

#### I.

The facts in this case, set forth in the plurality opinion of Members Stephens and Cohen, are not in dispute. In concluding that the Respondent violated the Act, the judge found that under *Retail Associates*,<sup>1</sup> the Respondent failed to timely withdraw from the multiemployer bargaining unit and was therefore bound to the contract reached in multiemployer bargaining. The judge rejected the Respondent's contention that the Board's decision in *John Deklewa & Sons*<sup>2</sup> precluded application of *Retail Associates* to the parties' 8(f) bargaining relationship.

We agree with the judge that the *Retail Associates*' principles limiting withdrawal from multiemployer bargaining units apply to 8(f) bargaining relationships and that the Respondent's withdrawal from the multiemployer unit was untimely under those principles. *Retail Associates* established that, absent mutual consent or unusual circumstances, a party may not withdraw from a multiemployer bargaining unit after the date set by the contract for notice of contract modification, after the agreed-upon date to begin multiemployer negotiations, or after negotiations have begun. The *Retail Associates*' principles were designed to promote stability in multiemployer bargaining units, as multiemployer bargaining furthers the Act's purpose of minimizing industrial strife.

The *Retail Associates*' rules maintain the stability of multiemployer bargaining by recognizing one simple principle: that both parties are entitled to know who is being represented at the other side of the bargaining table prior to the commencement of negotiations. They insure that this is the case by recognizing the effect of each employer's designation of bargaining authority to the employer association. Once this authority has been designated, the association becomes the authority's agent, with the authority to bind the employer by its actions in bargaining with the union. Thus, only the association, and not the individual employers, can take action regarding the bargaining relationship as long as the association still has the agency authority which was delegated to it by the individual employers. The union is entitled to rely on that designation of authority unless and until the employer takes an affirmative action to withdraw it, by notifying both the association and the union that it is doing so. *Retail Associates*, supra, holds that this withdrawal of agency authority is timely only if the employer notifies the union prior to the date

set for notice of contract modification, prior to the agreed-upon date to begin negotiations, or, at the very latest, prior to the start of the multiemployer negotiations.

The value of multiemployer bargaining has long been recognized. In approving the Taft-Hartley amendments, Congress rejected proposals that would have prohibited or restricted multiemployer bargaining. The minority report of the House Education and Labor Committee, expressing the view that ultimately prevailed, stated of proposals to limit multiemployer bargaining that "provision[s] more inconsistent with the policy . . . to minimize industrial strife and to encourage peaceful settlement of labor disputes, could scarcely be imagined."<sup>3</sup> "[I]mpairment of industry-wide bargaining . . . would upset existing collective-bargaining practices which have proved successful in many industries and made important contributions to industrial peace," according to the report, because "industry-wide bargaining has made a valuable contribution to the promotion and maintenance of fair standards in wages, hours, and working conditions, to the benefit not only of . . . the wage earners of this country but also the prosperity of the employers in the industry."<sup>4</sup> The report further declared: "The weakening of industry-wide bargaining would also harm rather than serve the cause of industrial peace because . . . [p]arties to such negotiations would [then] naturally await the results between other employers and employees before coming to terms on such important matters as wages, hours, and working conditions."<sup>5</sup> Similar sentiments were expressed by the Senate Committee on Labor and Public Welfare minority report, which likewise reflected the prevailing position. Significantly, that report noted that multiemployer bargaining had particular advantages in "such industries as longshoring and building construction—where workers change employers from day to day or week to week."<sup>6</sup>

Congress's endorsement of multiemployer bargaining has been recognized by the Supreme Court. In *NLRB v. Truck Drivers Local 449 (Buffalo Linen)*,<sup>7</sup> the Court observed:

Multi-employer bargaining long antedated the Wagner Act, both in industries like the garment industry, characterized by numerous employers of small work forces, and in industries like longshoring and *building construction*, where workers change employers from day to day or week to week.

<sup>3</sup> House Minority Report No. 245 on H.R. 3020, reprinted in 1 Leg. Hist. (NLRA 1948) 1947, at 377 (1948).

<sup>4</sup> Id. at 378–379.

<sup>5</sup> Id. at 379.

<sup>6</sup> S. Rep. No. 105, Pt. 2, on S. 1126 (1947), reprinted in Leg. Hist. at 468.

<sup>7</sup> 353 U.S. 87 (1957).

<sup>1</sup> Id.

<sup>2</sup> 282 NLRB 1375 (1987), enf'd. 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 899 (1988).

. . . .  
 At the time of the debates on the Taft-Hartley amendments, proposals were made to limit or outlaw multi-employer bargaining. These proposals failed of enactment. . . . They were met with a storm of protest that their adoption would tend to weaken and not strengthen the process of collective bargaining and would conflict with the national labor policy of promoting industrial peace through effective collective bargaining.

. . . .  
 The debates over the proposals demonstrate that Congress refused to interfere with such bargaining because there was cogent evidence that in many industries the multi-employer bargaining basis was a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining.<sup>8</sup>

Returning to this theme in *Charles D. Bonanno Linen Service v. NLRB*,<sup>9</sup> the Court enumerated the benefits of multiemployer bargaining:

As the Court of Appeals explained in this case: “Multiemployer bargaining offers advantages to both management and labor. It enables smaller employers to bargain ‘on an equal basis with a large union’ and avoid ‘the competitive disadvantages resulting from nonuniform contractual terms.’ . . . At the same time, it facilitates the development of industry-wide, worker benefit programs that employers otherwise might be unable to provide. More generally, multiemployer bargaining encourages both sides to adopt a flexible attitude during negotiations; as the Board explains, employers can make concessions ‘without fear that other employers will refuse to make similar concessions to achieve a competitive advantage,’ and a union can act similarly ‘without fear that the employees will be dissatisfied at not receiving the same benefits which the union might win from other employers.’ . . . Finally, by permitting the union and employers to concentrate their bargaining resources on the negotiation of a single contract, multiemployer bargaining enhances the efficiency and effectiveness of the collective bargaining process and thereby reduces industrial strife.”<sup>10</sup>

Recognizing these advantages of multiemployer bargaining, the Court in *Bonanno Linen Service*, supra, upheld the Board’s *Retail Associates*’ rules, which, as the Court noted, emphasized maintaining stability of multiemployer units. In particular, the Court, like the Board, rejected an impasse in bargaining as an unusual

circumstance warranting an exception to the rules’ general prohibition on withdrawal from multiemployer bargaining once negotiations have begun. The Court accepted the Board’s view that permitting withdrawal at impasse would undermine the utility of multiemployer bargaining; the Court found that if withdrawal were permitted at impasse, the parties would bargain under the threat of withdrawal by any party not completely satisfied with the results. Such a threat, of course, would undercut the parties’ ability, gained through multiemployer bargaining, to grant concessions without being put at a competitive disadvantage—an ability that greatly facilitated the reaching of agreements.

In the present case, the same reasons that the Court found in *Bonanno Linen Service*, supra, to militate against allowing withdrawal from multiemployer bargaining after impasse is reached weigh all the more against allowing totally unrestricted withdrawal from multiemployer bargaining in much of the construction industry. This, however, will be the natural result of finding *Retail Associates* inapplicable to 8(f) bargaining relationships, as our colleagues do today.

Such a finding is not required by the Board’s decision in *Deklewa*, supra, 120 NLRB 388. *Deklewa* does not make *Retail Associates*’ limitations on withdrawal from multiemployer bargaining units inapplicable to 8(f) relationships, and the two cases, indeed, concern totally different concepts. *Retail Associates* deals with multiemployer bargaining units. To maintain the stability of such units, *Retail Associates* restricts the times at which a party to a multiemployer bargaining unit may withdraw from the unit and bargain on an individual basis. *Deklewa*, on the other hand, addresses the bargaining obligations of an employer and a union in an 8(f) relationship.<sup>11</sup> *Deklewa* holds that, on expiration of an 8(f) agreement, an employer is not obligated to negotiate a successor agreement but, rather, may withdraw recognition from the union as the representative of the employer’s employees.

In applying *Deklewa* to multiemployer bargaining, it must be recognized that in multiemployer bargaining the employer association assumes the role of the employer in the relationship with the union. It is beyond dispute that

[o]nce the unit is formed, the multi-employer group becomes the employer for purposes of bargaining. . . . The bargaining obligations of the “multi-employer” are substantially the same as for any employer.<sup>12</sup>

<sup>8</sup> 353 U.S. at 94–95 (footnote omitted) (emphasis added).

<sup>9</sup> 454 U.S. 404 (1982).

<sup>10</sup> 454 U.S. at 409 fn. 3 (citations omitted).

<sup>11</sup> Indeed, the Board in *Deklewa* stated that it did not “imply that multiemployer associations and multiemployer bargaining are no longer appropriate in the construction industry.” 282 NLRB at 1385 fn. 42.

<sup>12</sup> Hardin, *Developing Labor Law* 508 (3d ed. 1992) (citation omitted).

Moreover, in multiemployer bargaining, the actions of the employer association are binding on the represented employers.<sup>13</sup> Therefore, although an employer has a right under *Deklewa* to withdraw recognition from a union on expiration of an 8(f) agreement, it does not follow that an employer in a multiemployer bargaining relationship may exercise that right individually. Rather, in an 8(f) context, the employer association may exercise the right granted employers under *Deklewa* to withdraw recognition from the union on expiration of the agreement. It is not the province of the represented employers to do so individually.

Any employer that has timely withdrawn from multiemployer bargaining may, of course, individually elect to withdraw recognition from the union on expiration of the 8(f) agreement. See, e.g., *Garman Construction Co.*<sup>14</sup> Such individual action, however, is predicated on the employer's timely prior withdrawal from multiemployer bargaining. As long as the employer remains in the multiemployer unit, it is bound by the actions of its representative.

The absence of a Section 9 bargaining relationship compels no different result. Although the employer, or, in the multiemployer context, the employer association, is not required to continue recognition of the union beyond contract expiration, it is certainly not barred from doing so. As long as the parties continue their relationship, the *Retail Associates'* rules limiting withdrawal from multiemployer bargaining should apply, because they seek to effectuate the statutory objectives of maintaining bargaining stability and avoiding industrial strife. Indeed, the rules do more to provide bargaining stability in the 8(f) context, where not only withdrawal from multiemployer bargaining units but also total withdrawal of union recognition is possible. Thus, the *Retail Associates'* rules permit employers represented by the employer association to negotiate successor 8(f) agreements without fear that some of the members will seek to gain competitive advantage by withdrawing recognition from the union.<sup>15</sup>

## II.

Members Stephens and Cohen state that in cases where an employer was part of a multiemployer unit, they are unwilling to bind the employer to multiem-

ployer bargaining for a successor contract in the 8(f) setting based on what they term "mere inaction." We disagree with their premise that an employer's delegation of its bargaining rights to a multiemployer association constitutes "mere inaction." Absent some time limitation in the authorization signed by the employer, the designation of the multiemployer association as the employer's bargaining agent continues until the employer acts to withdraw the agency authority. To recognize this principle is to do no more than respect a "fundamental polic[y]" of the Act, "freedom of contract." See *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970).

Members Stephens and Cohen refer to an 8(f) employer's "right" to withdraw recognition from the union on contract expiration. They assert that the employer must engage in a "distinct affirmative act" in order to clearly and unmistakably waive that "right." They are thus analogizing the "right" of an 8(f) employer to withdraw recognition to rights which are explicitly protected by the statute, which cannot be waived without some "clear and unmistakable" manifestation. Cf. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983). We do not necessarily agree that this is a sound analogy, but assuming arguendo that it is, its application in this context is flawed because it fails to recognize the import of the employer's designation of bargaining authority to the multiemployer association. Once that authority has been delegated, the association becomes the employer's agent, and the employer is bound by the association's actions. It is therefore the association, not the employer, which is the repository of this "right" to withdraw recognition from the union, unless and until the employer timely withdraws its agency authority. Because *Retail Associates* prescribes the rules for timely withdrawal of that authority, unless the employer has withdrawn within the timeframe set forth in *Retail Associates*, only the association, and not the employer, can lawfully withdraw from the bargaining relationship after contract expiration.

The position of Members Stephens and Cohen also intrudes deeply into the internal affairs of the multiemployer associations. They would rewrite and, in effect, extinguish the contractual agency relationship between the multiemployer association and its member employers at the end of each contract with the union. The association would have to reform at the end of each collective-bargaining agreement, notwithstanding the contrary arrangement contracted for by the association and its members.

Absent "a distinct affirmative action," Members Stephens and Cohen would allow employers part of a multiemployer unit to withdraw at any time prior to the multiemployer association's reaching a new agreement with the union. Their rule would have a serious

<sup>13</sup> It is inherent in the nature of multiemployer bargaining that each employer member is "bound in collective bargaining by group rather than by individual action." *Ruan Transport Corp.*, 234 NLRB 241, 242 (1978) (footnote omitted); see *Kroger Co.*, 148 NLRB 569, 573 (1964); see generally *NLRB v. Strong Roofing & Insulating*, 393 U.S. 357 (1969).

<sup>14</sup> 287 NLRB 88 (1987).

<sup>15</sup> *Deklewa* does not represent a judgment by the Board that labor relations stability is unimportant in the 8(f) context. In explaining its overruling prior law that permitted repudiation of 8(f) agreements, the Board in *Deklewa* reasoned that "a rule that sanctions unilateral contract repudiation . . . is not conducive to labor relations stability." 282 NLRB at 1383.

destabilizing effect on multiemployer bargaining in the 8(f) setting, contrary to the congressional intent discussed above.

Chairman Gould also requires an affirmative showing of commitment to bargaining for a successor contract, and therefore his concurrence suffers from the same flaws as the plurality opinion. In addition, his concurrence appears to have a serious internal inconsistency of its own. On the one hand, he claims that the *Retail Associates*' rule is "inapplicable to multiemployer bargaining in the construction industry." (Emphasis added.) On the other hand, he would release an individual employer from the multiemployer unit if it "notif[ies] the association and the union prior to the beginning of negotiations that it has withdrawn from the association," which is precisely what an employer must do if the *Retail Associates*' rule is applicable "to multiemployer bargaining in the construction industry."

The practical effect of today's decision, by combining Chairman Gould's concurrence with ours, is that any employer named on the list given by the multiemployer association to the union at the commencement of negotiations for a successor agreement is bound to any ensuing contract.<sup>16</sup> Chairman Gould's concurrence does not address the situations where the multiemployer association mistakenly lists the name of an employer that submitted its resignation to the association, or mistakenly omits the name of an employer that has not withdrawn its bargaining rights from the association. Our position would include in the unit any employer that has not notified the union, prior to the commencement of negotiations, of its withdrawal from the multiemployer association.<sup>17</sup>

### III.

Turning to the facts of this case, it is undisputed that the Respondent, for many years prior to the 1990 negotiations, had designated the AGC as its agent for the purpose of negotiating collective-bargaining agreements with Local 139. At no time prior to the negotiations, which commenced on April 19, 1990, did the Respondent, or any other party, notify Local 139 that

<sup>16</sup>If the multiemployer association does not submit a list of employers it purports to represent, and there is no other "distinct affirmative action," then Chairman Gould's position, combined with that of Members Stephens and Cohen, results in a rule permitting any employer to walk away from the negotiations up until the point the multiemployer association—or what's left of it—reaches agreement with the union.

<sup>17</sup>Cf. *South Texas AGC*, 238 NLRB 156 (1978) (the multiemployer association's presentation to the union at the commencement of negotiations of a list of employers who had withdrawn bargaining rights was effective notice of withdrawal); *Lenox Grill*, 170 NLRB 1027 (1968) (the multiemployer association's oral communication to the union at the commencement of negotiations that the respondent had withdrawn from the association was effective notice of withdrawal).

the Respondent had withdrawn that authority from the AGC to bargain on its behalf. Indeed, both the AGC and the Respondent acted, at all relevant times, as though the Respondent remained a participant in the multiemployer unit. Under the principles of *Retail Associates*, therefore, we conclude, in agreement with the judge, that the Respondent's attempt to withdraw from the multiemployer unit and to repudiate its 8(f) bargaining relationship with Local 139 after negotiations commenced was untimely. As we have set forth above, we believe that although, pursuant to *Deklewa*, an employer is entitled to withdraw from a bargaining relationship after the expiration of an 8(f) contract, the Respondent, having delegated its bargaining authority to the AGC, no longer was entitled to withdraw individually from the bargaining relationship absent timely withdrawal from the multiemployer unit. Local 139 was entitled to rely on the Respondent's prior designation of the AGC as its bargaining agent, because it had received no timely notice of the withdrawal of that agency authority. Because, under the principles of *Retail Associates*, the Respondent had not effected such a timely withdrawal from the multiemployer unit, we find the Respondent's failure to abide by and honor the collective-bargaining agreement reached during the 1990 multiemployer negotiations violated Section 8(a)(5) and (1) of the Act.

## APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to adhere to and implement the terms and conditions of the Area I Master Building Agreement, negotiated between Allied Construction Employers Association, the Associated General Contractors of Greater Milwaukee, and the International Union of Operating Engineers Local Union No. 139, AFL-CIO, effective from June 1, 1990, until May 31, 1993.

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

WE WILL forthwith accept, give effect to, and implement the terms of the 1990–1993 collective-bargaining agreement referred to above.

WE WILL make whole our employees covered by the agreement for any loss of pay or other employment benefits they may have suffered by reason of our refusal to accept, give effect to, and implement the aforesaid collective-bargaining agreement.

WE WILL make whole those fringe benefit funds that did not receive the contributions required by the aforesaid collective-bargaining agreement.

JAMES LUTERBACH CONSTRUCTION CO.,  
INC.

*Lucinda L. Flynn, Esq.*, for the General Counsel.  
*Thomas W. Scrivner and Jonathan O. Levine, Esqs. (Michael, Best Friedrich)*, of Milwaukee, Wisconsin, for the Respondent.  
*Warren Kaston, Esq.*, of Pewaukee, Wisconsin, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge. This case was tried in Milwaukee, Wisconsin, on January 23 and 24, 1991, and on March 11 and 12, 1991. On an unfair labor practice charge filed by the Union, International Union of Operating Engineers Local 139, AFL–CIO, in Case 30–CA–10989, the Regional Director for Region 30 issued a complaint and notice of hearing on August 14, 1990, against the Company, James Luterbach Construction Co., Inc. The complaint, as amended at the hearing, alleges that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) by refusing to adhere to a collective-bargaining agreement executed on or about June 28, 1990,<sup>1</sup> by the Union and two multiemployer associations.

In its answer, as amended at the hearing, the Company denied that it had committed the alleged unfair labor practices. Each of the parties timely filed a brief and a reply brief.<sup>2</sup>

<sup>1</sup>Henceforth, unless otherwise stated, all dates referred to in this decision occurred in 1990.

<sup>2</sup>On June 13, 1991, counsel for the General Counsel filed a motion to strike a portion of the Company’s reply brief designated “appendix A” (omitted from publication) on the ground that it included a new argument regarding the credibility of witness Don Shaw which neither she nor counsel for the Union had addressed in their original briefs. Counsel for the General Counsel also filed a response to appendix A.

On reviewing the Union’s original brief, I find that it raises an issue of credibility between the testimony of witnesses Don Shaw and William Lutterbach, regarding the disposition of an employer list at the outset of negotiations, on April 19. I, therefore, find no merit in the General Counsel’s motion and deny counsel’s request to file a response to appendix A.

On the entire record, including my observation of the witnesses and their demeanor, and after considering the posthearing briefs, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, with an office and place of business at New Berlin, Wisconsin, is engaged as a general contractor in the building and construction industry. The complaint alleges, the answer admits, and I find, that during the calendar year 1989, a representative period, the Company, in the course of its business operations, purchased and received goods and materials valued at more than \$50,000 from suppliers located outside the State of Wisconsin. I find that the Company is, and has been, at all times material to this case, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that International Union of Operating Engineers Local 139, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*<sup>3</sup>

The Company, founded by James Luterbach, currently its vice president, has been a general contractor in the building and construction industry for approximately 33 years. The Company employs laborers, cement masons, carpenters, bricklayers, and operating engineers. Typically, the Company has had an average of 45 to 50 employees from those five trades. Included in that employee group have been four or five operating engineers. The Company has had collective-bargaining relationships with the Unions representing the five trades, respectively, for at least 20 years.

I also find from the testimony of William P. Luterbach, the Company’s president since 1983, that its collective-bargaining relationship with the Union has existed for more than 20 years. During that time, pursuant to Section 8(f) of the Act,<sup>4</sup> the Company recognized the Union as the exclusive

<sup>3</sup>I have found no issues of credibility regarding my findings of fact.

<sup>4</sup>Sec. 8(f) of the Act provides:

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act [subsection (a) of this section] as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act [section 159 of this title] prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such

*Continued*

collective-bargaining representative of its operating engineers. The Company and the Union have been parties to a series of multiemployer collective-bargaining agreements, covering those employees, the most recent of which was effective from June 1, 1987, until May 31, and was entitled "Area I Master Building Agreement" (Area I or Area I Agreement).

Prior to the 1987 agreement, the Allied Construction Employers' Association (ACEA) negotiated contracts with the Union on behalf of the Company and other members of the Associated General Contractors of Greater Milwaukee (AGC). The Company has been a member of AGC for approximately 20 years. Through the years, William P. Luterbach has held a succession of offices in AGC, culminating in that of president, in 1987. Until 1987, AGC was a member of ACEA. As president of AGC, Luterbach was its representative on ACEA's board of directors.

In early January 1987, AGC decided to withdraw from the ACEA bargaining unit. In letters to the Union and the other craft unions having collective-bargaining relationships with its members, AGC announced its withdrawal of bargaining authority from ACEA and stated that it was willing to begin negotiating a new collective-bargaining agreement to become effective on or after June 1, 1987. Attached to each letter was a list of AGC contractors who had authorized AGC to bargain with the recipient union for the 1987 collective-bargaining agreement. Thus, attached to the letter addressed to the Union was a list of nine AGC contractor employers, including the Company.

In February 1987, AGC and ACEA agreed that henceforth, the two associations would negotiate collective-bargaining agreements as separate entities. Each would bargain on behalf of its own member employers. However, AGC and ACEA also agreed to bargain "alongside of, contiguous with, and adjacent to and in conjunction" with each other. In preparation for the 1987 contract negotiations with the Union and other labor organizations, AGC and ACEA set up a joint committee. The two associations signed the 1987 Area I collective-bargaining agreement with the Union as separate entities.

During the negotiations leading to the 1987 Area I Agreement between ACEA, AGC, and the Union, Company President Luterbach became a member of the joint bargaining committee. He participated in a committee caucus on June 18, 1987, and sat with the committee during negotiations with the Union on July 2, 1987.

In August 1989, AGC, by letter to its corporate members, announced preparations for collective-bargaining negotiations scheduled for 1990. Attached to the letter, was a list of the

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labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act [subsection (a)(3) of this section]: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e) [section 159(c) or 159(e) of this title].

AGC's collective-bargaining committees and a collective-bargaining authorization form. The letter showed that Company President Luterbach was chairman of the committee charged with bargaining for operating engineers. The collective-bargaining authorization form had spaces for an employer to check under "yes" or "no," next to the Union's name, to indicate whether or not AGC was authorized to bargain for the employer's operating engineers. The Company did not respond to this letter. Nor did the Company respond to a second letter, dated August 15, from AGC to its corporate members, who had not responded to the first letter. In that letter, AGC asked for the return of its authorization form.

On August 30, 1989, the Company returned its collective-bargaining authorization form to the AGC. The entries on the form show that the Company authorized AGC to represent it with regard to bricklayers, carpenters, cement masons, and laborers. The Company did not mark either "yes" or "no" with respect to bargaining about its operating engineers with the Union. AGC never asked the Company to remedy that omission. AGC concluded that it was not authorized to bargain with the Union on the Company's behalf.

In February, the Union, in letters to ACEA and AGC, requested negotiations for a new Area I Master Building Agreement. The first bargaining session occurred on April 19. Company President Luterbach was present and chaired the ACEA-AGC bargaining committee. He was the committee's primary spokesman. In the give-and-take of negotiations, at this early stage, Luterbach did most of the talking for the employers.

Early in the meeting, on April 19, the Union asked for a list of employers for whom the AGC and ACEA had bargaining authority. The ACEA-AGC bargaining committee provided the requested list to the Union. The list included the Company as one of eight contractors from whom AGC had received bargaining authority for negotiating with the Union.

On April 20, the Union filed with Region 30, a petition in Case 30-RC-5090, seeking certification as the exclusive collective-bargaining representative of the Company's operating engineers.<sup>5</sup> On the same date, the Regional Director for Region 30 notified the Company of the petition. Thereafter, the Union withdrew the petition because the Region was unable to process it within its time limits. On May 21, the Union filed a second petition, which was similar to its first petition in all material respects. On the same date, the Regional Director notified the Company of the new election petition.

William Luterbach chaired the ACEA-AGC bargaining committee at the next session of negotiations with the Union, on May 10. Again, he was the spokesperson for the employers' side. Luterbach continued as chairman of the employers' bargaining committee at the third meeting, on May 22. However, the parties did not engage in direct negotiations. Instead, each side caucused in a separate room and negotiated

<sup>5</sup> The unit described in the Union's petition was:

Included

All full-time and regular part-time equipment operators, welders, apprentices, mechanics, apprentice mechanics, greasers and oilers employed at or out of the Employer's New Berlin, Wisconsin facility,

Excluded

Office clerical employees, guards and supervisors as defined in the Act, as amended.

through a Federal mediator. At no time, during the meetings with the Union, at which he acted as the chair of the ACEA-AGC bargaining committee, did Luterbach announce that he was acting in a limited capacity, or that his Company had withheld bargaining authority from that committee.

On May 29, William Luterbach learned in a conversation with AGC's executive vice president, Richard E. Snow, that the Company's name had appeared erroneously on the list of employers which had authorized AGC to represent them in bargaining with the Union. That same day, Snow confirmed the conversation in a letter to Luterbach.

When the ACEA-AGC bargaining committee next met with the Union's bargaining committee, on May 30, William Luterbach was absent. ACEA's executive director, Henry S. Hunt, announced that Bill Emory, an official of Klug and Smith Company, was chairman of the employers' committee. The list of employers which the Union had received from the ACEA-AGC bargaining committee on April 19, had included Klug and Smith Company with the AGC members. Thereafter, until the conclusion of the negotiations, Emory was chairman of the employers' committee and Luterbach absented himself from the negotiations.

By letter dated May 31, to the Union's president and business manager, Donald Shaw, William Luterbach announced his withdrawal as chairman of the ACEA-AGC bargaining committee and the Company's intention to conduct its relations with the Union as an individual employer. Luterbach wrote that any further role he might play in the negotiations with the Union, would be as an advisor to the employers. Luterbach explained his withdrawal as chairman and his decision to abandon multiemployer bargaining as follows:

I am writing in response to recent developments between your union and the James Luterbach Construction Company. You know by now that those developments placed me in a position where I had no choice but to resign as chairman of the negotiating committee in the AGC/ACEA collective bargaining negotiations.

I am referring, in particular, to the recent filing by your union of two election petitions. In evaluating the election issue it became clear to me that the company should exercise its rights under the law, as set forth in the *Deklewa* case. It also became clear to me that your union does not represent an uncoerced majority of our employees in a bargaining unit that is appropriate under the law. Accordingly, we plan to proceed on the basis of an individual relationship with your union, if and when one is required by law.

Not until Luterbach's letter of May 31, had the Union received word that the Company had not authorized AGC or ACEA to be the Company's bargaining agent. Luterbach made the revelation as follows:

Any further role that I might play in the industry negotiations with the [Union] would be as adviser to the employers whose bargaining authority the associations hold. Our company is not one of those contractors.

On May 31, the Company filed a petition with the Regional Director of Region 30, for a representation election in a unit of its operating engineers, truckdrivers, and mechan-

ics.<sup>6</sup> The petition named the Union as the labor organization claiming representative status for the described unit.

On June 26, the ACEA-AGC bargaining committee and the Union reached an agreement, which they executed on June 28. The agreement, the Area I Master Building Agreement, is effective from June 1 until May 31, 1993. On July 2, and again on July 3, William Luterbach, on the Company's behalf, rejected union requests that it adhere to that agreement. To date the Company has persisted in that refusal.

#### B. Analysis and Conclusions

The General Counsel and the Union contend that the Company violated Section 8(a)(5) and (1) of the Act by refusing to honor the 1990-1993 Area I Master Building Agreement, which ACEA and AGC executed with the Union on June 28. The Company urges rejection of the General Counsel's and the Union's contention on two grounds. The initial ground is that Board policies governing bargaining relationships arising under Section 8(f) of the Act shielded the Company's refusal from the operation of Board policy regarding multiemployer bargaining. The second component of the Company's position is that even if its obligations under the Board's multiemployer bargaining policy were unaffected by Board policies governing 8(f) bargaining relationships, unusual circumstances excused its refusal to abide by the 1990-1993 Area I Master Building Agreement. Finding no merit in the Company's explanation, I agree that, by its refusal to adhere to the current Area I Master Building Agreement, the Company has violated its bargaining obligation under the Act.

In *Retail Associates*, 120 NLRB 388, 395 (1958), the Board announced the following guidelines for withdrawal from multiemployer units:

We would accordingly refuse to permit the withdrawal of an employer or a union from a duly established multiemployer bargaining unit, except upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations. Where actual bargaining negotiations based on the existing multiemployer unit have begun, we would not permit, except on mutual consent, an abandonment of the unit upon which each side has committed itself to the other, absent unusual circumstances.

The Court in *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 412-413 (1982), approved the Board's guidelines for multiemployer bargaining. Further, the Court in that case upheld the Board's determination that an impasse was not an unusual circumstance permitting a union or an employer to withdraw unilaterally from multiemployer bargaining. *Id.* at 416-417. In passing, the Court noted with ap-

<sup>6</sup>The unit described in the Company's petition was:

Included

All full-time and regular part-time equipment operators, mechanics and truck drivers employed by the Employer at or out of its facility located at 2880 South 171st Street, New Berlin, WI 53151.

Excluded

All clerical workers, guards and supervisors as defined in the Act and all other employees.

proval, that the courts had upheld the Board's decisions "that unusual circumstances will be found where an employer is subject to extreme financial pressures or where a bargaining unit has become substantially fragmented. [Citations omitted.]" Id. at 411-412.

In applying the *Retail Associates*, supra, guidelines, the Board has given them definition, particularly with regard to the notice requirement. Thus, the Board requires that an employer seeking to withdraw timely from multiemployer bargaining must give written notice to the union. *J & L Painting Contractors*, 239 NLRB 867, 870 (1978). Also, under Board law, an employer's notice to a multiemployer association that it intends to withdraw from multiemployer bargaining does not satisfy the employer's obligation to afford written notice to the union. *Goodsell & Vocke*, 223 NLRB 60, 66 (1976), enf. 559 F.2d 1141 (9th Cir. 1977).

A formal delegation of bargaining authority is not required to show an employer's unequivocal intention to be bound by a collective-bargaining agreement negotiated by a multiemployer group. *City Roofing Co.*, 222 NLRB 786, 788 (1976). In *Custom Colors Contractors*, 226 NLRB 851, 853 (1976), enf. 564 F.2d 190 (5th Cir. 1977), the Board provided the following guidance for determining an employer's intention to be bound:

The manifestation of an "unequivocal intention" to be bound requires something less, however, than a solemnly executed document signed and sealed with hot wax. A commitment to bargaining on a multiemployer basis will not be made to depend on the presence of a formal associational structure among the bargaining participants or on the formal delegation of authority from the individual employer to the multiemployer group. Nor will the Board, faced with outward manifestations of intent to engage in group bargaining, consider as controlling an employer's private manifestation of dissent. An employer who, through a course of conduct or otherwise, signifies that it has authorized the group to act in its behalf will be bound by that apparent creation of authority [footnotes omitted].

In light of the teachings of *Retail Associates*, supra, and its progeny, I find that the Company, by its conduct prior to May 31, outwardly manifested to the Union an unequivocal intention to bargain on a multiemployer basis. I also find that the Company did not give timely notice of its withdrawal from the ACEA-AGC bargaining unit. The record amply supports these findings.

The Company and the Union have been parties to a series of multiemployer collective-bargaining agreements covering the Company's operating engineers. In addition, Company President Luterbach actively participated in this multiemployer bargaining with the Union in 1987, as a member of the ACEA-AGC bargaining committee in 1987. Those negotiations produced the 1987-1990 agreement, which was effective until May 31. The Company considered itself bound by that collective-bargaining agreement.

In 1989, AGC asked the Company to indicate on a form whether it authorized AGC to bargain on its behalf in the contemplated negotiations with the Union. The Company returned the form without indicating "yes" or "no." Neither

AGC nor the Company apprised the Union of this circumstance.

In February, the Union notified AGC and ACEA of its desire to negotiate a new agreement. The associations agreed to the Union's request. However, in response to the Union, there was no word from either the associations or the Company that the Company had not authorized the joint committee to bargain on its behalf. Nor did the Company or the associations advise the Union that William Luterbach's participation in the forthcoming negotiations would not signify the Company's intention to be bound by the resulting agreement.

When negotiations began on April 19, the Union received from the ACEA-AGC bargaining committee a list of employers who had authorized that committee to bargain on their behalf. The Company's name appeared on that list. Again, neither the associations nor William Luterbach said or did anything to apprise the Union that the Company's name should not have been on the list or that William Luterbach was not negotiating for the Company. Indeed, William Luterbach chaired the ACEA-AGC negotiating committee, and was its spokesperson.

When negotiations between the Union and the ACEA-AGC committee resumed on May 10, William Luterbach chaired the joint committee, and was its lead negotiator. Again, the Union received no inkling from Luterbach, ACEA, or AGC that the Company had not agreed to multiemployer bargaining.

On May 22, a third meeting between the Union and the ACEA-AGC committee was scheduled. However, the parties caucused in separate rooms and negotiated through a Federal mediator. Again, William Luterbach chaired the employers' committee. Again, neither Luterbach nor the associations gave the Union any ground for suspecting that the Company was abandoning multiemployer bargaining.

When negotiations resumed on May 30, William Luterbach was absent. Bill Emory replaced him as chairman of the ACEA-AGC bargaining committee. However, neither the Company nor anyone on the management side of the negotiations gave any explanation of Luterbach's absence, or of his departure from chairmanship of the ACEA-AGC bargaining committee, to the Union.

Finally, by his letter of May 31, William Luterbach, for the first time, told the Union that the Company was abandoning the multiemployer bargaining group. He also advised the Union that he had resigned as chairman of the ACEA-AGC bargaining committee and that the Company had not authorized the associations to bargain on its behalf with the Union. Under *Retail Associates*, supra, the company's effort to free itself of the multiemployer bargaining relationship came too late. However, the company claims that it is exempt from the operation of *Retail Associates*.

I find no merit in the Company's position that the policies announced in *John Deklewa & Sons*, 282 NLRB 1375 (1987), exempted its conduct toward the Union from the requirements of *Retail Associates*, supra, and its progeny. In *Deklewa*, supra, the Board announced a set of principles applicable to bargaining relationships arising pursuant to Section 8(f) of the Act. Absent from *Deklewa* is any reference to either multiemployer bargaining or *Retail Associates*. Nor has the Board given any indication that *Deklewa* limits the application of *Retail Associates*. On the contrary, following the issuance of its decision in *Deklewa*, the Board has con-

sistently applied the requirements of *Retail Associates* to multiemployer bargaining involving employers with 8(f) bargaining relationships. E.g., *Twin City Garage Door Co.*, 297 NLRB 119 (1989). Thus, I find that *Deklewa* does not bar application of *Retail Associates* to the Company's conduct in this case.

The Company also argues that even if *Deklewa*, supra, did not permit it to escape from multiemployer bargaining, unusual circumstances did. The unusual circumstances listed in the Company's posthearing brief include the assertion that the Company did not authorize the AGC to bargain on its behalf with the Union. However, as pointed out earlier, Board law does not require a showing that the Company formally authorized AGC to bargain on its behalf with the Union. Instead, the Company's intent to give such authorization may be shown by "outward manifestations. *Custom Colors Contractors*, supra.

Here, as set forth above, the Company's conduct prior to May 31 clearly manifested an intent to authorize AGC to bargain with the Union on the Company's behalf, through a joint committee. *Hillsdale Inn*, 267 NLRB 982 fn. 2 (1983). In any event, I find that the Company's failure to authorize AGC, in accordance with the latter's procedure, to bargain on its behalf for the 1990–1993 Area I collective-bargaining agreement with the Union was not an unusual circumstance under the *Retail Associates* doctrine.

The Company contends that the Union's petitions for a Board-held election among the Company's employees, and the Company's petition for a Board-held representation election among its employees, were unusual circumstances excusing compliance with *Retail Associates*. However, the Company has not cited any Board authority which would support this contention. Nor would such holding be likely under current Board policy. See *NLRB v. Custom Wood Specialties*, 622 F.2d 381, 385 (8th Cir. 1980). For, as the Court pointed out in *Charles D. Bonnano Linen Service v. NLRB*, supra, the Board has found unusual circumstances "where an employer is subject to extreme financial pressures or where a bargaining unit has become substantially fragmented." (Citing among other cases, *Connell Typesetting Co.*, 212 NLRB 918 (1974), and *Atlas Electrical Service Co.*, 176 NLRB 827 (1969).) I find, therefore, that neither the Union's two RC petitions, nor the Company's RM petition were unusual circumstances which would have excused the Company from adhering to the 1990–1993 Area I collective-bargaining agreement with the Union.

Equally without merit are the Company's arguments that its good-faith doubt that the Union represented a majority of its employees, and the Union's insistence upon recognition pursuant to Section 9(a) of the Act, were unusual circumstances excusing compliance with *Retail Associates*. The Company has not shown any Board precedent in support of these arguments. Indeed, under Board law, as set forth above, neither a good-faith doubt of majority status, nor a demand for recognition under Section 9(a) of the Act, qualify as unusual circumstances.

Nor has the Company shown that a conflict of interest required its untimely withdrawal from the negotiations leading up to the Area I collective-bargaining agreement. The record does not show that there was any actual conflict of interest between the Company and the other employers represented at these negotiations. William Luterbach, without elaborating,

testified that he saw a conflict growing out of his Company's differences with the Union regarding 9(a) recognition and the unit placement of a mechanic. Neither he nor any other witness provided further substance to the Company's claim. Instead the Company, in its posthearing brief, speculated on how the Union could have harmed the Company at the bargaining table. This speculation did not enter into William Luterbach's letter of July 31 to the Union. Nor did he mention any of it in his testimony before me. In any event, the Company did not show that the asserted conflict of interest seriously threatened the vitality of its business. Accordingly, I find that the Company has not shown a conflict of interest which would allow it to withdraw from multiemployer bargaining unilaterally. *NLRB v. Custom Wood Specialties*, supra.

Finally, the Company would have me find that the Union implicitly consented to its withdrawal from the Area I negotiations. In support of its position, the company points, first, to the Union's continued bargaining with the ACEA-AGC committee after July 31, and the Union's failure to challenge the Company's withdrawal prior to the execution of the contract on June 28. The final proof, according to the Company, is found in the preamble to the 1990–1993 Area I agreement, to which it refuses to adhere. The language upon which the Company relies states:

This Master Agreement, made and entered into this 1st day of June, 1990, by and between the Allied Construction Employers Association and the Associated General Contractors of Greater Milwaukee, hereinafter called the "Associations" for and on behalf of those persons, firms or corporations who have authorized the Associations to negotiate and conclude a labor agreement on their behalf, hereinafter called the "Contractor," and International Union of Operating Engineers Local No. 139, hereinafter called the "Union."

At the outset, I note that the Company is careful to ignore conduct which strongly suggested that the Union had not consented to the withdrawal. Thus, in early July, the Union asked the Company to adhere to the 1990–1993 Area I collective-bargaining agreement. The record also shows that on June 28, the Union filed an unfair labor practice charge against the Company, alleging that:

On or about May 31, 1990, and continuing to date, [the Company] has failed and continues to fail to bargain collectively in good faith with the union.

To prove that the Union consented by its conduct, the Company must show that the conduct added up to "a course of affirmative action which is clearly antithetical to the [U]nion's claims that the [C]ompany has not withdrawn from multi-employer bargaining." *Preston H. Haskell Co.*, 238 NLRB 943, 948 (1978). The Company has failed to make such a showing. Neither the Union's failure to object to the Company's announced withdrawal, nor the Union's acceptance of the preamble to the 1990–1993 Area I agreement showed that the Union was consenting to the withdrawal an-

nounced in William Luterbach's letter of July 31.<sup>7</sup> On the contrary, the Union, by filing the unfair labor practice charge in the instant case, and by insisting that the Company adhere to the 1990–1993 Area I agreement, clearly showed that it had not consented to the Company's withdrawal from the multiemployer negotiations. *Reliable Roofing Co.*, 246 NLRB 716 (1979). Without the Union's consent, the Company was not free to withdraw from multiemployer negotiations and thereafter refuse to adhere to the collective-bargaining agreement reached between the ACEA-AGC bargaining committee and the Union. *Reliable Roofing Co.*, supra.

In sum, I find that the the Company's withdrawal from multiemployer bargaining was untimely, and that there were neither special circumstances nor consent by the Union to relieve the Company of its obligation to adhere to the 1990–1993 Area I Agreement between ACEA, AGC, and the Union. I further find that by failing to adhere to and implement that agreement on and after June 28, the Company has violated Section 8(a)(5) and (1) of the Act.

#### CONCLUSIONS OF LAW

1. James Luterbach Construction Co., Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union of Operating Engineers Local 139, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. All of the Company's heavy equipment operators and other employees covered under article 1, section 1.1 of the Area I Master Building Agreement, effective from June 1, 1990, until May 31, 1993, constitute an appropriate unit for the purpose of collective bargaining under the Act.

4. Since July 2, 1990, by refusing to comply with the Union's request that it adhere to and implement the Area I Master Building Agreement, executed on June 28, 1990, be-

<sup>7</sup>The Company insists that the Board's decisions in *Publicity Engravers*, 161 NLRB 221, 227–228 (1966); *C & M Construction Co.*, 147 NLRB 843, 845–846 (1964); and, *Metke Ford Motors*, 137 NLRB 950, 953–954 (1962), provide guidance in this case. I disagree.

In *Publicity Engravers*, supra, the Board found acquiescence, where the union never objected to the employer's withdrawal, never insisted that the employer adhere to the agreement reached after its departure, and had accepted a contract which stated that it covered only the employers named in it, who had ratified it, and which did not include the employer's name. In the instant case, the Union filed an unfair labor practice charge alleging that the Company's announced withdrawal violated the Act. Further, the 1990–1993 Area I agreement did not expressly excuse the Company from adhering to it. Indeed, unlike the union in *Publicity*, the Union, in the instant case has demanded that the Company adhere to the agreement reached in the multiemployer bargaining.

In *C & M Construction Co.*, supra, the Board found consent to untimely withdrawal, where the union showed interest in separate negotiations and did not insist that the employer was bound by the multiemployer agreement. In the instant case, the Union has demonstrated an abiding interest in obtaining the Company's adherence to the Area I agreement, and has not sought a separate agreement with the Company.

In *Metke*, supra, the Board found consent where the union raised no objection to the omission of the employer's name from a list of employers represented in the multiemployer bargaining group. In the case before me, the only list which the Union received, announced that the Company had authorized AGC to bargain on its behalf.

tween Allied Construction Employers Association, the Associated General Contractors of Greater Milwaukee, Inc., and the Union, the Company has refused to bargain with the Union as the representative of the employees in the unit described in paragraph 3, above, for purposes of collective bargaining in violation of Section 8(a)(5) and (1) of the Act.

#### REMEDY

Having found that the Company 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 shall recommend that the Company be ordered to adhere to and implement the Master Building Agreement Area 1, effective from June 1, 1990, until May 31, 1993. I shall also recommend that the Company be ordered to make its employees covered by that collective-bargaining agreement whole for any loss of earnings or other benefits suffered as a result of the Company's failure to apply it, such compensation or other payments to be computed as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), with interest thereon as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I shall also recommend that the Company be ordered to make such other payments as were required under the 1990–1993 Area I Master Building Agreement, retroactive to June 1, 1990.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>8</sup>

#### ORDER

The Respondent, James Luterbach Construction Co., New Berlin, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to adhere to and implement the terms and conditions of the Area I Master Building Agreement, negotiated between Allied Construction Employers Association (ACEA), the Associated General Contractors of Greater Milwaukee, Inc. (AGC), and the Union, International Union of Operating Engineers Local Union No. 139, effective from June 1, 1990, until May 31, 1993.

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

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

(a) Accept, give effect to, and implement the terms and conditions of the 1990–1993 Area I Master Building Agreement, negotiated between ACEA, AGC, and the Union, and give it retroactive effect to June 1, 1990, making its employees covered by that agreement whole for any loss of earnings suffered since that date as a result of the Company's failure to implement the agreement.

(b) Pay to the appropriate fringe benefit trust funds the contributions required under the 1990–1993 Area I Master Building Agreement, between ACEA, AGC and the Union, to the extent such contributions have not been made or that

<sup>8</sup>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.

the employees have not otherwise been made whole for medical and other expenses in accordance with that agreement.

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary or useful to the analysis of the amount of backpay due under the terms of this Order.

(d) Post at its facility in New Berlin, Wisconsin, copies of the attached notice marked "Appendix."<sup>9</sup> Copies of the no-

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<sup>9</sup>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

tice, on forms provided by the Regional Director for Region 30, 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.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."