

**Patterson-Stevens, Inc. and Laborers' International  
Union of North America, Local Union No. 210.**  
Case 3-CA-17899

April 21, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING  
AND COHEN

The principal issue contested before the Board in this case is whether the judge correctly found that the Respondent timely and unequivocally withdrew from multiemployer bargaining and did not violate Section 8(a)(5) and (1) of the Act by refusing to sign and adhere to the terms of a contract negotiated by the Union and the Construction Industry Employers Association (CIEA).<sup>1</sup> The 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,<sup>2</sup> and conclusions<sup>3</sup> and to adopt the recommended Order.

<sup>1</sup>On August 3, 1994, Administrative Law Judge Marvin Roth issued the attached decision. The Respondent, the General Counsel, and the Union filed exceptions and supporting briefs. The Respondent and the General Counsel filed answering briefs. The General Counsel filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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

<sup>3</sup>We affirm the judge's conclusion that the Respondent timely and unequivocally withdrew from multiemployer bargaining before the Union and the CIEA commenced negotiations for a new contract. We disavow any implication in the judge's analysis that face-to-face negotiations are a prerequisite to the commencement of bargaining, and we find it is unnecessary to pass on the judge's alternative finding that the Respondent timely withdrew from bargaining even if the parties' September 21, 1992 meeting involved negotiations for a new contract. Finally, we note that there are no exceptions to the judge's application of the rule of *Retail Associates*, 120 NLRB 388 (1958), to the circumstances of this case. Subsequent to the judge's decision, a Board majority held in *James Luterbach Construction Co.*, 315 NLRB 976 (1994), that the *Retail Associates* rule is inapplicable to multiemployer bargaining in the construction industry under 8(f). The Board would have dismissed the Sec. 8(a)(5) allegation here under *Luterbach*.

Member Browning, who dissented from her colleagues' position in *Luterbach* that the *Retail Associates* rules do not apply to 8(f) bargaining relationships, does not rely on the citation to *Luterbach*. As her colleagues point out, the Respondent filed no exceptions to the judge's application of *Retail Associates*. Under these circumstances, Member Browning would not raise sua sponte the issue of whether the *Retail Associates* rules are applicable to multiemployer bargaining in the construction industry.

In affirming the judge's conclusion that the parties had not actually begun early negotiations by the time of the September 18 meeting, Member Browning relies only on the fact that both parties, the Union and CIEA, characterized the September 18 meeting and their contacts leading up to it as communications regarding the conditions

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Patterson-Stevens, Inc., Tonawanda, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

to be established for early negotiations, and neither party considered them to be the beginning of the actual early negotiations. Similarly, both parties viewed the September 21 meeting as preliminary and intended it to deal with midterm contract modifications.

Member Browning specifically disavows the judge's conclusion that the employer's notice of withdrawal from multiemployer bargaining could not be considered untimely if the employer did not have actual notice of the beginning of early negotiations. Actual notice of the beginning of negotiations is not a prerequisite to the requirement to give timely notice of withdrawal from multiemployer bargaining pursuant to *Retail Associates*. See *Chel LaCort*, 315 NLRB 1036 (1994).

*Doren G. Goldstone, Esq.* and *Tamra Diamond, Esq.*, for the General Counsel.

*Thomas W. Gill, Esq.*, of Buffalo, New York, for the Respondent.

*Richard Lipsitz, Esq.* and *Eugene W. Salisbury, Esq.*, of Buffalo, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge. This case was heard at Buffalo, New York, on February 10 and 11 and March 21-23, 1994. The charge and amended charge were filed respectively on June 4 and July 22, 1993, by Laborers' International Union of North America, Local Union No. 210 (the Union). The second amended complaint, which issued on October 13, 1993, and was amended at the hearing, alleges that Patterson-Stevens, Inc. (the Company or Respondent) violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (the Act). The gravamen of the complaint is that the Company allegedly: (1) refused to execute, and failed and refused to adhere to, the terms and conditions of a collective-bargaining contract negotiated by the Union and Construction Industry Employers Association (CIEA), covering a multiemployer bargaining unit which includes the Company's laborer employees; (2) interrogated an employee about his union membership, activities, and sympathies, and threatened employees by conditioning their employment with the Company on their abandoning membership in the Union; and (3) discriminatorily terminated employees Anthony Baccaro, Victor Cali, Richard Carson, Angelo Ceccarelli, Frank Conidi, Vincent Conidi, Thomas Cordova, Bruce Curvin, Joseph Ettipio, Gerald T. Farr, Thomas Fino, Stephen D. Fletch, Anthony Hammill, Michael Jozak, David Kelley, Monroe Leslie, James J. O'Neil, Myron Patterson, Joseph Proietto, William Rainey, Michael K. Smith, and Kevin Bennett.

The Company by its answer denies the commission of the alleged unfair labor practices. The Company by its answer admits that it laid off 19 of the 22 alleged discriminatees (all but Cali, Proietto, and Bennett) on or about May 28, 1993, and laid off Bennett on an unspecified date, but denies that

it did so for discriminatory reasons. The Company contends in sum by way of affirmative defense that: (1) on September 21, 1992, the Company withdrew from membership in CIEA and notified CIEA and the Union that CIEA no longer had authority to bargain with the Union on the Company's behalf; (2) under Section 10(f) of the Act and in accordance with the National Labor Relations Board's decision in *John Deklewa & Sons*, 282 NLRB 1375 (1987), the Company had no duty to recognize or bargain with the Union after May 31, 1993; and (3) the 8(a)(5) allegations are untimely under Section 10(b) of the Act.

All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs. The General Counsel and the Company each filed a brief. Upon the entire record, and from my observation of the demeanor of the witnesses, and having considered the arguments of counsel and the briefs submitted by the parties, I make the following

#### FINDINGS OF FACT

##### I. THE BUSINESS OF RESPONDENT

The Company, a corporation with an office and place of business in Tonawanda, New York, is engaged as a contractor in the building and construction industry. In the operation of its business, the Company annually purchases and receives at its Tonawanda facility goods valued in excess of \$50,000 from other enterprises located in New York, each of which enterprises received those goods directly from points outside of the State of New York. I find, as the Company admits, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

##### II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

##### III. THE ALLEGED UNFAIR LABOR PRACTICES

###### A. *The Company's Alleged Unlawful Refusal to Execute the 1993-1996 Contract Between CIEA and the Union*

###### 1. The facts

CIEA is a multiemployer bargaining association in the construction industry in western New York. CIEA's bylaws contain several provisions which are at least arguably pertinent to the merits of this case. Article 3 provides in sum that membership in CIEA is open to members in four categories, specifically: general contractors; specialty contractors; associate members, i.e., entities engaged in businesses related to the construction industry; and honorary members, who are elected by CIEA's board of directors. Honorary members do not have the rights to vote or hold office in CIEA.

CIEA has collective-bargaining relations with basic (non-mechanical) trades unions in the greater Buffalo, New York area, including the Union. Article 5 of the CIEA's bylaws provides in part as follows:

*Section 2*—Collective bargaining agreements negotiated by and between the Association and any labor organization affecting the member's employees shall be binding upon only members of the Association who have au-

thorized the Association to negotiate with respect to that particular collective bargaining agreement.

*Section 3*—Each member whose employees perform on-site labor agrees to designate the Association as his or its exclusive representative in regard to all matters incidental to specific collective bargaining agreements which are applicable to the member's employees and the negotiation thereof. The designation shall be in the form approved by the Board of Directors.

Notwithstanding article 5, section 3, CIEA's standard form for "Agreement of Designation of Bargaining Agent" provides that CIEA and the signatory firm: "[E]xpressly agree that the terms and conditions of this AGREEMENT shall continue to be maintained in full force and effect and shall be irrevocable unless it is revoked by the FIRM no later than the last day in the month of January of any calendar year in which the ASSOCIATION collective bargaining agreements expire." CIEA Executive Vice President James Logan testified that in practice no further signature is required, and the initial designation of CIEA as bargaining representative remains in effect until revoked. However, Logan admitted that to his recollection, until the present case, no member ever claimed that it was not bound by a negotiated contract.<sup>1</sup> Logan also testified that no member has ever withdrawn authorization to negotiate without also withdrawing from CIEA membership.

The designation form also provides that revocation of designation shall be effective only if notice is given by registered mail. However, Logan testified that in practice, CIEA accepts resignations without notice by registered mail, and that he did not consider this factor with respect to the Company's asserted notice of revocation. As will be further discussed, Logan's testimony in this regard illustrates that in practice, CIEA does not consistently follow its own rules.

CIEA's bylaws further provide, in sum, that contract negotiations shall be conducted by CIEA's elected negotiating committees. There is a negotiating committee for each trade. The committees are elected (normally every 3 years), in the February following completion of contract negotiations, by the CIEA members "who employ basic trade labor." However, each member of a negotiating committee "must employ that specific trade." In addition, CIEA's executive vice president is an ex officio member of all committees, including the negotiating committees.

The bylaws also provide that negotiated collective-bargaining contracts shall be signed by the chairman of the pertinent negotiating committee and CIEA's executive vice president for and on behalf of CIEA, after receiving the approval of CIEA's board of directors. After completion of negotiations, each negotiating committee presents the terms of the tentative contract to CIEA's labor policy committee for ratification. Executive Vice President Logan testified that, in practice, all negotiated contracts are submitted to the board of directors for approval.

CIEA's bylaws provide in sum that the board of directors shall have charge of the affairs of CIEA between annual membership meetings, shall establish policies and objectives

<sup>1</sup>In 1984, following an impasse in bargaining with the cement masons' union, CIEA released its members from their designations. After agreement was reached, CIEA requested new designations.

of CIEA, and shall direct the executive vice president regarding the purposes, policies, and services of CIEA, among other responsibilities. The bylaws provide that the board shall consist of CIEA's president; first, second, and executive vice presidents; and "four general contractor members and four from other membership categories." All but the executive vice president are elected at the annual membership meeting for 1-year terms.

The executive vice president plays a key role in CIEA's affairs. Since 1982, James Logan has been executive vice president. He is in effect CIEA's manager, being responsible for conducting CIEA's business. He is the only paid officer, and need not be a member of CIEA. Among other functions, Logan actively participates in contract negotiations and grievance and arbitration proceedings, has custody of CIEA's funds and records, takes minutes of negotiating sessions and CIEA meetings, and serves as a trustee of most contractual fringe benefit funds. Together with union representatives, he reduces negotiated contracts to final language.

As indicated, the bylaws provide for an annual membership meeting. The bylaws further provide that the president may call additional membership meetings on 3 days' notice, and special emergency meetings "upon such notice as may be held reasonable by telephone, telegram, or messenger." There is no required quorum for meetings. Logan testified that decisions are made by majority vote of those members present, and usually only a minority of CIEA members attend such meetings. Logan further testified that about 25 CIEA members, including the Company, were bound to CIEA's 1990-1993 contract with the Union. In addition, some 100 to 120 independent (nonmember) contractors were signatory to the contract.

Since at least 1984, the Company has been a member of CIEA. On January 17, 1984, the Company, by its then president, Robert Clarence (Bob) Patterson, signed an agreement of designation form, designating CIEA as its bargaining representative with the Union and Cement Masons' Local 511, "in their respective territorial jurisdiction, whose members [the Company] employs." It is undisputed that the collective-bargaining relationship between the Company and the Union was established and thereafter renewed pursuant to Section 8(f) of the Act; in the words of the complaint, "without regard to whether the majority status of the Union has ever been established under the provision of Section 9 of the Act." It is also undisputed that prior to September 21, 1992, the Company did not revoke its authorization, or purport to withdraw from CIEA membership.

Bob Patterson served as company president until March 1991, when he was succeeded by his son, Robert Charles "Chuck" Patterson. (For ease in reference, the father will be referred to as Bob Patterson and his son as Chuck Patterson.)

Both Bob and Chuck Patterson have been active in the affairs of CIEA. Bob Patterson served as president of CIEA from 1987 to 1991, and thereafter continued to serve on its board of directors. In November 1993, he ran for reelection, was reelected, and continued to serve on the board of directors in 1994. Minutes of board meetings indicate that Bob Patterson was present and actively participated in such meetings in late 1992 and through 1993. On December 4, 1992, he joined in a unanimous vote to accept the 1993-1996 agreements negotiated by CIEA and the basic trades' unions, including the Union (Laborers). On August 24, 1993, Bob

Patterson was present when the board was informed of the present unfair labor practice charge. Patterson told the board that the Company sent letters to CIEA and the Union stating that the Company resigned its membership in CIEA. Patterson added that the Company intended to go nonunion. On September 16, 1993, Logan informed the board that Bob Patterson resigned as a trustee of the Laborers' benefit funds. Patterson participated in the discussion and vote on his successor. On November 23, 1993, the board discussed the Company's lawsuit to block arbitration over the Union's grievance concerning the Company's failure to adhere to the 1993-1996 contract. Patterson told the board that the Company was not hiring any Laborers, and did not agree to a union audit of its books. At the November 23 meeting, Patterson participated in a discussion to enlarge the board. He and the other board members agreed to run for another 1-year term on the board.

CIEA routinely sends copies of the minutes of board of directors' meetings to CIEA members. Executive Vice President Logan testified that in his opinion, the Company remained a member of CIEA during and after September 1992.

Bob Patterson previously served as a member of CIEA's Laborers' negotiating committee, i.e., the committee responsible for negotiations with the Union. In or about 1990, Chuck Patterson succeeded Bob Patterson on the committee, and was still a member of the committee in September 1992. Chuck Patterson also served on the grievance committee.

Bob Patterson served as company president until March 3, 1991, when he was succeeded by Chuck Patterson. Bob Patterson continued to serve as company treasurer, and he and his wife Margaret Patterson continued to serve as members of the Company's board of directors until December 24, 1991. Bob and Margaret Patterson together owned a majority of the Company's stock (102 of 180 shares). On December 24, 1991, Bob and Margaret Patterson sold all their stock, and concurrently resigned their positions with the Company. Thereafter the ownership consisted of Chuck Patterson and Company Vice President Randy Dowling, who each had a 45-percent interest, and Company Vice President Michael Corbett, who had a 10-percent interest. In sum, Chuck Patterson, Dowling, and Corbett purchased, in varying amounts, the shares of Bob and Margaret Patterson, paying for the shares by a combination of cash and promissory notes. The notes were payable in annual installments over a 5-year period, and secured by a stock pledge agreement under which some of the purchased shares were held in escrow as collateral for the notes. As of the present hearing, the notes were not yet paid off, but there was no default in payments.<sup>2</sup>

After sending the September 21 letter, Chuck Patterson did not attend or participate in any contract negotiations.

Chuck Patterson testified, in sum, that after December 24, 1991, Bob Patterson held no position with the Company, had no further duties to perform for the Company, did not represent the Company on CIEA's board of directors, and did

<sup>2</sup>Chuck Patterson's testimony, and some of the documentary evidence presented by the Company, was in several respects confused and contradictory concerning the above-described changes and transaction. Attorney Greg Miller, who arranged the December 24, 1991 transaction, was the Company's principal witness regarding the matter. The Counsel for General Counsel intensively cross-examined both witnesses. In his brief, however, the General Counsel does not dispute the facts above described, and as I here have found.

not report to him concerning CIEA board meetings. However, he knew that Bob Patterson continued to serve on CIEA's board of directors after December 24, 1991. Chuck Patterson further testified that he told CIEA Executive Vice President Logan that his father retired and was no longer with the Company. Chuck Patterson testified, however, that he could not recall when he said this, and that he did not tell Logan that Bob Patterson no longer represented the Company. Bob Patterson continued to receive deferred compensation and life insurance coverage pursuant to a deferred compensation plan executed on August 30, 1991.

Logan testified that he heard about negotiations for Chuck Patterson to purchase the business, and that he and Dowling became the owners, but was under the impression that Bob Patterson became company board chairman. Logan further testified that Bob Patterson served on CIEA's board of directors as an officer of the Company, that CIEA did not admit individual persons to membership as honorary members, and that Bob Patterson was not an honorary member.

CIEA and the Union negotiated and executed successive 3-year collective-bargaining contracts in 1984, 1987, and 1990. The 1990 contract was effective by its terms from June 1, 1990, through May 31, 1993. The contract defined the bargaining unit in terms of all employees of employer members of CIEA performing or hired to perform work within the Union's jurisdictional claims. The contract also provided for an exclusive hiring hall arrangement.

Typically, contract negotiations began after January 31 of the year of contract expiration. In preparing and participating in negotiations, CIEA cooperated with Highway Division of Associated General Contractors (AGC), a multiemployer association which also bargained with the Union. In 1980 CIEA, AGC, and the basic trades' unions reached early agreement on collective-bargaining contracts. Thereafter, until 1992, there were no "early negotiations" involving CIEA or the Union.

On May 1, 1992, the Union and CIEA's negotiating committee met and negotiated midterm changes in the 1990-1993 contract, to take effect as of July 1, 1992. The catalyst for these negotiations was a ruling by the New York State Department of Labor, stating, in sum, that the department would not give effect to collective-bargaining provisions which exclude public work projects from wage rates or conditions favorable to the employer. The parties agreed in sum to delete certain such provisions from their contract.

Beginning in July 1992, a series of events took place which eventually culminated in the 1993-1996 contract between CIEA and the Union, and the Company's alleged unlawful refusal to execute and abide by that contract. CIEA Executive Vice President Logan was the General Counsel's principal, and for all practical purposes, only witness concerning these matters. (Business Manager Peter Gerace, the Union's chief negotiator, was unable to testify because of illness. His subordinate, Business Representative Peter Capitano, gave only limited testimony.) Chuck Patterson was the Company's principal witness regarding these matters.

Logan cannot be regarded as a neutral or disinterested witness. CIEA's interest in this case, like that of the Union, is that the Company should be held bound by the 1993-1996 contract. Most, but not all, of the material operative facts concerning this issue are undisputed. Logan impressed me as a less than wholly credible witness. In connection with two

significant matters in dispute, Logan initially gave testimony favorable to the Company; and subsequently, on reflection, backed away from such testimony. As will be further discussed, I find that Logan's initial admissions, rather than his subsequent attempts to revise his testimony, more accurately reflect the truth of the matter.

In July 1992, representatives of the basic trades' unions contacted representatives of CIEA, AGC, and independent signatory contractors concerning the possibility of early contract settlements.<sup>3</sup> Logan was not personally involved in these discussions, but was informed of their substance. The basic trades' unions proposed 3-year contracts, including a wage freeze, and annual increases of 50 cents per hour in health and welfare benefits. Logan reported the proposal to CIEA's board of directors, and the board informally authorized acceptance. In early September, the participants in the discussions agreed that CIEA, AGC, independent contractors, and the basic trades' unions would meet on Tuesday, September 22, for the purpose of agreeing on the proposal. If there was agreement, the employer side would meet separately with each trade union to negotiate conditions, i.e., non-monetary changes. The unions indicated that if the proposal was not accepted, thereby precluding early settlement, the unions probably would seek more in subsequent contract negotiations.

By letter dated September 10, Logan informed all employer signatories to the 1990-1993 contract with the Union, whether or not members of CIEA, that he would conduct a meeting at CIEA's offices on Friday, September 18, at 8 a.m. The declared purpose of the meeting was to discuss the feasibility of early negotiations, which would commence as early as September 1992 and conclude by October 1992.

The meeting took place as scheduled. Logan and Jim Bidle (representing a CIEA member firm) conducted the meeting. Chuck Patterson and representatives from 13 other firms, including both CIEA members and independent signatories, were present. At Logan's request, CIEA Counsel Jeremy Cohen was present for the purpose of answering questions and providing advice, if necessary.

At the meeting, Logan explained the proposal, and that the proposal was subject to complete settlement with all of the basic trades' unions. Logan said that the purpose of early negotiations was to demonstrate unity in the organized construction industry and to avoid a strike. He informed the meeting that the unions said that if the proposal was rejected, the employers would have to take their chances on confronting higher monetary demands. Logan said that the employers had to make a decision before September 21, and that acceptance had to be unanimous on both sides. It is undisputed that the contractors present, including Chuck Patterson, voted unanimously to accept the proposal, as described and explained by Logan, as the basis for negotiations with the basic trades' unions.

Logan testified, in sum, that questions were asked at the meeting, and that one contractor member of CIEA said that he was not sure whether he would sign. Logan and Attorney Cohen, who was also presented as a General Counsel witness, testified, in sum, that they did not recall anyone saying or asking anything about withdrawal from CIEA. Chuck Pat-

<sup>3</sup> All dates hereafter are for the period of July 1, 1992, through June 30, 1993, unless otherwise indicated.

erson variously testified that Logan, or possibly Cohen or someone else, said they had until Tuesday morning, or by Monday night, to withdraw from CIEA. Patterson testified that he did not recall who raised the subject, or whether the "comment" was made at the meeting or in conversation after the meeting. In his investigatory affidavit, Patterson stated that the contractors were told that they had to mail in a letter by the next day in order to withdraw from CIEA and not be tied into the negotiations. Attorney Cohen impressed me as a candid witness. If the matter was discussed, he probably would have remembered the discussion. In light of Patterson's vague and ambiguous assertions, I credit Logan and Cohen. I find that the matter of withdrawal was not discussed at the September 18 meeting.

Immediately following the September 18 meeting, Logan telephoned Union Business Manager Gerace, and informed him that CIEA accepted the trades unions' proposal. At this point, Logan received what he described as a shock. Gerace said that there were issues important to the Union which had to be resolved before the September 22 meeting. Gerace said that he would fax to Logan the items to be discussed and resolved. The Union had given no prior indication that it sought such changes. Gerace apologized, but insisted this had to be done. Logan said they would get together on Monday, September 21.

At 5:22 p.m. on September 18, Logan received a three-page faxed document from Gerace describing proposed changes in article VII of the CIEA-union contract (hours of work and holidays). The most significant proposed change concerned overtime pay. The 1990-1993 contract provided for time and one half over 8 hours (daily) only if mandated by state or Federal specifications. The proposed change provided for time and one half after 8 hours daily, unless the employee was working on a 4-day 10-hour per day schedule. The Union's proposals did not indicate any effective date for the proposed changes.

Logan summoned the members of CIEA's negotiating committee, including Chuck Patterson, by telephone to a meeting with the Union at 9 a.m. on September 21 at CIEA's offices. He also invited an AGC contractor, in order to keep AGC informed. Chuck Patterson testified, without contradiction, that Logan called him on the morning of September 21, and that Logan gave no explanation for the meeting. I credit his testimony in this regard.

Logan, several contractors, including Chuck Patterson and Union Representatives Gerace and Capitano, were present at the September 21 meeting, which ran for 2 to 3 hours. Logan testified in detail concerning the meeting. Capitano testified only minimally concerning the meeting. Chuck Patterson also testified concerning the meeting. In his affidavit, however, Patterson stated that he was unsure whether Capitano attended the meeting. Patterson testified that he did not remember the meeting when he gave the affidavit, and that he guessed he was testifying about the meeting on the basis of what he learned from others. In light of Patterson's admissions, my findings concerning what transpired at the meeting, as distinguished from the unspoken understandings of those present, is based on Logan's testimony.

The Union reviewed its written proposals, asserting that these matters had to be settled or they would not attend the September 22 meeting. The parties discussed the proposals. CIEA made verbal proposals. The parties did not review the

entire 1990-1993 contract. The meeting ended in agreement, substantially on the Union's terms, including its proposal on overtime pay. The Union rejected nearly all of CIEA's proposals, except for one which was resolved on the basis of language proposed by the Union. The employers voted to accept the agreement, contingent on unanimous acceptance of the basic trades unions' monetary proposal for a 3-year contract.

Logan initially testified, on the first day of hearing, that the agreed-on contract changes would be effective immediately, i.e., as of September 21. The following day, when Logan resumed the witness stand, he stated, in sum, that following inquiry by the counsel for the General Counsel, he reconsidered and now wished to correct his previous testimony. Logan then testified that the parties "understood or agreed" that the changes would be effective with the new contract, i.e., as of June 1, 1993. Chuck Patterson testified that he understood the September 18 and 21 meetings were "pre-condition meetings," that negotiations were to begin on September 22, and that the changes agreed to on September 21 would become part of the current contract.

At the September 21 meeting, the parties were aware that the arrangement scheduled for the next day "may blow up." They discussed a serious question as to whether AGC and Operating Engineers Local 17 would agree to the monetary proposal for a 3-year contract. As matters turned out, their concern was justified.

In light of Logan's shifting and equivocal testimony, I find that the parties did not discuss the effective date of the agreed-on changes at their September 21 meeting. In light of Logan's initial testimony, and additional factors which will be discussed, I find that the parties understood that the changes would become part of the 1990-1993 contract.

At 3:56 p.m. on September 21, Company Vice President Dowling faxed a letter to CIEA, to Logan's attention, and a copy of the letter to Union Business Manager Gerace. The letter stated: "[T]his letter is to notify you to stop negotiations at this time on our behalf with Laborer's Local 210." Logan received the letter at about 4 p.m., and promptly faxed another copy to Gerace. Logan also telephoned Dowling to confirm receipt of the letter, but did not discuss or ask questions concerning its meaning or significance.

Chuck Patterson testified in sum as follows: After returning from the September 21 meeting, he and Dowling discussed the situation. They agreed to send the letter because they decided to withdraw from CIEA, although they had not yet decided whether to sign a contract with the Union. They believed they had to give notice of withdrawal prior to commencement of negotiations on September 21. However, in his affidavit, Patterson stated that on September 21, he withdrew authority for anyone at CIEA to bargain on behalf of the Company with the Union. Dowling testified that they sent the letter because they did not want CIEA to bargain for the Company anymore, and believed they had to give notice before the start of negotiations in order to protect their rights and keep their options open.

Union Business Representative Capitano testified that when he and Gerace received the letter, they were not sure what it meant. However, Logan's testimony was particularly significant. Logan initially testified that the letter stated "they would no longer designate the CIEA as the bargaining agent." Later, in response to a leading question from union

counsel, Logan testified that the letter was not a revocation of authority, but simply a direction to stop negotiations.<sup>4</sup> Logan testified that he believed the letter was ineffective because negotiations had begun and the parties had already reached agreement. I find that Logan's initial testimony, rather than union counsel's subsequent attempt to negate his admission, most accurately reflects Logan's state of mind on receiving the letter. I find that Logan, as he admitted, understood that the Company, by its letter, revoked designation of CIEA as its bargaining agent, although retaining its membership in CIEA.

On September 22 at 9 a.m., representatives from CIEA (including Logan), AGC, independent contractors, and the basic trades' unions met as scheduled to accept or reject the proposed terms for a 3-year contract. Logan described the meeting as "confused." Logan learned that two pile driving contractors were unwilling to accept the proposed terms. The meeting did not discuss contract specifics. The assembled participants agreed that the two contractors should be given until October 1 to agree on the proposed terms. Otherwise, in Logan's words, "the proposal would be removed from the table for all trades."

The pile driving contractors and the pile drivers' union did not reach an agreement by October 1. However, they continued their negotiations. Some time after November 9, they reached agreement. When the October 1 deadline passed, the employer side was informed, in Logan's words, that "the \$1.50 proposal [50-50-50] was withdrawn from the table," and "if we wanted to pursue the negotiations we would have to go back and start from scratch."

About November 1, the basic trades' unions submitted a new proposal. Representatives of the trades' unions met with representatives of CIEA, AGC, and independent contractors. Carpenters' business manager Terry Bodowes, speaking for all of the unions, informed the employer side that "in order to reach an early agreement, the new dollar amount was 75-75-50," i.e., a 3-year contract providing for annual fringe benefit increases of 75 cents, 75 cents, and 50 cents per hour, respectively. In Logan's words, the proposal was presented on a "take it or leave it" basis, and was "not a negotiable item." As with the prior proposal, this proposal was conditioned on unanimous acceptance. No deadline was set for such acceptance.

As indicated, on December 4, Bob Patterson joined in a unanimous vote of CIEA's board of directors "to accept the 3-year agreement which called for a total of \$2.00." By letter dated November 3, Logan summoned CIEA members and employers signatory to the union 1990-1993 contract to a meeting on November 9 to discuss the "joint negotiating session" of September 22, and the trades unions' new "proposal for contract settlement."

The November 9 meeting voted to accept the new proposal. The Company was not present at the meeting. Logan informed the Union of the acceptance. However, nothing could then be signed because the pile drivers' union and the pile driver contractors had not yet resolved their differences. When they did so, both the employer side and union side had unanimous agreement on the proposal. So far as CIEA and the Union were concerned, they had a final agreement.

<sup>4</sup>Union counsel's questioning of Logan was so blatantly leading as to be substantially worthless.

Thereafter Logan and Union Business Manager Gerace proceeded to draft a final document.

On January 8, Logan and Gerace signed an agreement for a 3-year contract between CIEA and the Union, effective June 1, 1993. The agreement provided, in sum, for continuation of the terms of the 1990-1993 contract, with the agreed-on changes, i.e., the 75-75-50 "wage" increases, to be used for fringe benefits, and the revised article VII on hours of work and holidays. The parties also agreed that they would consider proposed language changes for the purpose of correcting, clarifying, or elaborating on present provisions. Logan testified that the revised article VII reflected minor changes from the Union's September 21 proposal.

CIEA mailed copies of the signed agreement to its members (as of the present hearing, the 1993-1996 contract had not been prepared in booklet form). Logan testified that the Company remained on CIEA's active membership list. The Company had, previously, paid its dues for the fiscal year of April 1, 1992, through March 31, 1993. In April 1993, CIEA billed the Company for 1993-1994 dues, but the Company did not pay the dues. However, on March 30, at the Union's request, Logan sent the Union a list of "those firms that have designated Laborers." The list was prepared from an earlier (1990) list, with the Company's name deleted. Logan testified that the Company's name was deleted from the list because of the circumstances surrounding the Company's September 21 letter, although he could not make a legal determination concerning its significance.

By letter dated March 26, Union Business Manager Gerace enclosed, and requested the Company to sign, two "Interim Agreements" with the Union: the CIEA-union agreement of January 8; and a document accepting that agreement as the 1993-1996 contract. Normally such documents were sent only to independent (non-CIEA member) signatories to the 1990-1993 contract. Union Business Representative Capitano testified that the Union sent the documents to the Company because of uncertainty as to its status.

On April 2, Capitano met Chuck Patterson at a grievance meeting (the grievance involved alleged subcontracting by the Company to a nonunion firm). Capitano pointed out to Patterson that he had not yet received the signed interim agreements. Patterson said he would check with Company Vice President Dowling and get back to Capitano. The Union did not hear from the Company until May 28. By letter of that date, Dowling informed the Union that "[A]s of May 31, 1993 midnight, we will not be signing a new Agreement with your Local."

With regard to the effective date of the changes in article VII, agreed on between the Company and the Union, Chuck Patterson's testimony was confused and contradictory. Patterson variously testified that Union Business Representative Sam Caci told him the changes were to be effective immediately, that the Company had already instituted the overtime change, that he did not know whether there were any other changes affecting the Company, and that he did not know when the changes were implemented. The General Counsel requested, and the Company agreed to furnish, payroll records which would reflect the overtime change. However, the parties could not agree as to what, if any, records would reflect the change, and the matter was not pursued. Patterson did testify, in sum, that Caci told him that the overtime change concerned the same problem addressed in May 1992,

namely, the need to accommodate the contract to the New York State Department of Labor ruling.

By letter dated January 17, 1994, the Company informed CIEA that it was resigning from CIEA, effective immediately, because of confusion as to its membership, which “could cause us to be bound to labor agreements with unions we do not want to employ.” Logan testified that CIEA accepted the resignation.

## 2. Analysis and concluding findings

### a. *The timeliness issue*

The Company contends that the 8(a)(5) allegations in this case are untimely. The crux of this argument is that if the Company acted lawfully, the unfair labor practice, if any, occurred when the Company sent its September 21 letter to CIEA and the Union. Therefore, the Company argues that the present charge, filed more than 6 months later, is time barred under Section 10(b) of the Act. I disagree. I find that the charge was timely. Therefore, the merits of this case are properly before me for decision.

In *Preston H. Haskell Co.*, 238 NLRB 943 fn. 1 (1978), enf. denied 616 F.2d 136 (5th Cir. 1980), the Board held, in sum, that where an employer untimely withdraws from multiemployer bargaining, “the 10(b) period commences as of the date the new agreement, which the parties are obligated to sign, is reached.” This is because “the refusal to execute and apply the contract reached through multiemployer bargaining is the essential part of the 8(a)(5) violation.” In *Elevator Sales & Service*, 278 NLRB 627, 632 (1986), the Board affirmed the decision of Administrative Law Judge Socoloff, citing and applying *Haskell* in rejecting a 10(b) argument similar to that advanced in *Haskell* and the present case.

The court of appeals’ majority in *Haskell* did not reject the Board’s rationale on this issue. The case was heard by a three-judge panel (Judges Gee, Thornberry, and Hatchett). Judge Gee, writing the lead opinion, held that the complaint was time barred because the 10(b) period commenced with the employer’s “putative withdrawal from group bargaining.” Judge Thornberry, concurring only in the result, held in sum that the Board was correct on the 10(b) question, but there was no violation on the merits of the case, because of a lack of history of group bargaining. Judge Hatchett, dissenting, held that he would affirm the Board on both issues. Thus, two of three judges who heard the case held that they would affirm the Board on the 10(b) issue.

I recognize that there are Board decisions which detract from the clarity of the Board’s rationale in *Haskell*. In *Teamsters Local 378 (Capitol Chevrolet)*, 243 NLRB 1086 fn. 1 (1989), the Board held in sum that an untimely attempt by an employer-member to withdraw from a multiemployer group would constitute a violation of Section 8(a)(5) at the time of the withdrawal. The Board held that it was overruling *Haskell*, insofar as *Haskell* held otherwise. However, *Teamsters Local 378* did not involve a 10(b) issue, and the Board did not discuss or reject the central premise of *Haskell*, as stated above. Rather, the Board’s approach in *Teamsters Local 378* tends to support this premise. In *Teamsters Local 378*, the Board held that the respondent union violated Section 8(b)(3) of the Act by bargaining and executing a separate contract with an employer-member of a multiemployer

bargaining association, without the consent of the association, and without the employer making a timely withdrawal from the association. The charge was filed by the association against the union. A charge against the employer was settled. Consequently, the employer was not even a party to the litigated case. In sum, the crux of the Board’s decision was that the respondent union violated Section 8(b)(3) by negotiating and executing a contract with the employer; and the Board’s discussion of whether the employer violated the Act by attempting to withdraw from the association, and the Board’s reference to *Haskell*, was dictum.

In *Dixon Commercial Electric*, 302 NLRB 946 (1991), the Board, on a stipulated record, dismissed the complaint as time barred. Although the respondent employer terminated its membership in a multiemployer bargaining association (NECA) in 1983, the Board did not base its decision on that action. Rather, the Board based its decision on a letter sent by the employer to the charging union, on November 30, 1986, in which the employer, in “clear and unequivocal” language, repudiated its bargaining relationship with the union, as reflected in a collective-bargaining contract between NECA and the union (“Residential Agreement”), which expired on that date. There was no successor contract until February 9, 1987. In January 1987 the employer refused to respond to the union’s request for information concerning compliance with the expired contract, and restated its position. Nevertheless, the union waited until February 24, 1988, to file an unfair labor practice charge alleging that the employer violated Section 8(a)(5) and (1) of the Act by failing and refusing to furnish the requested information, refusing to abide by the new contract, and withdrawing recognition from the union.

In the present case, unlike *Dixon*, there was no hiatus between collective-bargaining contracts, and the Company continued to abide by the 1990–1993 CIEA-union contract until its expiration. More significantly, in the present case, the General Counsel contends in sum, that: (1) the Company’s putative withdrawal from multiemployer bargaining was untimely, and (2) the Company’s September 21 letter did not constitute a clear and unequivocal withdrawal from multiemployer bargaining, by reason of both the language of the letter itself and the Company’s overall course of conduct. Consequently, in order to determine whether Section 10(b) bars the present complaint, I would first have to determine the merits of the General Counsel’s case, on the entire record. Applying the Company’s argument to its logical conclusion, it would follow that: if the complaint was meritorious, Section 10(b) would not bar the complaint; but if General Counsel’s case failed on its merits, then Section 10(b) would bar the complaint. This makes no sense.<sup>5</sup>

I find, as discussed above, that *Haskell*, as defined above, governs the present case. Therefore, Section 10(b) does not bar the present complaint. I find it unnecessary to decide

<sup>5</sup> The Company’s reliance on Restatement 2d, *Contracts* 2d, § 253 (R. Br. at pp. 44–45) begs the question. The principle therein stated, is that when an obligor repudiates a contractual duty, the repudiation gives rise to a claim for damages for total breach. However, that principle does not resolve the question of whether the “repudiation” here took place when the Company sent its September 21 letter, or when the Company notified the Union that it would not sign the 1993–1996 contract.

whether the Company's September 21 letter would, standing alone, constitute a chargeable unfair labor practice.

b. *The merits*

In order to decide whether the Company unlawfully refused to execute the 1993–1996 contract between CIEA and the Union, it is necessary to determine whether the Company withdrew from multiemployer bargaining in a timely and unequivocal manner.

In *Retail Associates*, 120 NLRB 388, 395 (1958), the Board explained:

We would . . . 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 Board further explained that such notice must be both timely and unequivocal, and that: “the decision to withdraw must contemplate a sincere abandonment, with relative permanency, of the multiemployer unit and the embracement of a different course of bargaining on an individual-employer basis” (Id. at 393–394).

The principles set forth above, with one qualification, apply, as here, to bargaining relationships established and maintained pursuant to Section 8(f) of the Act. Under *John Deklewa & Sons*, 282 NLRB 1375 (1987), enf. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988), on the expiration of an 8(f) collective-bargaining agreement, the signatory union will enjoy no presumption of majority status, and either party may repudiate the 8(f) bargaining relationship. Therefore, if the Company here properly withdrew from the multiemployer unit, then the Company had no further obligation beyond compliance with the 1990–1993 contract, and was thereafter free to repudiate the 8(f) bargaining relationship, without obligation to bargain on an individual employer basis. See *City Electric*, 288 NLRB 443 (1988); *Plasterers Local 337 (Marina Concrete)*, 312 NLRB 1103, 1106 (1993). The General Counsel does not contend otherwise.

Turning to the facts of the present case, the first question presented is what, in the words of *Retail Associates*, supra, constituted “the agreed-upon date to begin the multiemployer negotiations,” i.e., negotiations for the 1993–1996 contract. The General Counsel contends (Br. at p. 28) that the “September 18, 1992 meeting conducted by CIEA qualifies as the commencement of negotiations”: I do not agree. I find that there was no agreed-on date for commencement of contract negotiations earlier than September 22, and that in fact, actual contract negotiations began, at the earliest, about November 1.

The September 18 meeting constituted nothing more than an internal meeting among employer signatories to the 1990–1993 contract, including CIEA members, for the declared purpose of considering the feasibility of early contract nego-

tiations. Prior to that meeting, employer and union representatives simply engaged in informal contacts for the same purpose. Logan was not even a participant in these contacts, although if these contacts were contract negotiations, he would have been present by reason of his position and duties. CIEA and the Union never expressly or impliedly referred to any meeting or contract prior to September 22 as contract negotiations. The proposal considered by the employers on September 18 was not a contract proposal. Rather, as Logan indicated in his September 10 letter, it was a basis on which early contract negotiations could take place. Significantly, the proposal fixed September 22 as the date on which the employer and union side would meet for the purpose of accepting or rejecting the proposal.

In sum, the contacts between the employer and union side were “exploratory talks before the formal opening of negotiations,” and therefore did not constitute contract negotiations under *Retail Associates*. *Dependable Tile Co.*, 288 NLRB 710 (1988) (*Dependable Tile II*); see also *Plasterers Local 337*, supra.

The September 18 meeting of employers convened by CIEA also did not constitute either the agreed-on date to commence negotiations, or actual bargaining negotiations. “Face-to-face negotiations between the bargaining principals is an elementary and essential condition of bona fide bargaining. So also is an exchange of contract proposals.” *Redway Carriers*, 274 NLRB 1359, 1377 (1985); *Colony Furniture Co.*, 144 NLRB 1582, 1589 (1963). The September 18 meeting did not meet either criteria. Rather, as indicated, the meeting was simply an internal discussion among the employer side.<sup>6</sup>

I further find that the September 21 meeting between CIEA and the Union did not, under *Retail Associates*, supra, constitute negotiations for a new contract. Rather, the meeting constituted negotiations over union-proposed changes in the 1990–1993 contract, acceptance of which, by CIEA, was a precondition for early negotiations for a new contract. As indicated, Logan initially admitted in his testimony that the agreed-upon changes would be effective immediately. Moreover, the substance of the most important change indicates that the parties contemplated an immediate change. As discussed, the 1990–1993 contract provided for time and one half after 8 hours, “only if mandated by State or Federal specifications.” Because of the somewhat oblique wording of this provision, CIEA and the Union, in their May 1992 mid-term negotiations, evidently overlooked or failed to realize that this provision could be interpreted as granting more favorable conditions to employers on private projects. There-

<sup>6</sup>The General Counsel's reliance on *Carvel Co.*, 226 NLRB 111 (1976), enf. 560 F.2d 1030 (1st Cir. 1977) (Br. pp. 26–28), is misplaced. In *Carvel*, the association and union there involved expressly and in writing agreed that receipt of the union's written contract proposals, and the association's acknowledgment of such receipt, would constitute the commencement of contract negotiations. They so agreed, because the existing contract required that negotiations commence not later than February 15 or else the existing contract would renew itself for another year, and the parties were unable to meet by that date. The Board, giving effect to the parties' agreement, held that under *Retail Associates*, negotiations commenced when the association acknowledged, by letter, receipt of the union's written proposals. In the present case, there was no such agreement. Rather, the only agreed-on date was September 22.

fore, the Union proposed to change the language in order to comply with the New York Department of Labor ruling. In sum, Chuck Patterson correctly understood that the September 21 meeting was, at least in part, a continuation or resumption of the May negotiations, which were designed to conform the existing contract to the state ruling. I also credit the uncontroverted testimony of Chuck Patterson that Union Business Representative Caci told him this was in fact the purpose of the change.

Assuming, arguendo, that the September 21 meeting constituted negotiations for the 1993–1996 contract, I would nevertheless find that the meeting did not preclude the Company from subsequently giving timely notice of withdrawal from multiemployer bargaining. A corollary of *Retail Associates* is that the affected employer is entitled to actual notice of the scheduled commencement of contract negotiations. Absent such notice, there can be no “untimely” withdrawal from the multiemployer unit. Withdrawal is also timely if, on receiving notice of the commencement of negotiations, the employer acts as “expeditiously as possible in withdrawing” from multiemployer bargaining.” *Gary Jasper Enterprises*, 287 NLRB 746, 747 (1987); *Acropolis Painting*, 272 NLRB 150 (1984). Accord: *Action Electric v. Local 292*, 856 F.2d 1062 (8th Cir. 1988).

In the present case, the Company received no notice whatsoever that the September 21 meeting constituted or was scheduled as either the commencement or continuation of 1993–1996 contract negotiations. Rather, on only a few minutes’ notice, Logan summoned Chuck Patterson and other members of CIEA’s negotiating committee to a meeting with the Union, without telling Patterson the purpose of the meeting. Assuming that Patterson, on attending the meeting, learned or was given reason to believe that this was 1993–1996 contract bargaining, he plainly acted as expeditiously as possible by sending the purported notice of withdrawal that same afternoon. (In *Jasper Enterprises*, supra, the Board found that the employer, in the absence of prior notice of negotiations, withdrew in timely fashion 2 weeks after the commencement of those negotiations.)

No negotiations took place on September 22. As the pile drivers’ union and pile driver contractors failed to agree on the proposed conditions for early negotiations, the conditions had not been met. Meanwhile, on the afternoon of September 21, the Company sent, and CIEA and the Union received, the Company’s purported notice of withdrawal.

For the reasons discussed above, I find the Company’s notice was timely. I shall next address the question of whether, under the standards of *Retail Associates*, supra, and its progeny, the Company gave clear and unequivocal notice of withdrawal from the multiemployer unit.

I find that the Company gave the requisite notice of withdrawal. First, the Company, by its faxed letter of September 21, unambiguously instructed CIEA to stop negotiating on its behalf with the Union, and so informed the Union. The phrase “at this time” did not detract from that instruction. As pointed out in *S. Freedman Electric*, 256 NLRB 432, 435 fn. 2 (1981), in sum, an employer may expressly reserve an option to resume “union status” at some future time, without thereby negating an otherwise effective withdrawal from the multiemployer unit. In the present case, the Company did nothing more by inserting the quoted phrase.

Second, CIEA and the Union by their reactions, demonstrated their understanding that the Company gave notice of withdrawal from the multiemployer bargaining unit. As discussed, Logan initially admitted in his testimony that the letter stated “they would no longer designate the CIEA as the bargaining agency.” Subsequently, CIEA deleted the Company’s name from the list of firms designating CIEA as their bargaining representative, and so informed the Union. Even before receiving such notice, the Union formally requested the Company to sign the 1993–1996 agreement, although such request would normally be made only to independent signatories to the 1990–1993 contract. I do not credit the self-serving attempts of Logan and Capitano, in their testimony, to explain away these reactions.

I further find that the Company did not act in a manner inconsistent with its asserted withdrawal. After September 21, Chuck Patterson did not attend or participate in any CIEA meetings or contract negotiations. As indicated, on April 2, Chuck Patterson told Capitano that he would get back to Capitano on the matter of the 1993–1996 contract. However, Patterson’s response was consistent with the Company’s right, under Section 8(f) of the Act, to reserve decision on whether to remain a union contractor on expiration of the 1990–1993 contract.

The Company did not, by its September 21 faxed letter to CIEA, terminate its membership in CIEA. As discussed, Bob Patterson continued to serve on CIEA’s board of directors, and was still serving on the board in 1994. I find that these factors fail to demonstrate that the Company acted in a manner inconsistent with withdrawal from the multiemployer unit.

In this regard, a distinction must be considered between withdrawal from membership in a multiemployer association and withdrawal from the multiemployer unit represented for collective-bargaining purposes by that association. Under Board law, an employer is not required to terminate its membership in an association in order to effectively withdraw from the unit. However, renewal of membership in the association, coupled with continued participation in group bargaining for a new contract, may be considered as evidence of conduct inconsistent with a stated intent to abandon group bargaining. *Ladies’ Garment Workers (West Side Sportswear)*, 286 NLRB 226 fn. 2, 231 (1987); *Dependable Tile Co.*, 268 NLRB 1147 (1984), enfd. as modified in other respect 774 F.2d 1376 (9th Cir. 1985) (*Dependable Tile I*).

In the present case, CIEA’s bylaws provided, in sum, that members whose employees performed onsite labor were required to designate CIEA as their bargaining representative with respect to such employees. The bylaws also provided, in sum, for categories of membership which, in practice, would preclude Bob Patterson from serving on CIEA’s board of directors, except as a representative of the Company. However, the evidence discussed above demonstrates that CIEA did not enforce these asserted policies; that CIEA permitted the Company to retain its membership, notwithstanding the Company’s withdrawal from multiemployer bargaining with the Union; and that CIEA permitted Bob Patterson to serve on its board of directors, notwithstanding that CIEA, and specifically Logan, knew that he no longer represented the Company.

As discussed, Bob Patterson sold his interest in the Company, resigned from all company offices, and retired from the

Company in December 1991. Logan testified, in sum, that he knew that Chuck Patterson was no longer an owner in the business. The testimony of Chuck Patterson and Logan is conflicting as to whether Chuck Patterson told Logan that Bob Patterson no longer held any position with the Company. However, in April 1993, the Company failed to renew its membership in CIEA. On August 24, 1993, Bob Patterson told CIEA's board of directors that the Company sent letters to CIEA and the Union, stating that the Company resigned its membership in CIEA, and that the Company intended to go nonunion. By letter dated January 17, 1994, the Company informed CIEA that it was resigning from CIEA, effective immediately. Nevertheless, CIEA took no action to terminate the Company's membership, and permitted Bob Patterson to serve on its board of directors through 1994.

In sum, it is evident that CIEA did not regard the Company's letter of September 21 as inconsistent with continued membership in CIEA, and understood that Bob Patterson no longer represented the Company on CIEA's board of directors. Therefore, the Company did not by its continued membership in CIEA, or by Bob Patterson's continued participation in CIEA's affairs, act in a manner inconsistent with its withdrawal from the multiemployer unit. See *Ladies' Garment Workers*, supra.<sup>7</sup>

For the foregoing reasons, the Company did not violate Section 8(a)(5) of the Act by refusing to sign the 1993-1996 contract between CIEA and the Union. It follows that the Company also did not violate the Act by failing to adhere to the terms and conditions of that contract, including the exclusive hiring hall arrangement, or by exercising its right, on expiration of the 1990-1993 contract, to repudiate its bargaining relationship with the Union. Therefore, the Company did not violate Section 8(a)(5) by its alleged termination of union employees about May 28. I shall next address the question of whether the Company violated Section 8(a)(1) and (3) of the Act by such termination and related conduct.

#### B. Alleged Unlawful Interrogation, Threats, and Termination of Union Employees

##### 1. The facts

Friday, May 28, 1993, was the last working day for the Company's day-shift laborer employees working under the 1990-1993 CIEA-union contract, and Saturday, May 29, the last such day for the night-shift laborers (Monday, May 31, was a holiday, and the next working day was June 1, following expiration of the contract). As indicated, the Company, by its answer, admitted that on or about May 28 it laid off 19 of the 22 alleged discriminatees (all union laborers), and another employee (Bennett) on an unspecified date. For reasons which will be further discussed, this admission substantially disposes of the Company's principal defenses in this proceeding.<sup>8</sup>

<sup>7</sup>*Dependable Tile I* is distinguishable on its facts. In that case, the Board found inconsistent conduct in that the employer renewed its membership in the association, and the employer's president actively participated in group negotiations for a new contract. In the present case, the Company failed to pay its 1993 dues, Chuck Patterson took no part in negotiations after September 21, and Bob Patterson did not represent the Company.

<sup>8</sup>The complaint alleged, but the answer denied, that the Company terminated Victor Cali about May 28. Cali was not presented as a

Company Vice President Dowling testified in sum as follows: He prepared a form letter, dated June 1, the text of which stated as follows:

Patterson-Stevens, Inc. is no longer signatory with Local #210, and will no longer make contributions for Health and Welfare payments to the Local.

These monies will be paid in your check or by other arrangements.

The letter was signed by Dowling, with a space below, under the word "ACCEPTANCE," for signature by the union employee. Dowling gave copies of the form letter to Company Project Manager Daryl Sornberger, with express or implied instructions to have them presented to the union member employees for signature and returned. Sornberger reported back to Dowling that he did so. Dowling personally showed the form to one or two employees (the Company does not dispute that job foremen, who were unit employees, were its agents for the purpose of distributing the form to employees). Employee signature was a condition of continued employment with the Company. However, employees who later returned to work for the Company were not required to sign the form. It is undisputed that none of the employees signed the form. It is also undisputed that on May 28 or 29, or shortly thereafter, the union member employees were given two paychecks, including a final paycheck, indicating that they were laid off or otherwise terminated by the Company.

The General Counsel presented testimony by 11 union member employees concerning the circumstances of their termination. Bruce Curvin was night-shift union steward on the NFTA job in downtown Buffalo, New York. Curvin testified in sum as follows: He heard rumors that the Company was going nonunion. During the week which culminated in the May 28 and 29 layoffs, he had two conversations with Job Superintendent Sornberger about the matter. Curvin asked if the rumors were true. Sornberger answered that they were, and the Company was not going to hire out of the union hall and was not going to hire union employees. On May 27 or 28, Curvin asked Vice President Dowling what was going on. Dowling answered that it was none of his business. Curvin insisted that he was the union steward and wanted to know. Dowling said: "I wouldn't hire you union guys if it was the last person on earth." Curvin subsequently testified that Dowling said: "I wouldn't hire you now if my life depended on it." Curvin responded that he was doing a good job, and that the Union would handle the matter. On the morning of May 29, Sornberger said that he was laying off all the union employees. No one presented Curvin with the company form letter.

Curvin further testified that he reported to work on June 2. Union employees were standing around. Curvin asked Dowling whether they were working that day, and Dowling laughed. It is undisputed that beginning on June 2, the Company used replacement employees, including new hires, and company employees transferred from outside of the Union's territorial jurisdiction.

witness in this proceeding, and no evidence was presented that Cali was on the Company's payroll at this time. I find that the General Counsel failed to present a prima facie case as to Cali. Therefore, I am recommending that the allegation of the complaint be dismissed insofar as it pertains to Cali.

Employee Richard Carson also worked the night shift on the NFTA job. Carson testified in sum as follows: On the morning of May 29, at the end of his shift, Sornberger gave him his final checks. Sornberger said he could return to work on June 1, if he wanted. On the afternoon of June 1, about 3 hours before the night shift was scheduled to begin, Sornberger telephoned Carson at home. Sornberger asked if Carson was going to work. Carson answered that was up to him. Sornberger asked if Carson was still with the Union. Carson answered that was "obvious." Sornberger replied: "well then, we can't use you for work." Carson asked: "where does that leave me for the future?" Sornberger answered: "you don't have one." Carson did not thereafter work for the Company. No one from the Company presented or discussed the form letter with him.

Employee Thomas Fino worked the day shift on the NFTA project. Fino testified, in sum, that he was laid off on May 28, no one from the Company spoke to him about returning to work, but he received the company form letter, which he did not sign.

Employee Michael Jozak also worked the day shift on the NFTA project. Jozak testified in sum as follows: On May 28, shortly before the layoff, Sornberger told him that the Company was going nonunion, but wanted him to stay, as well as Frank and Vincent Conidi. Jozak asked the circumstances. Sornberger said he would have to give up his union book. Jozak said he would not. Sornberger said that if Jozak remained, he would be covered by a company medical and retirement plan. Sornberger added that Dowling was fed up with the way the Union was running the Company, and they didn't want union members working for them. Sornberger showed Jozak the form letter, saying that if he remained, he would have to sign it. Jozak did not sign. Jozak went to the company office on June 1 to pick up his second (final) paycheck. Company Project Manager Leslie Wardell said the Company wanted Jozak to stay, but he would have to go nonunion. Jozak said he would not stay because he would have to give up his union representation.

Employee Gerald Farr worked the night shift on the NFTA project. Farr testified in sum as follows: On the morning of May 29, shortly before the end of his shift, Sornberger approached Farr, who had already learned of the layoff. Sornberger told Farr that the Company had a pension and benefit plan. Sornberger gave Farr his final paychecks, saying that if Farr wanted to continue working, he should give Sornberger a call. Farr did not personally receive the company form letter. However, Foreman Frank Conidi (one of the laid-off employees) told him that if he wanted to continue working, he would have to sign the letter. Farr replied that he would be off sick until he got more information about the letter. Farr did not thereafter work for the Company.

Employee William Rainey worked the night shift on the NFTA job. Rainey testified in sum as follows: Shortly before the layoff, Project Manager Sornberger told him that the Company would no longer be affiliated with the Union. Sornberger added that Rainey could continue to work, the Company had plenty of work, but the Company would not pay any union benefits. Rainey said he would get back to Sornberger. Rainey reported to work on June 1. Sornberger handed him the company form letter, saying that he had to sign if he wanted to work. Rainey refused to sign because he had 28 years in the Union and would lose his accumu-

lated pension benefits. Rainey did not thereafter work for the Company.

Employee David Kelley also worked the night shift on the NFTA project. Kelley testified in sum as follows: On May 28, Sornberger gave him his final paychecks. Sornberger said that if he wanted to work, he should report on June 1, but the Company would not be affiliated with the Union. When Kelley reported to work on June 1, Sornberger told him that he had to sign the company form letter. Kelley refused, and he did not thereafter work for the Company.

Employee Joseph Proietto testified in sum as follows: He was working the night shift on the NFTA project, although he had previously worked the day shift. He worked only 1 day during the week of May 24. On May 27, he told Sornberger that he was unable to continue working nights, and wanted to return to the day shift. Sornberger said that it wouldn't make much difference because unofficially, the Company was not going to stay Union. The next day, at the jobsite, Proietto and employees Thomas Fino and Joseph Ettipio spoke to Sornberger. One of the employees said: "[I]t's official now, we're done, we're through." Sornberger told the employees that there was work if they wanted to be nonunion workers. Proietto indicated that this was unlikely. Proietto received the company form letter in the mail, but did not sign it, and did not thereafter work for the Company.

By letter dated August 30, 1993, Company Vice President Dowling stated to Proietto as follows:

On May 31, 1993, you were laid off by Patterson-Stevens, Inc. As per our verbal offer, you were offered the opportunity to return to work on June 1, 1993 with the understanding that Patterson-Stevens, Inc. would no longer be making contributions to Local 210's Pension & Welfare Funds. You elected not to return.

The NLRB has issued a complaint asserting that Patterson-Stevens, Inc. terminated [sic] your employment, and did not allow you to continue because of your membership in Local 210.

To clear up any uncertainty, Patterson-Stevens, Inc. hereby offers you unconditional reinstatement. Please report to 400 Sawyer Avenue, Tonawanda, NY on September 1, 1993.

No evidence was presented that any of the other laid-off employees received such a letter.

Employee Anthony Hammill was working on the Company's Nabisco job. On May 28, Hammill and employee Michael Smith reported to the company yard, preliminary to working at the jobsite. Vice President Dowling took Hammill aside. Dowling told Hammill that the Company was severing ties with the Union, and that he would like Hammill to stay, but Hammill would also have to sever ties with the Union. Dowling promised that Hammill would be covered by a medical and pension plan, which he explained. Hammill replied that he had 20 years in the Union and had no intention of remaining with the Company for 25 years in order to obtain a pension. Hammill declared that he would keep his ties with the Union. Dowling said that this was probably Hammill's last workday, but Hammill could talk to him later. Hammill did not thereafter work for the Company. Hammill received his final paycheck in the mail, but did not receive the Company's form letter.

Employee Kevin Bennett was working at the Lincoln Park pool project in Tonawanda, New York. Bennett testified in sum as follows: Friday, May 28, was his last day at work. No one from the Company spoke to him about the layoff at that time. He reported to the job on June 1. A roofer foreman told him that he was not supposed to work that day. When Company Superintendent Michael Corbett arrived at the job-site, he confirmed the information. Bennett asked why. Corbett replied, by gesture, that they were sticking it to the Union. Corbett said that if Bennett wanted to work for the Company he should talk to Dowling, and had to sign a paper that he was no longer in the Union. Corbett told Bennett to pick up his last paycheck at the company office. Bennett went to the office, where he received his paycheck. As he was leaving, Dowling approached him. Dowling told Bennett that the Company was not signing with the Union, and Bennett could not work unless he gave up the Union. Bennett replied that he "couldn't do it." Bennett saw or received the company form letter, but did not sign it. He did not thereafter work for the Company.

Employee Anthony Baccaro also worked at the Lincoln Park pool project. Baccaro testified in sum as follows: On May 27, in the company office, Dowling told him that the Company was not going to sign with the Union. Dowling showed Baccaro a personal proposed company pension plan, indicating that Baccaro could be covered under the plan if he chose not to be a union member. Baccaro said he would let the Company know. The next day, Baccaro asked Project Manager Wardell if the only way to stay on with the Company was to quit the Union. Wardell answered: "[Y]es, that was correct." Baccaro said he would not quit the Union. Wardell told Baccaro to turn in his keys. The Company mailed Baccaro his final paychecks. That weekend, Foreman Frank Conidi told Baccaro that he had to sign the form letter in order to work for the Company. Baccaro did not sign the letter, and has not worked for the Company since May 28.

By letter dated May 28, Union Business Manager Gerace informed all union member employees of the Company that it was "imperative" that they attend a special meeting on the evening of June 2. The letter informed the employees that: "[I]f you are asked to continue to work by Patterson & Stevens please do so until further notice from the Union." Union Business Representative Capitano testified that he told members who inquired, that the Union had a contract, and they should continue to work. The Union gave such instruction in order to organize the Company's work force. However, at the June 2 meeting, Gerace concluded that the Union could not win an election. The Union decided to picket the Company, and requested its members not to cross the picket lines. The Union immediately set up picket lines at the NFTA and other company projects. Some of the alleged discriminatees participated in the picketing. The Union decided to suspend and fine members who crossed the picket lines, and in fact charged three union members, and two members of another Laborers local, with such conduct. Capitano further testified that the Union cannot accept benefit contributions from a nonunion contractor.

Company Vice President Dowling testified in sum as follows: During the week of May 24, Union Steward Joseph Ettipio asked him if the Company intended to sign the new contract. Dowling answered no. Ettipio said the employees were concerned about being locked out and unable to collect

benefits. Dowling responded that he appreciated that, and he was not trying to hurt anyone by not signing the contract. Project Manager Sornberger was present at this conversation. On another occasion, Dowling told a company steward that he would give everyone a layoff. He did not explain the reason. However, Dowling believed that the Union would not permit the employees to work without a contract. He also believed that by laying them off, rather than leaving them to strike, he would enable them to qualify for unemployment compensation.

Dowling further testified in sum as follows: He spoke to several of the employees, including Stephen Fletch, William Rainey, Anthony Hammill, Frank Conidi, Vincent Conidi, Michael Smith, and Kevin Bennett. He told them substantially the same thing. He told them the Company would not sign the new contract, would operate nonunion, and would not contribute to the union funds. He said he would like to have them as employees, but they would have to understand these conditions. He did not say they could not be union members or had to sever their ties with the Union. Some employees raised questions about union membership. Dowling answered that it made no difference to the Company. Dowling never met Bruce Curvin, never spoke to him, and did not make the alleged remark about not hiring union guys. Dowling did not take into consideration which employees were likely to stay.

Dowling further testified that some of the laid-off employees eventually returned to work for the Company. He also testified that Michael Smith worked without layoff until early June. However, as indicated, the Company admitted in its answer that it laid off Smith on or about May 28.

Project Manager Sornberger testified that he was not present when Dowling spoke to Joseph Ettipio. Sornberger initially testified that, during the week of May 24, he terminated Richard Carson because his services were no longer needed, specifically because: "[H]e just wasn't carrying his weight." Sornberger subsequently testified that night foreman Frank Conidi terminated Carson. Conidi, who was presented as a company witness, testified that Carson was included in the May 28 layoff. As indicated, the Company admitted that Carson was laid off on or about May 28. Carson's timesheet, initialed by Sornberger, indicates Carson worked through May 29, including overtime. When confronted with the timesheet, Sornberger retracted his testimony concerning Carson's alleged termination for poor performance. Sornberger's testimony, with regard to this matter, reflects adversely on his credibility.

Sornberger testified that he didn't think he talked to Bruce Curvin about contract termination, although he guessed he talked to Michael Jozak, and also talked to Gerald Farr, William Rainey, and David Kelley. Sornberger testified, in sum, that he told them their work was good, the Company would like to keep them, but the Company would not be signatory with the Union, and would not contribute to the Union's health and welfare fund, but hoped to offer the employees a better plan. Sornberger testified that he did not tell any employees that they had to quit the Union in order to continue working. Sornberger also testified that he did not say that the Company would not hire union employees. However, at one point, Sornberger testified that he did not know whether he said this. Frank Conidi, who as indicated was presented as a company witness, testified that Sornberger may have said

that employees who continued after Memorial Day would have to stop being union members. Sornberger testified that he asked those employees who worked conscientiously to remain, and didn't "really" consider who was likely to work nonunion. Sornberger further testified that he did not know whether an employee could work without a contract and remain a union member, and no one discussed this with him.

Leslie Wardell was project manager for the Lincoln Park pool job. Wardell testified in sum as follows: He did not discuss the situation individually with employees. However, during the week of May 24 he had a group conversation with Anthony Baccaro, Michael Jozak, and "Kevin" at the job-site. Wardell told them that the Company was not going to sign with the Union, but would like them to remain. They did not discuss fringe benefits. Baccaro may have asked whether he had to quit the Union in order to continue working. Wardell did not recall his response, but he did not say that they had to quit the Union. Wardell spoke to the employees as instructed by Chuck Patterson, Dowling, and Michael Corbett. Employees Michael Smith and Stephen Fletch were not laid off because they chose to remain with the Company. (As indicated, the Company's answer admits that both employees were laid off.)

Michael Corbett is company vice president in charge of its swimming pool business. Corbett testified that he did not discuss the matter of the Company going nonunion with Kevin Bennett or any other employee, and did not make the gesture attributed to him by Bennett.

The present case was initially consolidated with *Patterson-Stevens, Inc. and Operating Engineers Local 17*, Case 3-CA-17908. In that case, the complaint alleged, in sum, that: (1) the Company was bound by a collective-bargaining contract between Local 17 and AGC, covering operating engineer employees, which was effective by its terms from April 1, 1990, to March 31, 1994; (2) the Company violated Section 8(a)(1) and (5) of the Act by, since on or about May 31, 1993, failing and refusing to adhere to the terms and conditions of that contract; and (3) the Company violated Section 8(a)(1) and (3) by, on or about May 31, 1993, laying off two employees because of their membership and activities in Local 17, and to discourage employees from engaging in such activities. The two cases were subsequently severed. The Company filed a withdrawal of answer and consent to entry of judgment in the *Local 17* case. The General Counsel filed a Motion for Summary Judgment with the Board. On May 16, 1994, the Board granted the motion in a reported decision (313 NLRB 1229).

As the Board pointed out in its decision, the Company's withdrawal of answer and consent to entry of judgment "has the same effect as a failure to file an answer, i.e., the allegations in the [complaint] must be considered to be admitted to be true." The Board also noted that the Company, in withdrawing its answer, did not rely on any representations or assurances by the General Counsel that the default would not be used as evidence in a collateral proceeding. The Board also noted that it was not expressing any view about the evidentiary use, in the present case, of its Decision and Order in the *Local 17* case. However, under Board law an adjudication by consent or default, such as that in the *Local 17* case, may be used as evidence in another proceeding. *Teamsters Local 945 (Newark Disposal)*, 232 NLRB 1, 4 (1977), enf. mem. 103 LRRM 2603 (3d Cir. 1978). I find,

in light of the Company's withdrawal of answer and consent to entry of judgment, and the Board's Decision and Order in the *Local 17* case, that the Company's discriminatory layoff of two operating engineer employees, concurrently with the layoff of the alleged discriminatees in the present case, may here properly be considered as evidence of an antiunion motivation.

## 2. Analysis and concluding findings

I credit the testimony of the employee witnesses concerning their conversations with Project Manager Sornberger. As indicated, Sornberger was a less than credible witness. He testified falsely concerning the circumstances of Carson's termination. He was vague, equivocal, and contradictory concerning his conversations with the employees. At one point, he asserted that he did not know what he said. As indicated, the Company's own witness testified that Sornberger may have said that employees who continued working after Memorial Day would have to stop being union members. I have no comparable reservations with respect to the testimony of the employee witnesses.

I specifically find, that Sornberger asked Carson whether he was still with the Union and, when Carson answered affirmatively, told Carson that therefore the Company couldn't use him; that Sornberger told Curvin the Company was not going to hire union employees; and that Sornberger told Jozak that he would have to give up his union book in order to remain with the Company.

I also credit the testimony of Michael Jozak that Project Manager Wardell told him that he would have to go nonunion in order to remain with the Company; and the testimony of Anthony Baccaro that Wardell confirmed that the only way to remain with the Company was to quit the Union. As indicated, Wardell testified that he did not talk individually with the employees, but did have a group conversation with Baccaro, Jozak, and "Kevin" at the pool job-site during the week of May 24. This is improbable, because Jozak was working the day shift on the NFTA job. Therefore, it is more probable, as testified by Jozak, that he spoke to Wardell in the company office on June 1. Wardell, in his testimony, also professed to be unable to recall what he said when Baccaro asked whether he had to quit the Union.

The credible testimony of the employees with respect to their conversations with Sornberger and Wardell further lends credence to their testimony concerning statements made by Vice President Dowling. As indicated, Baccaro approached Wardell in order to confirm his understanding of what Dowling told him. I find that Dowling told Baccaro that he could be covered under a company pension plan if he chose not be a union member; told Anthony Hammill that he would have to sever ties with the Union in order to remain with the Company; and told Kevin Bennett that he could not work unless he gave up the Union.

I also credit Bruce Curvin, insofar as he testified that Dowling told him that: "I wouldn't hire you now if my life depended on it." In light of Curvin's testimony on cross-examination, I find that Dowling phrased his response in this manner. Curvin was night steward on the Company's largest and most visible project. It is unlikely that Dowling would not know him, or that neither Dowling nor Sornberger would have spoken to him about the situation. As union steward, it is probable, as Curvin testified, that he would have asked

either Sornberger or Dowling, or both of them, about the situation. I also find significant the fact that Curvin was among the few employees who did not receive the Company's form letter either in person or by mail. I also credit the testimony of Kevin Bennett concerning his conversation with Vice President Corbett, as Corbett's responses were consistent with those of Dowling, Sornberger, and Wardell.

The Company violated Section 8(a)(1) and (3) of the Act, as alleged in the complaint, by terminating its union member employees because of their membership in and support for the Union. I would so find, even in the absence of the credibility resolutions discussed above.

First, the employees were selected for layoff solely on the basis of their membership in or representation by the Union. Second, the Company told the employees that, as a condition of reemployment, they were required to sign a form, which in substance, required them to relinquish their rights under Section 7 of the Act. The Company could have lawfully informed the employees that as of June 1, they would be working under nonunion conditions, and the Company would not be contributing to the union benefit funds. *Yellowstone Plumbing*, 286 NLRB 993, 994 (1987). However, the Company went well beyond such statements. The Company first summarily terminated the employees, and told them that as a condition of reemployment they were required to sign a document by which they agreed to acquiesce in such conditions. Whether the Company or the Union was correct, the employees had a statutorily protected right, by grievance or other lawful concerted means, to contest the Company's position that it was not bound by the 1993-1996 collective-bargaining contract. By imposing this requirement, the Company unlawfully interfered with the employees' Section 7 rights. Consequently, even if the Company had not initially terminated the employees, the Company would have violated Section 8(a)(1) and (3) by actually or constructively denying employment to those employees who refused to sign the form.

Moreover, the credited testimony of the employees, discussed above, demonstrates that the Company was in fact telling them, and requiring them, to terminate their union membership as a condition of reemployment. I find without merit Dowling's explanation, in sum, that the Company did the employees a favor by laying them off, because the Union would not permit them to work without a contract, and they could qualify for unemployment compensation. The employees had a statutorily protected right to make that decision for themselves, without being terminated on the basis of their union membership or representation. *Jack Welsh Co.*, 284 NLRB 378, 383 (1987). As indicated, the Union initially instructed its members to continue working for the Company, but changed its position after the Company terminated all the union member employees and hired or transferred in non-union replacements.

The Company argues in its brief that it did not violate the Act, because the employees engaged in a strike. The argument is without merit, because the Company discriminatorily terminated the employees *before* the Union decided to establish picket lines. Therefore, the question of whether the employees went on strike, and if so, the nature of that strike, is one addressed to compliance, rather than the merits of the case.

I further find, based on the credited testimony of the employee witnesses, that the Company, by Dowling, Sorn-

berger, Bennett, and Wardell, threatened its employees by conditioning their employment with the Company on their abandoning membership in the Union. The Company thereby violated Section 8(a)(1) of the Act. The Company, by Sornberger, also violated the Act by interrogating Richard Carson as to whether he was still with the Union. The interrogation was plainly coercive and unlawful, as Carson had been unlawfully terminated, and Sornberger made clear (at the time when the Union was telling its members to continue working) that reemployment was conditioned on Carson's abandoning union membership. See *Honda of Hayward*, 307 NLRB 340, 345, 350 (1992).

On the basis of the Company's selection of the employees for layoff based solely on their union membership or representation, the statements of company supervisors, the unlawful condition for reemployment, and the Company's concurrent unlawful conduct as found in the *Local 17* case, the General Counsel presented a prima facie case that the Company violated Section 8(a)(1) and (3) by terminating the employees. As the reasons advanced by the Company for its actions were without merit in law and fact, it follows that the Company failed to meet the burden of establishing that it would have terminated the employees in the absence of their protected activity.

#### CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By interfering with, restraining, and coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act, the Company has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

4. By discriminatorily terminating Anthony Baccaro, Richard Carson, Angelo Ceccarelli, Frank Conidi, Vincent Conidi, Thomas Cordova, Bruce Curvin, Joseph Ettipio, Gerald T. Farr, Thomas Fino, Stephen D. Fletch, Anthony Hammill, Michael Jozak, David Kelley, Monroe Leslie, James J. O'Neil, Myron Patterson, Joseph Proietto, William Rainey, Michael K. Smith, and Kevin Bennett, thereby discouraging membership in the Union, the Company has engaged, and is engaging, in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

5. The Company did not violate Section 8(a)(5) of the Act as alleged in the complaint.

6. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

#### THE REMEDY

Having found that the Company has committed violations of Section 8(a)(1) and (3) of the Act, I shall recommend that it be required to cease and desist therefrom, to post appropriate notices, and to take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that the Company be ordered to offer the discriminatees immediate and full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any

loss of earnings and benefits that they may have suffered from the time of their termination to the date of the Company's offer of reinstatement. I shall further recommend that the Company be ordered to expunge from its records any reference to their unlawful terminations, to give each of them written notice of such expunction, and to inform them that its unlawful conduct will not be used as a basis for further personnel actions against them. Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).<sup>9</sup>

It will also be recommended that the Company be required to preserve and make available to the Board or its agents, on request, payroll and other records to facilitate the computation of backpay and reimbursement due.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>10</sup>

#### ORDER

The Respondent, Patterson-Stevens, Inc., Tonawanda, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in Laborers' International Union of North America, Local Union No. 210, or any other labor organization, by discriminatorily laying off or terminating employees, or in any other manner discriminating against them with regard to their tenure of employment or any term or condition of employment.

(b) Threatening employees by conditioning their employment on their abandoning membership in the Union or any other labor organization.

(c) Interrogating employees about their union membership, activities, or sympathies.

(d) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their rights under Section 7 of the Act.

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

(a) Offer Anthony Baccaro, Richard Carson, Angelo Ceccarelli, Frank Conidi, Vincent Conidi, Thomas Cordova, Bruce Curvin, Joseph Ettipio, Gerald T. Farr, Thomas Fino, Stephen D. Fletch, Anthony Hammill, Michael Jozak, David Kelley, Monroe Leslie, James J. O'Neil, Myron Patterson, Joseph Proietto, William Rainey, Michael K. Smith, and Kevin Bennett, immediate and full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any losses they suffered by reason of the dis-

<sup>9</sup>In accordance with our decision in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), interest on and after January 1, 1987, shall be computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. § 6621. Interest on amounts accrued prior to January 1, 1987 (the effective date of the 1986 amendment to 26 U.S.C. § 6621), shall be computed in accordance with *Florida Steel Corp.*, 231 NLRB 651 (1977).

<sup>10</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.

crimination against them as set forth in the remedy section of this decision.

(b) Expunge from its files any reference to their terminations, and notify each of them in writing that this has been done and that evidence of their unlawful terminations will not be used as a basis for future personnel actions against them.

(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 to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Tonawanda, New York office and place of business and at its jobsites copies of the attached notice marked "Appendix."<sup>11</sup> Copies of the notice on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on 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.

<sup>11</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 Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### 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.

WE WILL NOT discourage membership in Laborers' International Union of North America, Local Union No. 210, or any other labor organization, by discriminatorily laying off or terminating employees, or in any other manner discriminating against them with regard to their hire or tenure of employment or any term or condition of employment.

WE WILL NOT threaten you by conditioning your employment on your abandoning membership in Local 210 or any other labor organization.

WE WILL NOT interrogate you about your union membership, activities, or sympathies.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your right to engage in union or concerted activities, or to refrain therefrom.

WE WILL offer Anthony Baccaro, Richard Carson, Angelo Ceccarelli, Frank Conidi, Vincent Conidi, Thomas Cordova, Bruce Curvin, Joseph Ettipio, Gerald T. Farr, Thomas Fino, Stephen D. Fletch, Anthony Hammill, Michael Jozak, David Kelley, Monroe Leslie, James J. O'Neil, Myron Patterson,

Joseph Proietto, William Rainey, Michael K. Smith, and Kevin Bennett immediate and full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and WE WILL make them whole for any losses they suffered by reason of the discrimination against them, with interest.

WE WILL expunge from our files any reference to their terminations, and notify them in writing that this has been done and that evidence of their unlawful terminations will not be used as a basis for future personnel actions against them.

PATTERSON-STEVENSON, INC.