

Road Sprinkler Fitters Local Union No. 669, affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO and Lexington Fire Protection Group, Inc. Case 9-CB-7890

August 15, 1995

DECISION AND ORDER

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

On April 30, 1992, Administrative Law Judge George F. McInerney issued the attached decision. The Respondent, Road Sprinkler Fitters Local Union No. 669, affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (the Union) filed exceptions and a supporting brief and the Charging Party, Lexington Fire Protection Group, Inc. (LFP Group) filed an answering brief. The Board determined that this and another case¹ raised important questions concerning application of the rules regarding withdrawal from multiemployer bargaining units set forth in *Retail Associates*, 120 NLRB 388 (1958), and held oral argument on May 23, 1994. Participating in the oral argument were the Respondent, the General Counsel, the International Ladies' Garment Workers' Union (the charging party in *Chel Lacort*), and a number of amici curiae.²

The Board has considered the decision and the record in light of the exceptions, briefs, and oral argument and has decided, for the following reasons, to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order as modified.

We agree with the judge that the *Retail Associates*³ rules regarding withdrawal from multiemployer bargaining units are applicable to the facts in this case and that, under *Retail Associates*, Lexington Fire Protection Company (LFP Company) timely withdrew from the multiemployer unit in November 1987. Accordingly, we adopt the judge's finding that the Respondent violated Section 8(b)(3) of the Act by refusing to bargain on an individual basis with LFP Group,

¹ *Chel Lacort*, 315 NLRB 1036 (1994).

² The amici curiae were the American Federation of Labor and Congress of Industrial Organizations; Chamber of Commerce of the United States of America; Building and Construction Trades Department, AFL-CIO; National Electrical Contractors Association, Inc.; International Longshoremen's Association, AFL-CIO; and Associated General Contractors of America, Inc. LFP Group, Charging Party in the instant case, did not participate in the oral argument. All oral argument participants except the Chamber of Commerce filed briefs thereafter.

³ 120 NLRB 388 (1958).

which had purchased the assets of LFP Company and continued its business operations.⁴

The relevant facts are not in dispute. In 1975, LFP Company joined the National Fire Sprinkler Association, Inc. (Association) and granted the Association authority to bargain on its behalf as part of a multiemployer unit. By virtue of this designation, the Association placed LFP Company on its "A" list. That list set forth those members who had assigned the Association their collective-bargaining rights.

From 1975 until late 1987, LFP Company was in the multiemployer unit, and the Association was its authorized representative to bargain with the Respondent. On October 23, 1987, LFP Company wrote the Association that it would represent itself in upcoming negotiations for a contract to succeed the one expiring in April 1988. The Association thereupon followed the customary procedures. It immediately removed LFP Company from the "A" list. Further, consistent with past practice, when the Respondent and the Association met in November 1987 to begin multiemployer bargaining, the Association handed the Respondent the updated "A" list.⁵ LFP Company was not on the list. After the list was tendered, the parties began bargaining for a new multiemployer agreement.

On these facts, the judge found, and we agree, that the Association's tendering of this updated "A" list to the Respondent, prior to multiemployer bargaining, was adequate written notice that the Association was no longer bargaining on behalf of LFP Company.⁶ We also agree with the judge that *Lenox Grill*⁷ and *South Texas Chapter of the Associated General Contractors*⁸ support this conclusion. In these cases, the Board held that when, as here, written notice of withdrawal is tendered to the union prior to the exchange of bargaining proposals, the withdrawal is effective under *Retail Associates*.⁹

⁴ We do not, however, adopt the judge's further finding that the Respondent's refusal to bargain with LFP Group violated Sec. 8(b)(1)(A) of the Act. The judge made no independent factual findings on which the 8(b)(1)(A) allegation is based. It is well established that other 8(b) violations do not give rise to derivative violations of Sec. 8(b)(1)(A). *National Maritime Union*, 78 NLRB 971 (1948), enfd. 175 F.2d 686 (2d Cir. 1949), cert. denied 338 U.S. 954 (1950). Accordingly, we do not find an 8(b)(1)(A) violation in this case. *Food and Commercial Workers Local 454 (Central Soya)*, 245 NLRB 1295 (1979). See also *Teamsters Local 705 (Pennsylvania Truck Lines)*, 314 NLRB 95, 95-96 fn.4 (1994).

⁵ The Respondent acknowledges that the "A" list "is the list that the Association hands [the Respondent] at the beginning of negotiations that [the Association] believe[s] covers those that are bound to the multiemployer bargaining."

⁶ *Retail Associates*, 120 NLRB at 395.

⁷ 170 NLRB 1027 (1968).

⁸ 238 NLRB 156 (1978).

⁹ Contrary to the suggestion of our dissenting colleagues, we are not asserting that there was an all-party agreement to vary the *Retail Associates* principles. See *Acropolis Painting & Decorating*, 272 NLRB 150 (1984). Rather, we rely on those principles.

Continued

Our dissenting colleagues seek to distinguish the above-cited cases from the instant one. They argue that, in the cited cases, the association told the union the names of the employers that had withdrawn. By contrast, the dissent argues, the Association told the Union here of the employers who had not withdrawn, i.e., who were still in the Association. We believe that this is a distinction without a difference. In order to ascertain the names of those who had withdrawn, the Union had only to compare the names on the list with the names that were on the list at the time of the negotiation of the last contract. Because the list, which is in evidence here, was titled “MEMBERS WHO HAVE AUTHORIZED THE ASSOCIATION TO REPRESENT THEM IN COLLECTIVE BARGAINING,” the exclusion of the Employer from the list effectively informed the Union that the Employer had withdrawn its authorization for representation by the Association in bargaining.¹⁰ As the Association’s associate director testified, the tendering of the list was the notification of withdrawal.¹¹

Our dissenting colleagues contend that there was insufficient notification because the Union had to compare a submitted lengthy list with a prior lengthy list. This is the practice, however, that the parties them-

selves have historically followed.¹² If the Union thought that the process was cumbersome, it was free to seek a change. It never did so. In our view, our colleagues should not now seek to upset a practice of the parties simply because our colleagues think that the practice is a cumbersome one.

In sum, the Employer withdrew from the Association, and this withdrawal was effectively communicated to the Union. These events occurred prior to the start of substantive negotiations. Thus, this is not a case when an employer “hangs back” to see how the bargaining will proceed. Accordingly, the *Retail Associates* policy of discouraging that practice is not undermined.

Finally, the fact that the Employer chose to adhere to the 1988–1991 contract does not establish that it remained part of the multiemployer unit.¹³ An employer can agree to be a “me too” signatory to a multiemployer contract. *Ruan Transportation, Corp.*, 234 NLRB 241, 242 (1978).

Accordingly, we adopt the judge’s findings that the LFP Company timely withdrew from multiemployer bargaining, and that the Respondent was effectively notified of this fact in November 1987. We further find that neither LFP Company nor LFP Group thereafter evidenced a clear intent to be bound by multiemployer bargaining.¹⁴ Accordingly, even if LFP Company and LFP Group are alter egos or a single em-

We disagree with our dissenting colleagues’ claim that the “A” list was insufficient under *Retail Associates* because the parties had not expressly agreed that it was the method whereby the Association would notify the Union of employer withdrawals. An express agreement may be required if the parties wish to depart from the principles of *Retail Associates*. This case does not involve such a departure. Rather, it involves a particular method of the notification that is required by *Retail Associates*. Historically, the list was the Association’s method for notifying the Union of withdrawals.

¹⁰ We disagree with our dissenting colleagues’ claim that the Association did nothing specifically to apprise the Union that the Company had withdrawn from the multiemployer unit. On the contrary, consistent with settled practice, the Association did precisely that by removing the Company’s name from the “A” list and by providing the updated list to the Union prior to the commencement of bargaining.

We also reject, as hyperbole, the dissent’s mischaracterization of the “A” list as a “blizzard of data akin to a response to a discovery request.” The list quite specifically, and narrowly, enumerates those employers that authorized the Association to represent it for purposes of collective bargaining.

¹¹ Conceivably, there could be employers who were left off the list for reasons other than a withdrawal from the Association. The Union was free to point out such matters, and such employers would be in the unit. But, this “correction” process can have no impact on the Employer, who was appropriately omitted from the list, i.e., the Employer had previously withdrawn from the Association.

Chairman Gould views the conclusion that a violation was committed here as particularly appropriate under a holding that is predicated on the parties’ own collective-bargaining process relating to notice and their customary adherence to it. The fact that it may not be the most efficient or best in the view of this Agency or other third parties is irrelevant. It is the process devised by the parties, which they have bargained for, that supports our decision today and not our own view about what is best for them.

¹² The dissent argues that the Association’s tendering of the “A” list to the Union prior to negotiations was ineffective notice under *Retail Associates* because the “parties” settled practice [was] to verify and correct the ‘A list’ after, and not before, the commencement of bargaining.” We disagree. The “A” list satisfied the notice requirements under *Retail Associates*, and the Association clearly regarded its tendering of the “A” list as effective notice to the Union. Upon receipt of the list, the Union was on notice that those were the only employers for which the Association was bargaining. At that point, the Union could have insisted upon verification of the list prior to bargaining. It chose not to do so. This choice does not undercut the legal effectiveness of the Association’s notice.

¹³ The dissent argues that the Employer acquiesced to the Union’s claim that the Employer remained part of the multiemployer unit. In this regard, the dissent relies on the fact that the Employer adhered to the terms of the 1988–1991 multiemployer contract. In addition, the dissent relies on the fact that the Employer did not respond to the Union’s letter that claimed that the Employer remained part of the multiemployer unit. The dissenting argument has no merit. With respect to the dissent’s first point, we note that adherence to the terms of a multiemployer contract is not the same thing as agreement to be part of a multiemployer unit. With respect to the dissent’s second point, we note that the Employer clearly and unequivocally stated its intention to withdraw from the multiemployer unit, and such withdrawal was conveyed by the Association to the Union. In these circumstances, we do not infer a change of mind based on the mere fact that the Employer did not respond to the Union’s contrary claim.

¹⁴ The Board has long adhered to the rule that in order to bind an employer to multiemployer bargaining in the first instance, there must be evidence of that employer’s unequivocal intent to be bound by the actions of the multiemployer bargaining representative. See, for example, *Hunts Point Recycling Corp.*, 301 NLRB 751, 752 (1991), and cases there cited.

ployer, LFP Group had the right to bargain on a separate basis. Therefore, we find, as did the judge, that the Respondent violated Section 8(b)(3) when it refused LFP Group's January 1991 request to bargain on a separate basis.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Road Sprinkler Fitters Local Union No. 669, affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Landover, Maryland, its officers, agents, and representatives, shall take the action set forth in the order as modified.

1. Delete paragraph 1(b).
2. Substitute the attached notice for that of the administrative law judge.

MEMBERS BROWNING AND TRUESDALE, dissenting.

Our colleagues conclude that Lexington Fire Protection Company, Inc. (the Company) effectively withdrew from the multiemployer unit, even though it did not notify the Union of its purported withdrawal. Our colleagues reach this conclusion because at the start of contract negotiations, the National Fire Sprinkler Association, Inc. (the Association) handed the Union a 25–30 page list of some 300 employers that had authorized the Association to represent them in collective bargaining and the Company's name was not on that list. Therefore, our colleagues reason, the Union violated Section 8(b)(3) of the Act by refusing to bargain on other than a multiemployer unit basis with the Company's successor, Lexington Fire Protection Group, Inc. (LFP Group). Contrary to our colleagues, we would find that the mere absence of the Company's name from the list of 300 employers did not provide the Union the requisite notice of the Company's purported withdrawal from the multiemployer unit.

I. FACTS

In 1975, the Company joined the Association, assigned it the right to negotiate on the Company's behalf, and agreed to be bound by collective-bargaining agreements the Association negotiated. The Association added the Company to the Association's "A list," the list of members that had assigned bargaining rights to the Association.¹ The Company was covered by successive national multiemployer agreements negotiated between the Association and the Union through April 1, 1988.

¹The Association also maintained a "B list" of members that engaged in collective bargaining independently and a "C list" of members that were nonunion.

The Association and the Union have a history of beginning national negotiations for a new contract in November of the year prior to contract expiration. At the beginning of the first meeting, the Association presents the Union with a draft of its updated "A list" for examination by the Union. The Union later checks the list against its records and brings discrepancies to the Association's attention, and the parties attempt to resolve the discrepancies.

On October 23, 1987, the Company informed the Association by letter that the Company would "represent itself in the spring negotiations and will be our own bargaining agent." Neither the Company nor the Association sent the Union a copy of the Company's letter, nor was the Union otherwise informed about it. The Association simply removed the Company's name from the lengthy "A list."

In November 1987, the Association and the Union held their initial meeting for negotiation of a contract to succeed the one set to expire April 1, 1988. At the start of the meeting, the Association gave the Union a copy of the "A list," which was 25–30 pages long and contained the names of about 300 employers, but did not include the Company. In a December 16, 1987 internal memorandum, the Union noted that nothing in its files showed that the Company had withdrawn from the multiemployer unit. On February 2, 1988, the Union notified the Company by certified mail, with a copy to the Association, that the Union "is currently bargaining with [the Association] for a new national agreement effective April 1, 1988, and . . . as a contractor member of the multiemployer unit, [the Company] will be bound to the results of [the] negotiations." Neither the Company nor the Association responded to the Union's letter. The judge found that the Company failed to respond, yet accepted the Union's conclusion and honored the 1988–1991 contract that resulted from the negotiations.

In June 1990, the assets of the Company were sold. The new owners changed the name to Lexington Fire Protection Group, and continued to operate the same business with the same employees and the same customers. LFP Group continued to observe the terms of the 1988–1991 collective-bargaining agreement.

In November 1990, consistent with past practice, the Association and the Union began negotiations for a successor contract. In January 1991, LFP Group took the position that it was not bound to the ongoing multiemployer negotiations for a successor contract. The Union at that time refused to negotiate with LFP Group on an individual basis in derogation of the multiemployer unit. Our colleagues find that the Union's refusal to negotiate with LFP Group on an individual basis violated Section 8(b)(3) of the Act.

II. DISCUSSION

In our view, our colleagues err in finding that the Company successfully withdrew from the multiemployer unit in 1987. Contrary to our colleagues' findings, the Company's purported withdrawal neither met the requirements of *Retail Associates*² nor was sanctioned by the parties' past practice.

To ensure the stability of multiemployer bargaining relationships, the Board, in its landmark 1958 *Retail Associates* decision, established rules that have governed withdrawal from multiemployer bargaining units for more than three decades. Those rules, cast in the mold of a generalized prohibition with specified exceptions, are narrow and precise:

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.³

Retail Associates and its progeny establish a simple, yet fundamental, requirement: For an employer to withdraw from a multiemployer bargaining unit without the union's consent, the union must be given timely, adequate, and unequivocal written notice of the employer's withdrawal. Notice provided solely to the multiemployer representative is insufficient. Thus, an employer may inform the employer association that it is withdrawing its bargaining rights or resigning from the association but, regardless of the employer's desires, if the union is not timely notified, the employer still will be bound by a collective-bargaining agreement that the association subsequently negotiates.⁴

The key to an employer's withdrawal from multiemployer bargaining is adequate, timely notice to the union, and the burden is squarely on the employer to provide such notice. This burden is hardly an insurmountable one. To avoid being bound by a subse-

quently negotiated multiemployer collective-bargaining agreement, the employer need only provide a simple statement to the union, in a timely manner, declaring that the employer is withdrawing from the unit.

Despite these clear requirements, however, our colleagues find that the Association's presentation to the Union of a document listing entities that it represented in bargaining at the outset of the first bargaining session in November 1987, coupled with the Company's October 1987 letter notifying the Association, but not the Union, that the Company would represent itself in negotiations, effectively withdrew the Company from the multiemployer unit. In so doing, our colleagues erroneously rely on two cases in which the Board found employers' withdrawals from multiemployer units effective: *Lenox Grill*,⁵ in which the employer notified the association in writing of its withdrawal 3 months prior to negotiations and the association informed the union of the withdrawal at the start of the first bargaining session; and *South Texas Chapter of the Associated General Contractors*,⁶ in which several employers notified the association of their withdrawals several weeks before negotiations were to begin and the association orally notified the union of the withdrawals before negotiations began at the first meeting of the parties.

Contrary to our colleagues, we find the present case differs in a crucial respect from both *Lenox Grill* and *South Texas Chapter*. In *Lenox Grill*, at the start of the first bargaining session, the association specifically told the union that the employer in question had withdrawn from the unit. In *South Texas Chapter*, the association at the outset gave the union a written list of employers that had withdrawn from the unit. Here, the Association did neither. Indeed, the Association did nothing to bring specifically to the Union's attention the Company's purported withdrawal from the multiemployer unit. The Association gave the Union a 25–30 page list of 300 employers that had assigned their bargaining rights to the Association, rather than a list of employers no longer in the unit. A list of such length in such a format could not reasonably bring to the Union's attention employers that had withdrawn, as the notices in *Lenox Grill* and *South Texas Chapter* had done. In those cases, unlike here, the associations provided the unions with effective, actual notice of the employers that would not be included in bargaining before bargaining actually began. Thus, we disagree that the presentation of the "A list" satisfied the *Retail Associates* notice requirement. Rather, under the circumstances here, we would find that the provision to the Union of an extensive list of employers in the unit did not constitute notice that the Company had withdrawn from the unit. Such a list, standing alone,

² 120 NLRB 388 (1958).

³ Id. at 395.

⁴ See *General Printing Co.*, 263 NLRB 591 (1982); *Players Restaurant*, 246 NLRB 863 (1979); *Goodsell & Vocke, Inc.*, 223 NLRB 60 (1976), *enfd.* 559 F.2d 1141 (9th Cir. 1977); *NLRB v. Central Plumbing Co.*, 492 F.2d 1252, 1255 (6th Cir. 1974).

Our colleagues are in agreement with us that the rules set forth in *Retail Associates* regarding withdrawal from multiemployer bargaining units are applicable to the facts of this case. Compare *James Luterbach Construction Co.*, 315 NLRB 976 (1994), in which a Board majority held that *Retail Associates* principles do not apply to 8(f) bargaining relationships.

⁵ 170 NLRB 1027 (1968).

⁶ 238 NLRB 156 (1978).

hardly constitutes the adequate, unequivocal notice contemplated under *Retail Associates*.

Our colleagues oversimplify the issue in stating that “to ascertain the names of those who had withdrawn, the Union had only to compare the names on the list with the names that were on the list at the time of the negotiation of the last contract.” First, the list that the Association provided the Union did not fulfill the *Retail Associates* notice requirement because the list did not, of itself, identify which employers, if any, that previously had been included in the unit no longer remained in the unit. Ascertaining omitted employers required the Union to undertake a further onerous and time-consuming task, i.e., to make a detailed comparison between the 25–30 page list that the Association provided and an equally long list of employers that previously were in the unit. To satisfy the *Retail Associates* test for withdrawal from a multiemployer bargaining unit, however, either the Company or the Association had to notify the Union of the Company’s withdrawal from the unit, not merely provide the Union a draft document from which the Union, with study and reference to other documents, could eventually deduce that the Company intended to withdraw from the unit. *Retail Associates* places the burden on the Company or, by extension, the Association to notify the Union of the withdrawal; the Union has no obligation to aid the employer or the Association in fulfilling their responsibility to provide the information by puzzling out what the Company and the Association failed to provide. The language of *Retail Associates* clearly requires actual notice. It does not allow for the option of providing, as here, a blizzard of data akin to a response to a discovery request.

Moreover, our colleagues err in their assertion that the Union could have ascertained, through a comparison between the list that the Association provided and a previous list, that the Company had withdrawn from the multiemployer unit. Rather, such an exercise would have disclosed merely the names of employers that, for any reason, had been omitted from the list, not solely the names of those that had withdrawn their bargaining rights from the Association. The Association deleted employers’ names from the list for a variety of reasons, e.g., because they had merged with other companies, changed corporate names, gone out of business, or through clerical error. Indeed, the record shows that employers’ names were not infrequently omitted from the “A list” for these very reasons.⁷ Thus, the results of the comparison of lists suggested by our colleagues

⁷For example, the judge noted that, of the 12 companies missing from the list in November 1990, 3 had changed their names or associated themselves with other companies not on the list, 1 was omitted by mistake, 1 the Association stated it had never heard of, 3 had been voted out of the Association by the Association’s board of directors, and 3 had withdrawn or attempted to withdraw from the multiemployer unit.

would not have identified employers that had withdrawn from the unit because it would not have distinguished between them and those omitted for other reasons. Absent an affirmative statement to the Union from the Company or the Association that the Company had withdrawn from the unit, the mere omission of the Company from the list failed to convey that it had withdrawn from the unit.

Our colleagues additionally contend that the Association’s furnishing the “A list” at the start of bargaining and the Union’s subsequent checking it against its records was an historical practice that the Union could have sought to change if it so desired. In viewing this practice as a method by which employers could withdraw from the multiemployer unit (and, thus, one that the Union might well want to change), our colleagues erroneously ascribe to this practice a significance that it did not possess. It is telling that no party contends that the Association’s furnishing of its “A list” to the Union at the start of bargaining in 1987 constituted an agreed-upon method or practice for providing notice of withdrawals or otherwise permitting withdrawals from the unit.⁸ Nor does our colleagues’ putative finding gain any support in the record.

At the hearing, both Union Business Manager Simpson and the Association’s Associate Director of Labor Relations, Cahill, testified concerning the parties’ bargaining practices. Their testimony demonstrates that the parties did not intend that the list definitively establish which employers were bound to the multiemployer bargaining unit and which ones had withdrawn from the unit or were otherwise excluded from it. Simpson testified, without contradiction, that, as at all prior negotiations, the “A list” that the Association representative presented him at the beginning of the 1987 negotiations was not a final or official list. When accepting the list, Simpson, following customary practice, stipulated that it was accepted subject to review and correction. Cahill, who first participated in the Association-Union negotiations in 1990, acknowledged that the Association’s “A list” was not infallible and that sometimes employers were erroneously excluded from or included on the list. Cahill testified, and documentary evidence confirms, that the Union, after receiving the “A list,” had brought such errors to the Association’s attention and the Association had agreed to changes. Cahill further testified that when Simpson was given the “A list” at the first 1990 bargaining session, Simpson stated that the Union would review the list and get back to Cahill if corrections were needed.

⁸See *Handy Andy, Inc.*, 313 NLRB 616, 617 fn. 7 (1993) (Board limits its examination to arguments and business justifications actually placed before it).

Cahill's testimony corroborates Simpson's uncontroverted testimony that, consistent with past practice, the Union accepted the "A list" at the start of the 1987 negotiations with the understanding that the list sometimes contained errors and was subject to the Union's review, correction, and verification. The participants' testimony also demonstrates that neither party expected the Union to review the "A list" for accuracy prior to commencement of bargaining.

Therefore, the record, considered as a whole, does not support the majority's critical finding that under the parties' historical practice the Union was obligated to undertake the list verification process as soon as it received the list or be charged with effective notice of the names of employers not on the list. Because the record shows that the parties' settled practice was to verify and correct the "A list" after, and not before, the commencement of bargaining, it is not reasonable for this Board to treat the mere tendering of the list as instantaneously conveying to the Union information that the parties themselves knew the Union would be unaware of until a later point in time.

Additionally, the conduct of all the parties regarding the Company's attempted withdrawal was consistent with an understanding that the Association's furnishing of its "A list" at the start of negotiations did not conclusively establish which employers were or were not in the multiemployer unit. Once the Union's check of its own records revealed the Company's omission from the "A list," the Union sent the Company a certified letter, with a copy to the Association, stating that the Union was currently bargaining with the Association for a new contract and that, as a member of the multiemployer unit, the Company would be bound by the results of the negotiations. Significantly, neither the Company nor the Association took issue with the Union's letter, and the Company followed the terms of the new multiemployer contract.

Finally, there is no evidence that any party—the Association or Employer—ever took the position that providing the "A list" itself constituted notice of withdrawals from the unit until the Association asserted this position in a January 14, 1991 letter to the Union, more than 3 years after the Company's withdrawal attempt. Significantly, the letter did not purport to characterize in factual terms the parties' past practice but, rather stated that "[o]ur attorney has advised us that the submission of the list" constituted notice.⁹

Thus, in our view, the actions of the Company and the Association in 1987 clearly failed to satisfy the notice requirements for withdrawal from multiemployer bargaining units.¹⁰ Consequently, we would find that

⁹The Union's attorney responded with a letter denying that the submission of the list constituted notice.

the Company did not effectively withdraw from the multiemployer unit in 1987 and remained in the unit at the time of its 1990 sale of assets to LFP Group. Accordingly, we dissent from our colleagues' conclusion that the Union violated Section 8(b)(3) by refusing to bargain individually with LFP Group.¹¹

¹⁰Art. I of the 1988–1991 collective-bargaining agreement between the Association and the Union required the Association to notify the Union within 20 days whenever any contractor-member withdrew or was terminated from membership in the Association. There is no evidence about whether the collective-bargaining agreement in effect at the time of the Company's attempted 1987 withdrawal from the unit contained a similar provision. Even if it had, however, such a provision would not have applied to the Company's 1987 conduct, because the Company did not attempt to withdraw from the Association itself but sought to retain membership in the Association and merely withdraw its assignment of its bargaining rights. In any event, the record reflects instances before 1987 in which the Association members themselves directly notified the Union that they were withdrawing their bargaining rights from the Association. In sum, there is no contention or evidence that prior to 1988 there was any contractual requirement that the Association notify the Union in the event that employers withdrew from the multiemployer unit or that the Association members relied on such a contractual requirement. To the contrary, the record shows that at least some of the Association members themselves provided written notice of withdrawal directly to the Union.

¹¹Our conclusion that the Company was still in the multiemployer unit at the time of its 1990 sale of assets to LFP Group would not resolve the ultimate issue of whether LFP Group was in the multiemployer unit when the Union refused to bargain with it individually in 1991, even though the judge found LFP Group to be the Company's successor. The membership of LFP Group's predecessor in the multiemployer unit and LFP Group's adherence to the multiemployer contract in effect when LFP Group purchased the Company's assets would not, standing alone, make LFP Group a member of the multiemployer unit. See *Pioneer Printers*, 201 NLRB 900 (1973). Further, as the judge found, LFP Group never expressed a clear intent to be bound to the multiemployer unit.

The Union contended that LFP Group was required to bargain on a multiemployer basis because, inter alia, LFP Group was an alter ego or single employer with the Company. The judge refused to accept evidence about whether LFP Group was an alter ego of, or single employer with, the Company and failed to rule on this question. The Union has excepted to this failure. The Union is correct, in our view, that, if LFP Group was an alter ego or single employer with the Company, LFP Group would have been a member of the multiemployer unit, as we would find that the Company remained a member of the multiemployer unit at the time it sold its assets to LFP Group. Thus, the question of LFP Group's alter ego or single employer status is determinative of whether the Union's refusal to bargain with LFP Group on an individual basis violated Sec. 8(b)(3). (LFP Group's subsequent attempt to withdraw from the multiemployer unit during the 1990–1991 contract negotiations clearly was untimely under *Retail Associates*. See *Chel Lacort*, 315 NLRB 1036 (1994)). Accordingly, the appropriate course is to remand this proceeding for presentation of evidence and resolution by the judge regarding whether LFP Group was an alter ego of, or single employer with, the Company.

APPENDIX

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

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

WE WILL NOT refuse to bargain with Lexington Fire Protection Group, Inc.

WE WILL, on request, bargain in good faith with Lexington Fire Protection Group, Inc., and, if we reach an agreement, WE WILL put that agreement in writing and sign it.

ROAD SPRINKLER FITTERS LOCAL
UNION NO. 669, AFFILIATED WITH THE
UNITED ASSOCIATION OF JOURNEYMEN
AND APPRENTICES OF THE PLUMBING
AND PIPEFITTING INDUSTRY OF THE
UNITED STATES AND CANADA, AFL-
CIO

Damon W. Harrison, Jr., Esq., of Cincinnati, Ohio, for the General Counsel.

William W. Osborne, Esq. (Beins, Axelrod, Osborne & Money, P.C.), of Washington, D.C., for the Respondent.

Robert F. Houlihan, Esq. and *Larry A. Sykes, Esq. (Stoll, Keenon & Park)*, of Lexington, Kentucky, for the Charging Party.

DECISION

STATEMENT OF THE CASE

GEORGE F. MCINERNEY, Administrative Law Judge. Based upon a charge filed by Lexington Fire Protection Group, Inc. (the Group) on March 20, 1991, the Acting Regional Director for Region 9 of the National Labor Relations Board issued a complaint on July 25, 1991, alleging that Road Sprinkler Fitters Local Union No. 669, affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO (Local 669 or the Union) had violated Section 8(b)(3) of the National Labor Relations Act (Act) by refusing to bargain in good faith with the Group. The Union filed a timely answer in which it denied the commission of any unfair labor practices.

Pursuant to notice contained in the complaint, a hearing was held before me in Lexington, Kentucky, on September 19, 1991, at which all parties were represented by counsel, and had the opportunity to present witnesses and documentary evidence, to examine and cross-examine witnesses, to present motions, and to argue orally. After the close of the hearing, all parties submitted briefs, which have been carefully considered.¹

¹ In this case I found all the briefs to be exceptionally clear, concise, and well prepared.

Upon the entire record, including my observations of the witnesses, and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Group is a corporation that is engaged in selling and installing fire prevention equipment from its location in Lexington, Kentucky. It received gross revenues in excess of \$500,000 in the 12 months before the issuance of the complaint, and received at its Lexington location in that same period goods and materials valued at over \$50,000 directly from points outside the Commonwealth of Kentucky. The complaint alleges, the answer admits, and I find that the Group is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The complaint alleges, the answer admits, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED REFUSAL TO BARGAIN

A. Background

In 1975 Lexington Fire Protection Company, Inc. (the Company), to differentiate it from Lexington Fire Protection Group, Inc., became a member of an organization called National Fire Sprinkler Association, Inc. (NFSA). At the same time the Company assigned to NFSA the right to conduct collective-bargaining negotiations on its behalf, and the Company agreed to be bound by collective-bargaining agreements negotiated on its behalf by NFSA.

NFSA was described by its Associate Director of Labor Relations, Cornelius J. Cahill, as a trade association of employers engaged in the fire protection business.² In the labor relations area, the Association has three classes of membership; first, contractors who have agreements with unions and who have assigned the duties of bargaining to NFSA; second, those who have labor agreements, but negotiate on their own; and, third, nonunion contractors. Those in each category are described as being on the "A" list if they assign bargaining rights, on the "B" list if they do their own bargaining, and on the "C" list for those who operate non-union.

NFSA negotiates with 17 or 18 unions nationwide, including the Respondent here, Local 669.³ This is a national local in this industry, representing 8000 to 8500 employees in the 48 contiguous States, the District of Columbia, and Puerto Rico.

Lexington Fire Protection Company, the Company, was placed on the "A" list and was covered by the national con-

² Including contractors who do installation of sprinkler systems and other fire protection equipment, and also suppliers to the industry and manufacturers of equipment used by other members of NFSA.

³ H. V. Simpson, the business manager of Local 669 testified that NFSA bargains with the Union on behalf of about 300 employers, in national negotiations. Another 100 or so employers bargain with the Union on their own.

tract negotiated by NFSA and Local 669 up to and including an agreement that terminated in 1988.

According to Cahill, the members of the Association are free to become members of the joint bargaining group, to bargain independently, or to resign from the Association altogether. Those members on the "A" list who resign are immediately taken off the list. The Association is not concerned with the relationship between the individual employer who resigns from the multiemployer unit, but they will inform the employer, if the resignation is untimely, that he will be bound by a collective-bargaining agreement entered into in that time period. Otherwise it is up to the employer and the Union to work out their own relationship.

At the beginning of national negotiations⁴ the Association presents the Union with an updated copy of the "A" list. The Union then checks it over, and, if the list does not agree with the Union's records, the matter is taken up with the Association. In some instances, as shown in correspondence contained in the record here, the problems may be due to clerical errors or changes in corporate titles or ownership, and are adjusted. In other cases there are disagreements, the solutions to which do not appear in the record.

B. *The 1987 Withdrawal*

As has been noted, Lexington Fire Protection Company was a member of the multiemployer and appeared on the "A" list on a contract that was to expire on April 1, 1988.

On October 23, 1987, the Company, by its President Royce E. Blevins, sent a letter to NSPA informing the Association that Lexington Fire Protection Company would "represent itself in the spring negotiations and will be our own bargaining agent." No copy was sent to the Union, but apparently the Company's name was removed from the "A" list, which was submitted to the Union at the beginning of negotiations in November 1987.

The Union checked the list submitted by NFSA against its own records, and noted in internal memorandum dated December 16, 1987, that there was nothing in the Union's files to show that the Company had withdrawn from the multiemployer limit. This was followed up by a letter from R. V. Simpson, business manager of the Union, to the Company,⁵ dated February 2, 1988, stating that the Company, "as a contractor member of the multi-employer bargaining unit" will be "bound to the results of those negotiations."

C. *The Transfer to the Group*

Kenneth W. Carpenter, the President of Lexington Fire Protection Group, testified that in June 1990, the group of which he is a member purchased the assets of Lexington Fire Protection Company, changed the name to Lexington Fire Protection Group, and continued to operate the same business with the same employees, the same customers, and under the same collective-bargaining agreement as the Company had operated.

The owners of the Group are Carpenter, Vicki and Frank Blevins, Carlos Pennington, and Shade White.⁶

⁴The record shows that those negotiations begin in November of the year prior to the expiration of an existing contract.

⁵With a copy to the Association.

⁶Pennington had owned an equity interest in the Company, the two Blevinses were related to Royce E. Blevins, former president of

Carpenter testified that the Group continued to operate during 1990 under the terms of the multiemployer agreement with the Union. The Group paid dues to NFSA until April 1991,⁷ but apparently did not notify the Association of its change of name, because Cahill testified that the enterprise was still carried on the books of the Association as Lexington Fire Protection Company.

D. *The August 1990 meeting*

There was no contact between the Union and the new owners of the Lexington Fire Protection enterprise until August 1990.⁸ Gerald Singleton had talked to Shade White⁹ at least once, and a meeting was arranged between Singleton, White, and Carpenter in Carpenter's office. They talked about general things, companies, and people in the fire protection business.

According to Carpenter, he told Singleton that he "did not want the Association to do our bargaining in this—or our contract—that we wanted to bargain our own contract with the Union." Singleton replied that he thought they should let the Association bargain for them. Carpenter said that he "wanted to bargain with Local 669 myself."

During the meeting, White asked Singleton whether they needed to sign a new contract for the remaining term of the multiemployer agreement, or whether that agreement would cover them. Singleton said he would find out. Apparently he did, because on September 19, 1990, Business Manager Simpson wrote to Carpenter voting the change of the corporate name, and stating that "It is understood by Local Union No. 669 that any reference to your company by either name includes both companies for the duration of the current collective-bargaining agreement." Simpson asked for a reply if this understanding was not correct. The Group made no reply.

White testified that he contacted Singleton as early as July to come in and talk to people at the Group.¹⁰ He sat in on the meeting with Carpenter and Singleton and he recalled that "Mr. Carpenter mentioned that he wanted to be an independent company," and that Singleton answered that he "thought we would be better off if we would stay in the Association at that time." Carpenter did say that he wanted to bargain "with the Union himself rather than have a bargaining agreement." White added that he had agreed with Carpenter, stating to Singleton that he "wanted to be an Inde-

the Company, and Shade White, the field superintendent of the Company, continued in that capacity with the Group, as well as becoming a shareholder. There was some talk in this hearing about whether the Group is an alter ego, or a simple employee with the Company, but I did not then, and do not now, feel that the issue is relevant to this proceeding.

⁷Carpenter said at the hearing that the Group intended to commence paying dues again.

⁸There was some disagreement between the testimony of Carpenter and Shade White, who described three meetings as taking place in August, and Union Business Agent Gerald Singleton, who said it was in September. This difference is not important because either date puts the meeting 2 months or so before the start of negotiations for the multiemployer unit in November.

⁹White is a member of the Union and has been since 1965, even though he is clearly a supervisor within the meaning of the Act.

¹⁰White also stated in his testimony that he was still, at the time of this hearing, operating under the Local 669 contract. He did not say which one, and no one pursued the matter.

pendent company.” Finally, Singleton said that the Group was bound by the contract they had accepted in the agreement when they bought out the Company, and they were bound by it until April 1, 1991. He did not “see any problem with us continuing on as we were.” White agreed to this.

As I noted above, Singleton recalled that the meeting occurred in September. He did agree that he met with Carpenter and White, and that they talked about the industry and mutual acquaintances in the business. He did recall that the matter of the new contract was brought up, but he said he could not remember who brought it up. He recalled Carpenter saying that he “could not stand a labor stoppage or strike at the expiration of the contract.” Singleton tried to allay his fears on that point, but Carpenter “brought that subject up again.” Singleton did not recall Carpenter saying that they intended to negotiate independently.

Because Singleton did not recall what Carpenter said about independent negotiations, I think it is reasonable to infer that Carpenter’s version of what he said at the meeting is correct. White’s testimony would indicate, and I think an inference is permissible, that Carpenter was not forceful, or unequivocal in his statements, leaning more toward “we want to” rather than “we will” or “we are going to.”

E. *The January 1991 Withdrawal*

On January 29, 1991, the Group wrote to the Union informing it that “to the extent” that the Group was a party to the 1988 multiemployer agreement “is in bound by the same company [the Company] we hereby notify you that this company wishes to terminate that agreement.”¹¹ The Union promptly, on February 1 acknowledged this letter and advised that the Union would be in contact with the Group on “negotiations for a new agreement.”

This last apparently slipped through undetected at the Union’s office, because on February 6 the Union sent another letter to the Group stating that the February 1 letter was “a clerical error,” and that it was the position of the Union that the Group was bound to the ongoing negotiations for the multiemployer unit.

After this exchange, there was additional correspondence between the Union and the Group. The Union on February 11 sent a questionnaire to the Group requesting information regarding its equity owners, officers, business locations, names, and dates of hire of all supervisory and non-supervisory employees, and all transactions between the Company and the Group. In addition the Union requested the Group to set forth its position about why it contended it was not bound to the authorization given by the Company to NFSA to represent it for purposes of collective bargaining.

The Group responded on March 8 by stating that after consulting its legal counsel¹² it was not represented for collective bargaining by NFSA.

¹¹ On the same date the Group notified NFSA that it withdrew any bargaining rights from the Association to represent the group in negotiations with the Union.

¹² By this time the Group was represented by their current counsel, the firm of Stoll, Keenon & Park, of Lexington, see letter of January 29 to NFSA indicating that Houlihan of the Stoll, Keenon firm was representing it at that time. Before the Group was represented by some other, unidentified, counsel.

In this March 8 letter, the Group outlined its position as follows: It admitted that a group of its employees have chosen to be represented by the Union, and that the Union is their bargaining representative. The Group, however, is a “distinctly separate corporation from its predecessor,” the Company. The Group has a different set of offices, and a substantially different set of shareholders, although the present supervisors are the same as those employed by the predecessor. The Group purchased the assets of the Company during 1990, and immediately began to function in the same general area (of business) and with the same group of employees covered by (the then-current multiemployer contract). The Group continued to operate under the terms of that contract, but gave notice to the Union, to the extent that such was necessary,¹³ that it was willing to negotiate a new contract with the Union. The Group again urged the Union to contact Carpenter and set up a time and place to negotiate.

The Union’s reply to this, dated March 14, was a threat to file unfair labor practice charges, and a request to direct any future correspondence on this issue to the Union’s lawyers.

The question of the accuracy of the Association’s “A” list was the subject matter of correspondence between the Union and the Association during the late fall and winter of 1990–1991. On December 3 the Union’s counsel, who participated in the negotiations and had been present at the November 9 meeting when the “A” list was presented by NFSA, wrote to Cornelius Cahill informing him that 12 contractors who participated in the previous, 1988 negotiations, did not appear on the “A” list. Among these contractors was Lexington Fire Protection Company. Cahill responded on January 2, 1991, going down the list and noting that three of the companies named had been voted out as Association members by the NFSA board of directors, three had associated with the other companies that were properly carried on the “A” list, one which should have been carried on the “A” list, several companies, including Lexington Fire Protection Company, which had either resigned from the Association, or had withdrawn bargaining rights from it, and one company that was unknown to the Association.¹⁴

Counsel for the Union replied to this letter on January 10, agreeing with some of the Association’s explanations, and disagreeing with others, including the Association’s assertion in its January 2 letter that “Lexington Fire Protection Company is a member of the Association who has not assigned its bargaining rights to the Association. The Association does not represent Lexington Fire Protection and it is not part of the multiemployer group.”

The Union referred to its letter to the Lexington Fire Protection Company dated February 2, 1988,¹⁵ and maintained its position that “Lexington was bound to multi-employer negotiations for the existing agreement and our files reflect no contrary notification from that time until the November

¹³ This presumable refers to an 8(d) 60-day notice, given on January 29 to terminate an agreement that was due to expire on April 1.

¹⁴ One company named on the Union’s list was not listed in the Association’s reply, but that company has nothing to do with this case.

¹⁵ A copy of which is in evidence here and that shows that a copy was sent to NFSA.

9 commencement of negotiations for a successor agreement.”

An additional exchange of correspondence was entered into record on the question of whether the submission of the “A” list at the first negotiating session, before the exchange or discussion of any collective-bargaining proposals, constituted legally sufficient notice of the presence or absence of a contractor from the multiemployer unit being represented by the Association.

F. Conclusions

Before considering the principal issues in this case, I think it is necessary to make three preliminary findings. The first is that the evidence submitted by the Union on the issue of “misconduct” by the Group as a result of Shade White’s discussions with two employees about a possible nonunion operation, is insufficient to allow me to determine that a motive, or one of the motives, of the Group in seeking independent bargaining, was to operate on a nonunion basis. Moreover, the Group has offered and continues to offer to negotiate on an individual basis with the Union, a situation that I feel would make the Group more vulnerable to union pressure than as a member of a multiemployer bargaining unit. The unfair labor practice filed by the Union on this matter was the subject of a complaint issued by the Regional Director for Region 9 of the Board, and was informally settled before hearing. The Union did not, as was its right (NLRB Rules and Regulations, Sec. 102.26) appeal the settlement. I, therefore, find that there has been no showing of an unlawful or an insincere motivation by the Group in this proceeding.

The second preliminary finding I make here deals with the status of the Group as a successor to the Company. There is no question concerning this fact in the record. The Group took the assets, the customers, the employees, and the supervisors of its predecessor and continued the same business in the same location. Both White and Carpenter assured Union Business Agent Singleton that they would comply with all of their contractual obligations to the Union and to their employees and they did so comply. Thus, I find the Group to be a successor employer to the Company; *NLRB v. Burns Security Services*, 406 U.S. 272 (1972); *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987).

Having found the Group to be a legal successor to the Company, I find further that the Group adopted and applied the existing multiemployer contract during 1990 and early 1991, but at the same time the Group qualified its position with respect to subsequent negotiations and Carpenter made it clear as I have found, that he wished the Group to negotiate independently with the Union.

The Board’s procedures with respect to withdrawal from a multiemployer unit are set forth in *Retail Associates, Inc.*, 120 NLRB 388 (1958). The Board attempted in that case to balance the rights of unions and employers to associate freely with others in bargaining relationships, or to refrain from or withdraw from such associations, against the “fundamental purposes of the Act of fostering and maintaining stability in bargaining relationships.” Although mutual consent of the Union and employers involved is a basic ingredient supporting the appropriateness of a multiemployer bargaining unit, the stability requirement of the Act dictates that reasonable controls limit the parties as to the time and manner that with-

drawal will be permitted from an established, multiemployer bargaining unit.” Pursuant to these precepts, the Board stated, “He would accordingly refuse to permit the withdrawal of an employer or a union from a duly established multi-employer 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 multi-employer negotiations. Where actual bargaining negotiations based on the existing multi-employer 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.” *Retail Associates*, supra.

In this case, the simple exchange of information contemplated by the Board’s decision is complicated by the presence of the Association itself, the agent for the 300 or so employers forming the unit. The Association certainly must, for its own protection, and to assure that the needs of its constituent membership are carefully considered, establish policies and procedures to channel new members into the unit, and to facilitate the exit of those who wish to withdraw. But those internal institutional procedures of the agent should not divert the flow of critical information between the parties to the multiemployer relationship. I am here referring to the practice of the Association, when a member wishes to withdraw from the multiemployer unit, of striking that member’s name from the “A” List, but not notifying the Union until the beginning of negotiations (in recent history this could be as long as 3 years) of the fact, by the presentation of the “A” list to the Union.¹⁶

Of course the Association is not on trial here, and I certainly appreciate and sympathize with the Association’s problems in dealing with 300 proud, independent, contrary, and possibly fractious members, along with 17 or 18 unions nationwide. Likewise, I can appreciate the strictures that this practice places on the Union. Here the Union is confronted at the beginning of negotiations with a list of 300 or some names of employers. Cahill’s testimony and the correspondence between the Union and the Association on the subject of the deletions from the list, show that of the 12 companies named by the Union as missing from the list without prior notification; 3 had changed their names or associated themselves with other companies that did appear on the list; 1 that was omitted from the list by mistake; 1 that the Association had never heard of; 3 which, for reasons not stated, had been voted out of the Association by its board of directors; and 3 companies, including Lexington Fire Protection Company, which had withdrawn or attempted to withdraw from the multiemployer unit.

The practical problems that emerge from the evidence in this case are varied and complex, confronting the Association, the Union, and the members of the multiemployer group. If, as will be noted below in the discussion of the Board’s rulings qualifying *Retail Associates*, the presentation of the list determines the makeup of the unit, what happens to the companies stricken from the list by action of the Association’s board of directors, say, for nonpayment of dues, but

¹⁶The April 1, 1988 agreement provided in art. I, third paragraph, that the Association would notify the Union of withdrawals, terminations, or additions within 20 days of such actions. Cornelius Cahill testified that this was not done. He testified that the Association would advise an employer attempting to withdraw if such action was untimely, but not in any other way.

which have not indicated that they do not wish to withdraw from the multiemployer unit? What of the orphan employer, of which the Association knows not? Or a company on the list that merges with one not on the list? Or vice versa?

These are only a few of many problems which one more clever than I might discern in this situation. Some changes in the current practice followed by the Association and the Union here could have prevented this case from taking the course that it has.

The first issue in this case dealing with withdrawal occurred on October 23, 1987, when Royce Blevins, president of the Company wrote to the Association advising that the Company would represent itself in the spring negotiations and would be its own bargaining agent. They indicated that they did not require NFSAs as their agent. As I noted above, no copy of this was sent to the Union.

Under the *Retail Associates* standards, if this was all, this withdrawal would not appear to have been effective because it was not communicated to the Union in writing. We do not know when the 1987 negotiations began. Assuming that the procedure then was roughly the same as in 1990, negotiations beginning on the second Friday of November would have occurred on November 13, 1987. The Association had not notified the Union about the withdrawal, but did strike the Company's name from the "A" list presented to the Union at the first negotiating meeting. There was no evidence about the beginning of negotiations in 1987, but, in talking about the 1990 negotiations, Cahill stated that after the parties had "introduced one another and exchanged some pleasantries, the Local asked for the List." The list was not discussed at all, but, as Cahill stated, "it was put in somebody's briefcase and we went on to exchanging proposals." On the basis of this evidence, and on the premise that negotiations for this multiemployer unit were conducted in substantially the same way, using the same formalities and ceremonies, indeed, the testimony of Union Business Manager H. V. Simpson shows that the 1987 negotiations were conducted in exactly the same way, and in the same order, with the list being delivered before any proposals changed hands. I believe this case is controlled by the Board's decision in *Lenox Grill*, 170 NLRB 1027 (1968). In that case, the member company notified its bargaining representative, an association, of its withdrawal from the unit, but did not notify the union, in advance of negotiations. At the first negotiating session, the association representative present informed the Union of the Company's withdrawal, "before any other matters were discussed at the meeting" *Lenox Grill*, supra at 1029. This decision was followed by the Board in *Associated General Contractors*, 238 NLRB 156 (1978), in which the Board stated "We consider the sequence of events at the May 24 meeting [the first meeting between the multiemployer group and the Union] to be critically important. Our conclusion that the notice of the withdrawal was timely is predicated as the credited testimony of [a witness] which reveals that the notice of withdrawal was given prior to the onset of negotiations." *Associated General Contractors*, supra at 238 NLRB 156 fn. 2. The critical point, then, is the

submission by at least one party of proposals for a new amended agreement.¹⁷

Because the withdrawal by the Company met the Board's requirements, the Company need not have been bound by the 1988-1991 multiemployer contract. In fact, the Company observed all of the terms of that contract until it conveyed its assets to the Group. The Group, as I have found, continued its adherence to the terms of the 1988-1991 contract, but it is clear that neither the Company, nor the group ever expressed a clear and unequivocal intent to be bound to the multiemployer unit. Contrary to the Union's argument, I cannot find that the Group adopted the multiemployer unit, nor is it bound by the "membership in the unit to which it succeeded; cf. *White-Westinghouse Corp.*, 229 NLRB 667 (1977); *Indianapolis Mack Sales & Service*, 288 NLRB 1123 (1988). The Group never exhibited any intent to become a member of the Group, and the only expression that the Group did make, at the August meeting with Singleton was just the opposite. See *Lenox Grill*, supra at 1030.

Because the 1987 withdrawal was effective, and because there was no novation, or adoption of membership in the multiemployer unit by either the Company or the Group thereafter, then what happened in November 1990 was really irrelevant. The employer was out of the multiemployer unit, and its absence from the "A" list, controlling to a determination of the issues here.

I find that by refusing to bargain with the Group, as requested by it in January of 1990, the Union is in violation of Section 8(b)(1)(A) and (3) of the Act.

IV. THE REMEDY

Having found that the Union has violated Section 8(b)(3) of the Act, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

I shall order the Union to bargain in good faith with the Group in the following bargaining unit, which I find to be appropriate,

All journeymen sprinkler fitters and apprentices in the employ of Lexington Fire Protection Group, Inc. who are engaged in the installation, dismantling, maintenance, repairs, adjustments and corrections of all fire protection and fire control systems including the unloading, handling by hand, power equipment and installation of all piping and tubing, appurtenances and equipment pertaining thereto, including both overhead and underground water mains fire hydrants and hydrant mains, standpipes and hose connections to sprinkler systems, sprinkler tank heaters, air lines and terminal systems used in connection with sprinkler and alarm systems, also all tanks and pumps connected thereto, also included shall be CO-2 and Carbox Systems, dry chemical systems, foam systems and all other fire protection systems, but excluding steam fire protection systems. Excluding all other employees of the employer,

¹⁷ See *Carvel Co.*, 226 NLRB 111 (1976), in which notice was not given until the Unions' proposals had been sent by mail to the multiemployer unit representatives.

office clerical employees, guards and supervisors as defined in the Act.¹⁸

and if agreement is reached, to reduce such agreement to writing and execute same.

I shall further order the Union to post appropriate notices.

CONCLUSIONS OF LAW

1. The Group 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(6) of the Act.

3. By refusing to bargain individually with the Group, the Union has violated Section 8(b)(1)(A) and (3) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁹

ORDER

The Union, Road Sprinkler Fitters Local Union No. 669, affiliated with the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the

¹⁸The substance of this definition of the unit is identical with the description of the Union's jurisdiction contained in art. 18 of the 1988-1991 collective-bargaining agreement, received in evidence here, with the addition of the customary exclusions from a unit of production employees. Although the Union's answer denied that this unit was appropriate, the Union introduced no evidence to support that claim.

¹⁹If 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.

United States and Canada, AFL-CIO, Lexington, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to recognize and bargain in good faith with Lexington Fire Protection Group, Inc.

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

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

(a) Upon request bargain in good faith with the Group as the employer of employees employed in the unit as set out in section IV of this decision, and if an agreement is reached, reduce such agreement to writing and execute same.

(b) Post the notice to members attached hereto at the offices of Lexington Fire Protection Group, Inc., in Lexington, Kentucky copies of the attached notice marked "Appendix."²⁰ Copies of the notice, on form provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

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

²⁰If 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."