

District Council of Painters No. 8 of the Brotherhood of Painters and Allied Trades AFL-CIO and Northern California Drywall Contractors Association and District Council of Painters No. 16 of the Brotherhood of Painters and Allied Trades, AFL-CIO; Anderholt Specialties, Inc.; Aero Drywall; Anning-Johnson, Company, Inc.; Boyett Construction, California Drywall; DDR, Inc.; Tom Daniels Taping, Inc.; Raymond Guarglia Drywall; Golden Gate Drywall; H. L. Heggstad, Inc.; Lakewood Construction Specialties; RFJ, Inc. d/b/a Joseph Meiswinkel Co.; Frederick Meiswinkel, Inc.; and S&R Drywall, Parties in Interest. Case 32-CB-4848

September 24, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On January 9, 1998, Administrative Law Judge Jay R. Pollack issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Party and District Council of Painters No. 16 of the Brotherhood of Painters and Allied Trades, AFL-CIO filed separate answering briefs.

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

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,¹ and conclusions and to adopt the recommended Order as modified.²

We shall require the Respondent to rescind the individual collective-bargaining agreements (the "Interim Agreements") it entered into with individual employer-members of the Northern California Drywall Contractors Association. See *Southern California Pipe Trades Council (Plumbing Industry)*, 292 NLRB 270 (1989). In addition, we do not adopt paragraph 2(b) of the judge's recommended Order, providing for a make-whole rem-

¹ The Respondent has 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), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully reviewed the record and find no basis for reversing the findings.

Member Brame finds it unnecessary to pass on the validity of *Casale Industries*, 311 NLRB 951 (1993), and *MTF Fire Protection, Inc.*, 318 NLRB 840 (1995), cited by the judge for the proposition that the Respondent could not challenge the legality of the 1989 voluntary recognition. Member Brame notes that the judge addressed the issue involving the 1989 voluntary recognition on the merits, and he rejected the Respondent's arguments on that issue.

² Because there is no complaint allegation or finding that the Respondent independently violated Sec. 8(b)(1)(A) of the Act, we shall delete from the recommended Order the general injunctive "like or related" language recommended by the judge. We have also substituted a new notice reflecting this modification. See *Paperworkers Local 620 (International Paper Co.)*, 309 NLRB 44 fn. 3 (1992).

edy for bargaining unit employees. See *Graphic Arts Union Local 280 (Barry Co.)*, 235 NLRB 1084, 1085 (1978), enfd. 596 F.2d 904 (9th Cir. 1979). Accordingly, we shall substitute a new notice to members reflecting these modifications.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, District Council of Painters No. 8 of the Brotherhood of Painters and Allied Trades, AFL-CIO, Oakland, California, its officers, agents, and representatives, shall take the action set forth in the Order as modified.

1. Delete paragraph 1(c).

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

"(b) Rescind the Respondent's 'Interim Agreements' with the employer-members of the Association that purport to succeed the 1993-1997 agreement between the Association and District Council of Painters No. 16 and the Respondent."

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

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 refuse to bargain in good faith with the Northern California Drywall Contractors Association by withdrawing from multiemployer/multiunion bargaining, failing and refusing to honor and abide by the 1997-2000 collective-bargaining agreement between the Association and District Council of Painters Nos. 8 and 16 and by entering into separate collective-bargaining agreements with employer-members of the Association.

WE WILL rescind the "Interim Agreements" with the employer-members of the Association that purport to succeed the 1993-1997 agreement between the Employer and District Council of Painters Nos. 8 and 16.

WE WILL make whole any employer-members of the Employer-Association for any expenditures made, after August 7, 1997, pursuant to the "Interim Agreements" which they would not have been obligated to make under the 1997-2000 collective-bargaining agreement between the Employer-Association and District Council of Painters Nos. 8 and 16.

The appropriate unit for purposes of collective bargaining within the meaning of Section 9 of the Act is:

All employees performing work covered by "Second Clause Scope of Work" of the master collective bar-

gaining agreement between the Employer (The employer-members of the Northern California Drywall Contractors Association) and the Union (District Councils of Painters Nos. 8 and 16), effective for the period August 1, 1997 through July 31, 2000, excluding all other employees, guards, and supervisors as defined in the Act.

DISTRICT COUNCIL OF PAINTERS NO. 8 OF THE BROTHERHOOD OF PAINTERS AND ALLIED TRADES, AFL-CIO

Gary M. Connaughton, Esq., for the General Counsel.

James E. Eggleston, Esq. (Eggleston, Siegel & LeWitter), of Oakland, California, for the Respondent.

Morton H. Orenstein, Esq. (Schacter, Kristoff, Orenstein & Berkowitz), of San Francisco, California, for the Employer and the Employer Parties in Interest.

David A. Rosenfeld, Esq. (Van Bourg, Weinberg, Roger & Rosenfeld), of Oakland, California, for Painters District Council 16, Party in Interest.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge. I heard this case in trial at Oakland, California, on October 27, 28, 29, and 31, 1997. On August 4, 1997, Northern California Drywall Contractors Association (the Association or the Employer) filed the charge in Case 32-CB-4848 alleging that District Council of Painters No. 8 of the Brotherhood of Painters and Allied Trades (Respondent or District Council 8) committed certain violations of Section 8(b)(3) of the National Labor Relations Act (29 U.S.C. § 151 et seq.) (the Act). The Association filed an amended charge on August 13, 1997. On August 14, 1997, the Acting Regional Director for Region 32 of the National Labor Relations Board issued a complaint and notice of hearing against Respondent, alleging that the Union violated Section 8(b)(3) of the Act by refusing to bargain in good faith with the Association. The complaint was amended on September 4, 1997. Respondent filed timely answers to the complaints, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. On the entire record,¹ from my observation of the demeanor of the witnesses,² and having considered the posthearing briefs of the parties, I make the following

¹ On December 3, 1997, counsel for the General Counsel filed a motion to correct the transcript. As the motion is unopposed, I grant the motion and incorporate the corrections as Judge's Exh. 1.

² The credibility resolutions have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings here, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

The Association is an organization of various employers engaged in the drywall sector of the construction industry in northern California. The Association represents its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including Respondent.

Anning-Johnson Company has been an employer-member of the Association and has authorized the Association to represent it in negotiating and administering collective-bargaining agreements with various labor organizations, including Respondent. During the 12-month period prior to the issuance of the complaint, Anning-Johnson Company, purchased and received materials valued in excess of \$50,000 directly from suppliers located outside the State of California. Accordingly, Respondent admits that the Association and its employer-members meet the Board's jurisdictional standards.

Respondent is an organization composed of three local unions, Painters Local Unions Nos. 4, 23, and 364 of the International Brotherhood of Painters and Allied Trades, AFL-CIO. Respondent admits and I find that Respondent and each of its constituent member organizations, is a labor organization within the meaning of Section 2(5) of the Act.

District Council 16 of the Brotherhood of Painters and Allied Trades (District Council 16) is an organization composed of various local unions of the International Brotherhood of Painters and Allied Trades, AFL-CIO. Respondent admits and I find that District Council 16, and each of its constituent member organizations, is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background and Issues

For a number of years, Respondent and District Council 16 have been parties to a series of collective-bargaining agreements with the Association and its employer-members. The 1993-1997 agreement expired on July 31, 1997. Prior to 1997, District Council of Painters No. 33 was part of the multiunion bargaining group with Respondent and District Council 16. However, prior to 1997, District Council 33 merged into District Council 16. The multiemployer/multiunion agreements covered the terms and conditions of employment for employees performing work as drywall tapers for the employer-members of the Association in the geographic territories of the constituent locals of the District Councils.

Bargaining for a successor agreement to the 1993-1997 collective-bargaining agreement commenced on July 9, 1997. The parties met on five subsequent occasions and, on July 25, reached tentative agreement on a successor collective-bargaining agreement, subject to ratification by the employer-members of the Association and the employee-members of District Council 16 and Respondent. On July 31, 1997, the employee-members of Respondent and District Council 16 voted, in pooled voting, to reject a proposed tentative collective bargaining agreement for the period of August 1, 1997, to July 31, 2000. On August 2, Respondent proposed new ground rules for collective bargaining for a successor agreement to the 1993-1997 contract. These new ground rules were rejected by both the Association and District Council 16. On August 3,

after both the Association and District Council 16 rejected Respondent's proposed ground rules, Respondent withdrew from the multiemployer—multiunion bargaining. Thereafter, the Association and District Council reached an agreement on a tentative contract to succeed the recently expired collective-bargaining agreement, subject to ratification. The contract was ratified by the employer-members of the Association and the employee-members of District Council 16. However, Respondent refused to submit the contract for ratification. Further, beginning on August 3, Respondent commenced signing individual contracts with employer-members of the Association. Respondent has refused to abide by the terms and conditions of the multiemployer/multiunion contract negotiated by District Council 16 and the Association.

The General Counsel, the Association, and District Council 16 contend that District Council 16 and Respondent were the joint exclusive bargaining representative of the employees employed by the employer-members of the Association. They further contend that Respondent and District Council 16 were recognized jointly as the exclusive bargaining representative of the employees under Section 9(a) of the Act in the 1989 and 1993 agreements. Thus, the complaint alleges that Respondent violated Section 8(b)(3) by its untimely withdrawal from the multiemployer/multiunion bargaining. Further, the complaint alleges that Respondent violated Section 8(b)(3) by bargaining directly with, and signing contracts with the employer-members of the Association.

Respondent contends that it did not withdraw from nor repudiate a multiemployer/multiunion bargaining relationship. Respondent avers that it is "willing and able to bargain on a multiunion basis with District Council 16 as its partner, providing Respondent has equal voice at the bargaining table." Respondent also contends that District Council 16 and Respondent were separate representatives of the employees in their respective geographic areas. Respondent argues that the bargaining relationship was not a 9(a) relationship but rather a relationship under Section 8(f) of the Act. It further argues that even if the bargaining relationship was a 9(a) relationship, the two District Councils were separate representatives and not a joint representative.

B. Bargaining History

In 1985, a dispute arose between Respondent and District Councils 16 and 33 and the Association as to whether District Council 8 was bound by the 1982 amendments to the 1980–1983 Bay Area Dry Wall Finishers Joint Agreement. That dispute was submitted to Arbitrator Harvey Letter. In a decision dated July 29, 1985, the Arbitrator found that Respondent was bound by the amended multiemployer-/multiunion agreement between the Association and the three District Councils. In that dispute, Respondent had engaged in group bargaining with District Councils 16 and 33. After the tentative agreement was agreed to by the union negotiators and Employer negotiators, the tentative agreement was to be submitted to members of the multiunion group for "pooled" ratification vote. However, Respondent refused to submit the contract to its members for ratification and sought to withdraw from the group bargaining. The Arbitrator found that Respondent had violated Section 8(b)(3) of the National Labor Relations Act by failing and refusing to bargain in good faith with the Association by its refusal to honor the agreement as amended. The Arbitrator found that the three District Councils were a "group" bargaining rep-

resentative of the employees of the employer-members of the Association working in the geographic areas covered by the three District Councils. In doing so, the Arbitrator rejected Respondent's argument that it separately represented the employees working in its geographic jurisdiction. The arbitrator specifically found that Respondent had not effectively withdrawn from the multiunion bargaining unit and ordered Respondent to comply with the agreement.

The Arbitrator's award was enforced on October 11, 1985, by the United States District Court for the Northern District of California. In enforcing the award, the district court noted that Respondent was not bound to the multiunion bargaining unit "forever" but "must withdraw from the *group* in a timely fashion." Rather than withdraw from multiemployer/multi-union bargaining, Respondent entered into the 1986–1989 multiemployer/multiunion agreement. That agreement, included the same description of the bargaining unit as the agreements interpreted by the Arbitrator and District Court.

The 1989–1993 agreement expressly stated that it was entered into "by District Councils 8, 16 and 33 of the Brotherhood of Painters and Allied Trades, AFL–CIO (the Union) acting as the exclusive collective-bargaining representative of employee members of the Union, or who hereafter become members thereof, and the Northern California Drywall Contractors Association acting as the exclusive representative of Employer Members of said Association, or who hereafter become members thereof, and other Associations of Employers and Individual Employers who are signatory to this Agreement or any copy thereof and are regularly engaged in the Drywall Taping and Finishing business, all hereinafter referred to as the Employer."

In the 1989–1993 collective-bargaining agreement the Association voluntarily recognized the three District Councils as the exclusive bargaining representative of the employees in the same multiemployer/multiunion bargaining unit covered by the prearbitration agreements. Thus, at the request of the District Councils, the 1989–1993 agreement included the following recognition clause:

The Employer and each individual employer expressly acknowledge that they and each of them have satisfied themselves that the Union and/or each of its constituent bodies represents a majority of employees employed to perform bargaining unit work and agrees that the Union and/or each of its constituents is the collective bargaining representative of such employees. The Employer on behalf of itself and each of its members and each individual employer specifically agrees that it and they are establishing or have established a collective bargaining relationship by this Agreement within the meaning of Section 9 of the National Labor Relations Act of 1947, as amended.

I find that this language was not intended to change the historical multiemployer/multiunion bargaining unit. The purpose of this language was to protect the Union and the Employer from the adverse consequences of the Board's decision in *John Deklewa & Sons*, 282 NLRB 1375 (1987). See the discussion of *Deklewa*. By including this language in the agreement, the parties intended to bind individual employers to union representation at the expiration of the bargaining agreement. The language changing the relationship from one under Section 8(f) of the Act to a relationship under Section 9(a) of the Act did not change the fact that the three District Councils were recognized as a group as previously found by the Arbitrator and United

States District Court. The “Union” was defined in the Agreement as District Councils 8, 16, and 33 of the Brotherhood of Painters and Allied Trades, AFL–CIO, just as the term Union had been defined in the prior agreements.

The 1993–1997 agreement expressly stated that it was entered into “by District Councils 8 and 16 of the Brotherhood of Painters and Allied Trades, AFL–CIO (as the Union), acting as the exclusive collective-bargaining representative of employee members of the Union, or who hereafter become members thereof, and the Northern California Drywall Contractors Association acting as the exclusive representative of Employer Members of the Association, or who hereafter become members thereof, and other Associations of Employers and Individual Employers who are signatory to this Agreement or any copy thereof and are regularly engaged in the Drywall Taping and Finishing business, all hereinafter referred to as the Employer.” Except for the fact that the Union consisted of only District Councils 8 and 16, because District Council 33 had merged into District Council 16, this was the same language used in all the agreements between the Union and the Employer since 1974. The 1993–1997 agreement also contained the same language recognizing the Union as the Section 9 representative of the employees contained in the 1989–1993 agreement.

C. *The 1997 Negotiations*

On July 9, bargaining began for a successor agreement to the August 1, 1993, to July 31, 1997 agreement. During July, representatives of the Association met with representatives of the Union, District Councils 8 and 16 on six occasions. On July 29 a tentative agreement was reached subject to ratification by the employer-member of the Association and the employee-members of the two District Councils.³ On July 31, in pooled voting the employees rejected the tentative agreement. The employee-members of the two District Councils voted at the same time and were presented with the same proposed changes to the 1993–1997 agreement. While two separate totals were calculated for the two District Councils these totals were pooled and a grand total was calculated. This method of pooled voting had been used throughout the history of the multiemployer/multiunion bargaining relationship.

On July 31, 1997, Chuck Davenport, the secretary treasurer for District Council 16, informed Ronald Becht, the executive secretary of the Association and chief negotiator for the Association, that the tentative agreement had been rejected by the employees. Davenport further notified Becht that Robert Murray, who had been executive secretary of Respondent and chief spokesmen for the Union at the negotiations, had been defeated in Respondent’s intraunion elections. Rodney Reclus had been elected as Respondent’s new secretary treasurer. Davenport and Becht agreed to resume negotiations for the successor agreement on the morning of August 2. Davenport then called Reclus and informed him of the August 2 meeting.

The meeting of August 2 was scheduled for 10 a.m., but, Reclus and Respondent’s representatives did not appear until after 11 a.m. Respondent’s negotiators had been at a meeting that morning at which they had drafted new ground rules for the negotiations. Unhappy, with the conduct of negotiations, and the performance of Respondent’s former chief negotiator,

Robert Murray, Respondent drafted new ground rules.⁴ While Respondent contends that the import of the new ground rules was simply to give Respondent equal voice with District Council 16, the new proposed ground rules had the effect of changing the nature of the group bargaining. The new rules proposed that District Councils 8 and 16 were the exclusive collective-bargaining agents, “within the respective geographical jurisdictions of each District Council.” The two proposals which caused exception and disagreement by the Association and District Council 16 were:

No proposal will be made by Labor to Management and no tentative agreement will be reached by Labor and Management in these negotiations unless and until the designated negotiation teams for District Council 8 and 16 separately agree on such proposal or agreement. . . .

A tentative agreement or contract proposal will not be deemed ratified or have any force or effect unless and until it is duly ratified by membership referendum vote of drywall tapers which receives separate majority approval of the members of District Council 8 and District Council 16.

After some discussion of Respondent’s newly proposed ground rules, Davenport, on behalf of District Council 16, and Becht, on behalf of the Association, informed Reclus that Respondent’s proposed rules were unacceptable because they would create separate bargaining between the Association and the two District Councils. According to Becht, whom I credit, Reclus said that he was willing to bargain with the Association but only as a separate bargaining unit from District Council 16. Reclus stated that if the Association and District Council 16 did not accept his new ground rules, Respondent was not prepared to continue negotiations. Both Becht and Davenport refused to accept Respondent’s new ground rules. Becht reminded Reclus that District Council 8 had litigated the issue of separate bargaining in 1985 and that the arbitrator had decided the issue against Respondent. Becht said he would not bargain with Respondent separately and would only bargain with the two District Councils as a “joint” representative. Referring to Respondent’s proposal to change pooled voting, Davenport stated that he “wasn’t going to let the tail wag the dog.”⁵

Reclus handed Becht a note stating that the Association had no right to bargain over work within the geographic jurisdiction of Respondent and that Respondent would bargain directly with employers performing work in Respondent’s geographic area. Becht then wrote and handed Reclus a note stating that Respondent was not bargaining in good faith and asking why, if Respondent had wanted to withdraw from multiunion/multiemployer bargaining, it had not withdrawn in a timely fashion. Reclus and his negotiating team then left the meeting. After Reclus and Respondent’s representatives left, Becht asked Davenport to continue bargaining as the joint representative. However, Davenport answered that he had to consult with his attorney before negotiating further.

During the evening of August 2, Davenport called Becht and informed Becht that he had consulted with District Council 16’s attorney and that District Council 16 was prepared to negotiate an agreement covering the entire bargaining unit. Becht and

³ The tentative agreement contained no changes in the language recognizing District Councils 8 and 16 as the Sec. 9 representative of the employees employed by the employer-members of the Association performing drywall finishing work in northern California.

⁴ The original ground rules had been discussed and agreed on by all parties, including Respondent’s representatives, at the first negotiation session of July 9.

⁵ District Council 16 had approximately twice the number of tapers, eligible to vote for or against ratification, as District Council 8.

Davenport agreed to meet and negotiate the next morning. Becht called Reclus and requested that Reclus and his bargaining team attend the negotiation meeting the next morning.

On the morning of August 3, Reclus and his bargaining team met with representatives of the Association and District Council 16. Reclus again stated that Respondent would not continue negotiations unless its new ground rules were accepted. Both Becht and Davenport refused to accept the new ground rules and told Reclus that they would negotiate under the ground rules adopted by the parties on July 9. Reclus said that he was going to leave. Before leaving, Reclus asked Davenport if he was going to negotiate for Respondent. According to Davenport, whom I credit, he said "no." Davenport told Reclus, "I am the negotiator for District Council No. 16 and I have been advised by my attorney to stay and negotiate the contract that we started for."

Reclus testified that Davenport assured him that Davenport would only bargain over District Council 16's geographic area. I credit Davenport's testimony over that of Reclus. I found Davenport to be a credible witness. Further, his testimony is substantially corroborated by the testimony of Becht and other credible witnesses. Reclus, on the other hand, was so upset by the conduct of negotiations, that his perceptions are not trustworthy. Reclus was clearly biased against District Council 16, the Association and Robert Murray, Respondent's chief officer prior to July 31. Reclus was angry because he believed that Robert Murray had not properly performed his duties on behalf of Respondent. He was further angry because District Council 16 had granted concessions to the Association that were against his wishes. Moreover, Reclus was unhappy that pooled voting gave District Council 16 the ability to ratify a contract over the wishes of a majority of the employees in District Council 8. Reclus incorrectly believed that Respondent should be able to enter into a separate contract with the Association. Reclus believed Respondent was entitled to bargain separately with the Association and was willing to characterize his impressions or beliefs as facts in order to obtain the desired result in this case. Reclus wanted the Association to bargain with Respondent separately. However, the Association refused to bargain separately and demanded that Respondent bargain jointly with District Council 16.

I find Reclus' testimony to be unworthy of belief. Based on Reclus' testimony before me and the inconsistencies in his pretrial declaration, I am convinced that Reclus intentionally made inaccurate statements in his pretrial declaration and his trial testimony. He believed the declaration would help his case before the Board. During the hearing, Reclus determined that he could not testify that certain statements were factual and, therefore, Reclus testified that his statements in the declaration were his "impressions." He subsequently testified that these were not impressions and then again changed his testimony and testified that these statements concerning the meeting of August 2 were impressions. Thus, I find that Reclus testified in accordance with his interests in this case, without regard to the truth or falsity of his statements. Under these circumstances I cannot credit any of Reclus' testimony.

D. The 1997 Agreement and the Interim Agreements

On August 3, after Reclus and Respondent's bargaining committee walked out of the negotiations, the Association and District Council 16 reached agreement on a new tentative agreement, subject to ratification by the employer-members of

the Association and the employee-members of District Council 16 and Respondent. On August 4, Respondent received written notification from the Bay Area Drywall Joint Committee, comprised of employer and union representatives, of the ratification vote scheduled for August 7, a copy of the tentative agreement and copies of the joint minutes of the August 2 and 3 negotiation meetings. In this notification, the Joint Committee recommended that Respondent have its members vote on the tentative agreement. On August 7, the employee-members of District Council 16 voted to ratify the agreement. Respondent did not permit its employee-members to vote on the tentative agreement. Since only the members of District Council voted, the majority of votes cast by those employees was deemed sufficient for ratification. The employer-members of the Association also ratified the contract and the collective-bargaining agreement was put into effect.

Since August 3, Respondent has been bargaining directly with individual employers performing drywall finishing work within its geographical jurisdiction, including employer-members of the Association. Respondent has entered into "Interim Collective Bargaining Agreements" (Interim Agreements) with 16 employer-members of the Association, which contain some different terms and conditions of employment than the 1997-2000 agreement between the Association and the Union (District Councils 8 and 16). These differences include double time for Saturday work rather than time and a half; a commercial wage increase 50 cents an hour greater in the first year and 25 cents an hour greater in the second year; and elimination of the residential 1 and 2 classifications under the housing wage increase which are lower than the journeyman rate.

The Interim Agreements purport to cover the geographic jurisdiction of Respondent. The Interim Agreements assert that they are subject to Respondent and the Association entering into a collective-bargaining agreement to replace the 1993-1997 labor agreement. On August 11, Reclus notified Becht that Respondent was willing to bargain with the Association "in [the] District Council 8 geographic area." Reclus took the position that Davenport had agreed in Becht's presence to bargain only for District 16's geographic area. Becht wrote back declaring Reclus' letter "a glaring misstatement." On August 11, Reclus wrote Davenport claiming that Davenport had given assurances that he would not negotiate a Bay areawide agreement with the Association. Davenport wrote back asserting that Reclus' letter was "absolute nonsense." As stated earlier, I find no substance to Reclus' claim.

Analysis and Conclusions

A. The 9(a) Relationship

In *John Deklewa & Sons*, 282 NLRB 1375 (1987), the Board held that when parties enter into an 8(f) agreement, they will be required by virtue of Section 8(a)(5) and Section 8(b)(3) to comply with that agreement unless the employees vote, in a Board-conducted election to decertify their bargaining representative. In the absence of an election, on the contract's termination, the signatory union will not enjoy a presumption of majority status and either party may repudiate the 8(f) relationship. With respect to multiemployer bargaining in the construction industry, the Board held that the employees of a single employer cannot be precluded from expressing their representational desires simply because their employer has joined a multiemployer association. Under this framework, an employer, at the expiration of an 8(f) agreement, is free to withdraw recogni-

tion from the union and avoid any obligation to bargain for a successor agreement.

In *James Luterbach Construction Co.*, 315 NLRB 976, 979 (1994), the Board held, that in an 8(f) context, in order for an employer to obligate itself to be bound to the successor multiemployer contract, there must be more than inaction, i.e., the absence of a timely withdrawal. Thus unlike Section 9(a) relationships governed by *Retail Associates*, 120 NLRB 388 (1958), mere inaction during the multiemployer negotiations will not bind an 8(f) employer to a successor contract reached through those multiemployer negotiations. The Board set forth the following two part test:

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

In *Luterbach Construction*, the Board summarized the *Retail Associates*, as applying to Section 9(a) multiemployer bargaining relationships under Section 9 of the Act:

Each of the employers has a Section 9 bargaining relationship with the union, and the multiemployer group (consisting of those employers) has a Section 9 relationship with the union. Accordingly, at the end of the multiemployer contract, the employers have a statutory duty to bargain with the union for a successor contract. The only issue is whether they must bargain on a multiemployer or on a single employer basis. Under *Retail Associates*, if an employer wishes to abandon multiemployer bargaining and wants to bargain on a single employer basis, that employer must withdraw from the multi/employer unit in advance of multiemployer negotiations.

In *MTF Fire Protection, Inc.*, 318 NLRB 840 (1995), the Board found that the employer's execution of a written acknowledgment of the union as the exclusive collective-bargaining representative of its employees pursuant to Section 9(a) was sufficient evidence of the parties intent to change the status from Section 8(f) to Section 9(a). Further, the Board held that the employer could not, more than 6 months later, challenge whether the union was, in fact, the majority representative at the time the employer bestowed Section 9(a) status. 318 NLRB at 842, citing *Triple A Fire Protection, Inc.*, 312 NLRB 1088 (1993), and *Casale Industries*, 311 NLRB 951 (1993).

In the instant case, it is clear that District Councils 8, 16, and 33 were the exclusive bargaining representative of the employees in the multiunion/multiemployer bargaining. The Arbitrator and the district court termed this group bargaining but clearly indicated that the three District Council jointly represented the employees employed by the employer-members of the Association in one bargaining unit. Respondent could have withdrawn from this group or joint representative status in 1989, 1993, or, in a timely fashion, in 1997. However, Respondent did not withdraw from the group unit found by the Arbitrator and the district court. Rather, in 1989, Respondent entered into an agreement containing the same language describing the bargaining unit and adding language designed to make it more difficult for individual employers to withdraw from union representation. The language included in the 1989

agreement changed the multiemployer/multiunion relationship from an 8(f) relationship to one under Section 9(a) of the Act. The group or joint representative status did not change. The 9(a) recognition of the group or joint representative continued in 1993 and was unchanged in 1997.⁶

B. *The Untimely Withdrawal*

In *Retail Associates*, supra, 120 NLRB 388 at 393, the seminal case on multiemployer bargaining the Board held:

While mutual consent of the union and employers involved is a basis 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 withdrawal will be permitted from an established multiemployer bargaining unit. Thus, the Board has repeatedly held over the years that the intention by a party to withdraw must be unequivocal, and exercised at an appropriate time. 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. The element of good faith is a necessary requirement in any such decision to withdraw, because of the unstabilizing and disruptive effect on multi-employer collective bargaining which would result if such withdrawal were permitted to be lightly made. The attempted withdrawal cannot be accepted [as] unequivocal and in good faith where, as here, it is obviously employed only as a measure of momentary expediency, or strategy in bargaining. . . .

At page 395 the Board added, "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.

Subsequently, in *Evening News Assn., Owner & Publisher of 'The Detroit Evening News'*, 154 NLRB 1494 (1965), enfd. 372 F.2d 569 (6th Cir. 1967), the Board held that the rules governing employer withdrawals from multiemployer bargaining units are equally applicable to union withdrawals from such units. In *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404 (1982), the Supreme Court approved the Board's *Retail Associates* guidelines for withdrawal from multiemployer units.

Here, after participating in multiemployer/multiunion bargaining, Respondent sought to withdraw from the joint bargaining unless the Association and District Council accepted its new ground rules. The new ground rules, in effect, gave Respondent the option of bargaining jointly with District Council 16 or separately, if it did not agree with District Council 16. Incapable of obtaining its new ground rules, Respondent withdrew from the group bargaining, without the consent of the Association and District Council 16. Under *Retail Associates* and *Evening News Assn.*, the withdrawal of Respondent was ineffective. The Association and District Council could lawfully insist that Respondent remain subject to the multiemployer/multiunion bargaining.

Notwithstanding its absence from the bargaining table on August 3, Respondent was bound by the group action which

⁶ Under *Casale Industries*, and *MTF Fire Protection*, Respondent cannot now challenge the legality of the 1989 voluntary recognition.

resulted in a tentative agreement. The tentative agreement was subject to ratification. The joint committee provided Respondent with the proper documents to conduct a ratification vote. However, Respondent failed and refused to submit the tentative agreement to its members for ratification. Respondent cannot now complain that its members did not ratify the contract. The only employees who voted for or against ratification were employee-members of District Council 16. Under the procedure used by the Union and Employer in the past, the agreement was properly ratified. Respondent and District Council were recognized as joint representative by the Employer and the actions of District Council 16 acting on behalf of the Union was all that was required to bind the two District Councils to the collective bargaining agreement. See *Adobe Walls*, 305 NLRB 25, 27 (1991); *Crothall Hospital Services*, 270 NLRB 1420, 1423 fn. 17 (1984). Under these circumstances, Respondent was bound by the 1997–2000 agreement.

C. The Interim Agreements

In *Charles D. Bonanno Linnen Service v. NLRB*, 454 U.S. 404, 414–415 (1982), the Supreme Court stated:

the Board distinguishes ‘between interim agreements which contemplate adherence to a final unit-wide contract and are thus not antithetical to group bargaining and individual agreements which are clearly inconsistent with, and destructive of group bargaining.’ 243 NLRB at 1096. In *Sangamo Construction Co.*, 188 NLRB 159 (1971), and *Plumbers and Steamfitters Union No. 323 (P.H.C. Mechanical Contractors)*, 191 NLRB 592 (1971), the agreements arrived at with the struck employers were only temporary: both the union and the employer executing the interim agreement were bound by any settlement resulting from multi-employer bargaining. “[I]n both cases, since the early signers maintained a vested interest in the outcome of final union-association negotiations, the multi-employer unit was neither fragmented nor significantly weakened,” 243 NLRB at 1096, and unilateral withdrawal was not justified.

On the other hand, where the union, not content with interim agreements that expire with the execution of a unit-wide contract, executes separate agreements that will survive unit negotiations, the union has so “effectively fragmented and destroyed the integrity of the bargaining unit,” *ibid.*, as to create an “unusual circumstance” under *Retail Associates* rules. Cf. *Typographic Service Co.*, 238 NLRB 1565 (1978). Furthermore, the Board has held that the execution of separate agreements that would permit either the union or the employer to escape the binding effect of an agreement resulting from group bargaining is a refusal to bargain and an unfair labor practice on the part of both the union and any employer executing such an agreement. *Teamsters Union Local No. 378 (Olympia Automotive Dealers Assn.)*, 243 NLRB 1086 (1979). The remaining members of the unit thus can insist that parties remain subject to unit negotiations in accordance with their original understanding.

In the instant case, the Interim Agreements executed by Respondent state that they are subject to Respondent and the Association entering into a collective-bargaining agreement to replace the 1993–1997 labor agreement. However, Respondent did not honor or abide by the 1997–2000 successor agreement. Respondent treated the 1997–2000 multiemployer/multiunion

contract as a nullity. Thus, the interim agreements were enforced by Respondent after the legally effective date of the multiemployer/multiunion agreement. Therefore, I find that Respondent committed an unfair labor practice by maintaining the so-called “Interim Agreements” after Respondent and the 16 employer-members of the Association were bound, under the Act, to 1997 Association-District Council 8 and 16 collective bargaining agreement.

D. Respondent’s Defenses

I find no merit in Respondent’s argument that pre-*Deklewa* evidence cannot be used to establish the scope of the bargaining unit. The 1985 Arbitration decision and Respondent’s subsequent conduct establish that the unit has historically been composed of a group of employers (referred to in the collective-bargaining agreements as the Employer) and a group of unions (referred to in the contracts as the Union). After the *Deklewa* decision established as a matter of law that there would be no presumption of majority status at the expiration of the contract, the parties added language recognizing the Union as the Section 9 representative of the multiemployer/multiunion bargaining unit. This language gave the Union the presumption of majority status, at the expiration of the bargaining agreement, in the multiemployer/multiunion bargaining unit and also in any single employer unit created by a timely withdrawal from group bargaining. Neither the *Deklewa* decision nor the action of the parties ever changed either the multiunion or multiemployer nature of the bargaining relationship.⁷

I also find no merit in Respondent’s argument that Section 10(b) of the Act bars the background evidence which established the bargaining history and the scope of the unit. Section 10(b) of the Act provides in part, “no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge.” The United States Supreme Court has long held that evidence of events which occurred outside the 6 months’ statute of limitations may be used as background to shed light on a Respondent’s motivation for conduct within the 10(b) period. *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411, 416–417 (1960). Here, the facts which occurred within the 10(b) period show that Respondent unlawfully withdrew from the multiemployer/multiunion bargaining. The earlier bargaining history sheds light on the group nature of the bargaining unit and the Section 9 status of the union representation. The events alleged, and found to be unfair labor practices clearly occurred within the Section 10(b) period. Evidence of unfair labor practices outside the 10(b) period was not utilized to establish that otherwise lawful events, within the 10(b) period, were unlawful.

Respondent argues that the recognition language was intended to create separate recognition to each District Council as the exclusive bargaining representative for work within the geographic jurisdiction of each District Council. In furtherance of this argument, Peter Tiernan, an elected business representative for Respondent, testified that in 1989 Charles Hall, then Respondent’s secretary treasurer requested voluntary recognition in the multiemployer/multiunion bargaining, “in order to make sure that each of the councils were recognized as repre-

⁷ Since Respondent withdrew after participating in the 1997 multiemployer/multiunion bargaining the result is the same whether the relationship is governed by Sec. 8(f) or Sec. 9(a). *James Luterbach Construction Co.*, supra; *Atlas Transit Mix Corp.*, 323 NLRB No. 197 fn. 2 (1997).

senting labor.” According to Tiernan, Respondent then secured union authorization cards from its employee-members. Union authorization cards were secured from all members of Respondent, painters and tapers, regardless of what bargaining unit they were employed in. While I find that Hall, on behalf of all three District Councils, requested and obtained voluntary recognition, I give no weight to Tiernan’s interpretation that recognition was separate for each District Council.

I found Tiernan to be an untrustworthy witness. Tiernan was unhappy with the handling of negotiations by District Council 16 and by Murray. Tiernan, like Reclus, was more concerned with arguing his case than with truthfully testifying to the facts. I find Tiernan’s testimony was designed not to tell the truth but to make the facts fit Respondent’s arguments. I simply do not credit Tiernan’s testimony.

Respondent contends that District Council 16 did not comply with the July 9 ground rules. The July 9 ground rules provided that each District Council would have three representatives. According to Robert Murray, the chief negotiator for the labor side, and Davenport, chief officer of District Council 16, the labor negotiators caucused and decided on proposals based on a majority vote of the six labor representatives. On one or two occasions, Tiernan voted against a proposal but it was carried, because Murray voted along with the District Council 16 representatives. Tiernan and Reclus were upset. However, the procedure was that a majority vote, not a unanimous vote, was necessary to obtain a union proposal.

I give no credence to the arguments of Reclus and Tiernan that District Council stacked votes and allowed more than its three allotted representatives to vote on proposals. On the other hand, I found Murray to be a credible witness. Murray was placed in a highly uncomfortable position. Murray, no longer a union official, was called as a witness by the General Counsel to testify against his own bargaining representative. Further making matters difficult for Murray was the fact that Respondent’s counsel in this case is representing Murray, and other former and present officials of Respondent, in a civil action. Murray was a disinterested witness who stood to gain nothing from his testimony. Notwithstanding his awkward position, Murray gave testimony clearly against the case argued by his labor organization and his attorney. Under these circumstances, I find it highly unlikely that Murray would give false testimony against his union. Murray credibly testified that voting on union proposals was based on a majority vote and that he had voted along with the District Council 16 representatives against the wishes of Reclus and Tiernan.

CONCLUSIONS OF LAW

1. Northern California Drywall Contractors Association is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. District Council of Painters Nos. 8 and 16 of the Brotherhood of Painters and Allied Trades, AFL–CIO are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent District Council of Painters No. 8 violated Section 8(b)(3) of the Act by failing to bargain in good faith with the Association by its untimely withdrawal from the multi-employer/multiunion bargaining, failing and refusing to abide by the 1997–2000 agreement between the Association and District Council of Painters Nos. 8 and 16, and by maintaining separate collective agreements with employer-members of the Association.

4. Respondent’s acts and conduct above constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices, within the meaning of Section 8(b)(3), I recommend that Respondent be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Respondent shall be required to make whole any bargaining unit employees, with interest, for any losses of wages and/or benefits suffered by reason of Respondent’s failure to honor and abide by the 1997–2000 bargaining agreement. Backpay shall be computed on a quarterly basis, as prescribed in *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Further, Respondent shall be ordered to make whole any employer-members of the Association for any expeditors made, after August 7, 1997, pursuant to the “Interim Agreements” which they would not have been obligated to make under the 1997–2000 collective-bargaining agreement between the Association and District Council of Painters Nos. 8 and 16. See *Teamsters Local 70 (Emery Worldwide)*, 295 NLRB 1123 (1989).

On the foregoing findings of fact and conclusions of law, and on the entire record, I issue the following recommended⁸

ORDER

The Respondent, District Council of Painters No. 8 of the Brotherhood of Painters and Allied Trades, AFL–CIO, Oakland, California, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Refusing to bargain with the Northern California Drywall Contractors’ Association (the Employer) by refusing to honor and be bound by the 1997–2000 collective-bargaining agreement between the Employer and District Council of Painters 16 and District Council 8 (the Union).

(b) Refusing to bargain with the Employer by maintaining and giving effect to so-called Interim Agreements with employer-members of the Northern California Drywall Association, which agreements have terms and conditions different from the 1997–2000 agreement between the Employer and the Union.

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

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

(a) Notify the Northern California Drywall Contractors Association, the employer-members of the Association with whom Respondent has signed “Interim Agreements,” and District Council of Painters No. 16 that it will honor and give effect to the 1997–2000 agreement between the Association and District Council of Painters No. 16 and Respondent.

⁸ All motions inconsistent with this recommended order are denied. In the event no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules 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.

(b) Make whole bargaining unit employees for any financial losses they may have suffered as a consequence of the Respondent's "Interim Agreements" with employer-members of the Association and/or as a consequence of Respondent's failure to abide by the collective-bargaining agreement between the Employer and the Union, with interest.

(c) Make whole any employer-members of the Association for any expenditures made, after August 7, 1997, pursuant to the "Interim Agreements" which they would not have been obligated to make under the 1997-2000 collective-bargaining agreement between the Employer-Association and District Council of Painters Nos. 8 and 16.

(d) Preserve and, within 14 days of a 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 moneys due under the terms of this Order.

(e) Within 14 days after service by the Regional Director, post at its hiring halls, meeting rooms, and offices in Northern California, copies, in English and Spanish, of the attached notice marked "Appendix."⁹ Copies of the notice, on forms pro-

vided by the Regional Director for Region 32, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced or covered by other material. Additional copies of the notices shall be provided to the Association for posting, if it is willing, in such places as the Association shall deem necessary. In the event that, during the pendency of these proceedings, Respondent ceased operations or closed any of the hiring halls or local union offices involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the employer-members of the Association at any time since August 3, 1997.

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

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."

⁹ If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice "Posted by Order of the National