

W. R. Mollohan, Inc. and International Brotherhood of Painters and Allied Trades, Local Union No. 970, AFL-CIO-CLC and International Brotherhood of Painters and Allied Trades, Local Union No. 1144, AFL-CIO-CLC. Cases 9-CA-36048-1, 9-CA-36358-1, and 9-CA-36358-2

May 7, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, HURTGEN,
AND WALSH

On July 28, 1999, Administrative Law Judge William N. Cates issued the attached bench decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

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 as modified, and to adopt the recommended Order as modified.

1. The complaint alleges that the Charleston Chapter of the Painting and Decorating Contractors of America Association (PDCA or the Association) was authorized by the Respondent to bargain collectively on the Respondent's behalf with the Union. It further alleges that the Association and the Union reached an agreement effective June 1, 1998, through May 31, 2001. The complaint also alleges that the Respondent refused to execute or abide by this agreement, in violation of Section 8(a)(5) and (1) of the Act. The Respondent contends that it never authorized the Association to bind it to a collective-bargaining agreement.

The Respondent's vice president of operations, Joe Beam,² was also president of the Association. In the latter capacity he wrote a letter to the Union dated March 12, 1998,³ stating, *inter alia*, that the Association desired to open negotiations for the next contract period. The first negotiating session was on April 7. Union official, George Galis, asked the Association's negotiators, including Beam, on whose behalf they were negotiating. Beam and the Association's secretary-treasurer, Ken

Bowen, responded that they represented specific individual employers, including the Respondent. On April 17, Beam wrote to the Association stating that he had resigned from the PDCA-negotiating committee.⁴ The next negotiating session was held on April 28. On that day, the parties reached an agreement contingent upon ratification by the union membership. Beam did not attend the second meeting. On May 8, Beam wrote a letter to the Association stating that the Respondent withdrew authorization from the Association to bind it in collective bargaining.⁵

The record does not firmly establish that the employers in the Association were in a multiemployer unit. Beam and Bowen, however, told the Union on April 7 that the Association represented specific individual employers including the Respondent. Thus, the Association had apparent authority to act as the agent for each of the named employers. The fact that *Beam* resigned from the Association's *negotiating committee* on April 17 did not take away the principal-agent relationship between the Respondent and the Association. Thus, when the Association and the Union reached an agreement on April 28, that agreement was binding on the Respondent.⁶ Accordingly, the Respondent's subsequent attempt to withdraw bargaining authority from the Association on May 8, was untimely.⁷

2. The Respondent excepts to the judge's finding that it was not excused from executing the agreement because it contained allegedly unlawful provisions. Specifically, the Respondent argues that the leasing provisions of the "successorship clause"⁸ and the "preservation of work

⁴ The letter indicates that a copy was sent to the Union. Beam also wrote the joint apprentice training committee a letter (with a copy to the Union) on the same date stating that he was resigning from that committee.

⁵ A copy of this letter was sent to union official, George Galis.

⁶ See, *University of Bridgeport*, 229 NLRB 1074 (1977). See also *Metco Products v. NLRB*, 884 F.2d 156 (4th Cir. 1989), *enfg.* 289 NLRB 76 (1988).

⁷ There is no record evidence of when the contract was ratified. In any event, there is no contention that any condition of ratification should excuse the Respondent from executing the contract.

⁸ Art. XXXII "Successor Clause" of the collective-bargaining agreement states in pertinent part:

This agreement, and any supplements or amendments thereto, hereinafter referred to collectively as "agreement", shall be binding upon the parties hereto, their successors, administrators, executors and assigns.

In the event the Employer's business is, in whole or in part, sold, leased, transferred, or taken over by sale, transfer, lease, assignment, receivership, or bankruptcy proceedings, such business and operation shall continue to be subject to the terms and conditions of this Agreement for the life thereof.

It is understood by this provision that the parties hereto shall not use any leasing or other transfer device to a third party to evade this agreement.

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 Drywall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir.1951). We have carefully examined the record and find no basis for reversing the findings.

² Beam testified that he owned 45 percent of the Respondent's stock, and the remainder is owned by his wife.

³ All subsequent dates are 1998 unless stated otherwise.

clause”⁹ both violate Section 8(e) of the Act. The judge found both provisions to be lawful, but held that, even if the disputed provisions of the contract violate the Act, the Respondent is not privileged to refuse to execute the contract, as it is saved by the general savings clause.¹⁰ We agree with the judge’s conclusions about the general savings and work preservation clauses.¹¹ However, we disagree with his analysis of the successorship clause.

In pertinent part, the successorship clause provides:

In the event the Employer’s business is, in whole or in part, sold, leased, transferred, or taken over by sale, transfer, lease, assignment, receivership, or bankruptcy proceedings, such business and operation shall continue to be subject to the terms and conditions of this Agreement for the life thereof.

It is understood by this provision that the parties hereto shall not use any leasing or other transfer device to a third party to evade this agreement.

The judge read the first paragraph above—requiring a new entity to be bound by the agreement—to be qualified by the language in the second paragraph. In other words, he found

“the matters that are forbidden by the successorship clause would pertain only to an attempt by the Company to evade the agreement.” As such, he found that the provisions were lawful. We disagree with his reading. There is no language suggesting that the second paragraph above is a limitation on the first; rather it is a separate and distinct term of the agreement.

Turning to the legality of the provision, Section 8(e) is violated when an employer and a union enter into an agreement requiring the employer to cease doing business with any other person. The Board has generally considered a lease to be a form of “doing business” within the meaning of Section 8(e). *Hotel & Restaurant Employees Local 274 (Sheraton University Hotel)*, 326 NLRB 1058 (1998).¹² As the Board in *Sheraton* discussed, however, Section 8(e) does not prohibit agreements whose primary objective is the preservation of bargaining unit work, as distinct from a secondary objective of advancing the union’s interests elsewhere, id., citing *National Woodwork Manufacturers Assn. v. NLRB*, 386 U.S. 612, 634 (1967).

The leasing provision at issue here effectively requires that the lessee become bound to the contract regardless of whether the unit employees are retained. As such, it exceeds the legitimate primary purpose of protecting unit work and is directed at the secondary purpose of furthering union objectives elsewhere. Since the employer would be prohibited from doing business with a potential lessee who refused to be bound by the agreement, this leasing provision of the successor clause violates Section 8(e). See *Chicago Dining Room Employees Local 42*, 248 NLRB 604, 607 (1980), cited in *Sheraton*, supra. Significantly, however, as in *Sheraton*, this does not render the entire successor clause void. Indeed, the parties have agreed, in the general savings clause, that the invalidation of a particular section of the agreement does not affect the remainder of the agreement.

3. We shall order the Respondent to execute and abide by the 8(f) agreement, consistent with the principles enunciated in *John Deklewa & Sons*, 282 NLRB 1375 (1987), *enfd. sub nom. Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988). In its exceptions, the Respondent argues that since this case arises in the United States Court of Appeals for the Fourth Circuit, the Board must address contrary precedent of that court. Specifically, the Respondent cites *Industrial TurnAround Corp. v. NLRB*, 115 F.3d 248 (1997).

In *Industrial TurnAround* the Fourth Circuit declined to enforce a Board order requiring the employer and its

⁹ Art. XVI “Preservation of Work Clause” states in pertinent part:

To protect and preserve, for the employees covered by this Agreement, all work they have performed and all work covered by this Agreement, and to prevent any device or subterfuge to avoid the protection and preservation of such work, it is agreed as follows: if the Employer performs on-site construction work of the type covered by this Agreement, under its own name or the name of another, as a corporation, company partnership, or business entity, including a joint venture, wherein the Employer, through its officers, directors, partners, owners, or stockholders, exercises directly or indirectly (through family members or otherwise), management, control, or majority ownership, the terms and conditions of his [sic] agreement shall be applicable to all such work.

¹⁰ Art. XXXIII, the “General Savings Clause” states in pertinent part: If any Article or Section of this Agreement should be held invalid by operation of law or by any tribunal of competent jurisdiction, or if compliance with or enforcement of any Article or Section should be restrained by such tribunal pending a final determination as to its validity, the remainder of this Agreement or the application of such Article or Section to persons or circumstances other than those as to which it has been held invalid or as to which compliance with or enforcement of has been restrained, shall not be affected thereby.

¹¹ The “Work Preservation Clause” is virtually identical to a clause found not to violate Sec. 8(e) in *Carpenters (Mfg. Woodworkers Assn.)*, 326 NLRB 321, 326 (1998) (“Other Operations,” Sec. 1. “Work Preservation Clause”). For the reasons fully set forth in that case, we adopt the judge’s conclusion that the “Work Preservation Clause” at issue here, does not violate Sec. 8(e).

Member Hurtgen agrees with the majority that the “Preservation of Work Clause” here is virtually identical to the one at issue in *Mfg. Woodworkers Assn.*, supra. For the reasons discussed in his dissent in that case, he concludes that the clause here violates Sec. 8(e). However, as the agreement here contains a “General Saving Clause,” he would require the Respondent to execute and abide by the remainder of the contract.

¹² Member Hurtgen notes here, as in *Sheraton*, supra, that the issue of whether the sale or transfer of a business constitutes “doing business” within the meaning of Sec. 8(e) is not presented in this case.

nonunion alter ego company to abide by the terms of an 8(f) agreement that had been negotiated on their behalf by a multiemployer bargaining association. The Board found that the employer had not timely withdrawn its bargaining authority from the multiemployer association prior to the creation of its alter ego and subsequent unlawful repudiation of its still-current 8(f) collective-bargaining agreement. In denying enforcement of the Board's remedial order, the court held, under existing Fourth Circuit precedent,¹³ that 8(f) prehire agreements may be repudiated at any time by either party prior to the union's achievement of majority status, *id.* at 254, and that the alter ego employers in *Industrial TurnAround* therefore had the right to repudiate the 8(f) agreement.

We find the instant case, however, to be distinguishable from *Industrial TurnAround*. Unlike there, the Respondent does not seek to *repudiate* the 8(f) relationship. Rather, it is refusing to execute the negotiated agreement because it wants to negotiate a different contract *within* that 8(f) relationship. Inasmuch as the contract here has been reached within a relationship which the Respondent does not seek to abrogate, we do not believe that our decision and order here is in conflict with the Fourth Circuit precedent.¹⁴

AMENDED REMEDY

We shall modify the judge's remedy by providing that the Respondent be required to agree to, execute, and abide by the collective-bargaining agreement which is effective for the period June 1, 1998, through May 31, 2001, after those portions of article XXXII of the agreement pertaining to leasing, which effectively provide that the agreement shall be applicable to and binding on any lessee, have been deleted.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and orders that the Respondent, W.R. Mollohan, Inc., Charleston, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

¹³ *Clark v. Ryan*, 818 F.2d 1102, 1107 (4th Cir. 1987).

¹⁴ In any event, to the extent that our opinion in this case is in conflict with Fourth Circuit precedent, we note that our duty to apply uniform policies under the Act, and the Act's venue provisions for review of our decisions, make it, as a practical matter, impossible for us to acquiesce in every contrary decision by the Federal courts of appeals. *TCI West, Inc.*, 322 NLRB 928 (1997) (citing *Arvin Industries*, 285 NLRB 753, 757-758 (1987)), *enf. denied* sub nom. *TCI West, Inc. v. NLRB*, 145 F.3d 1113 (9th Cir. 1998), and *Insurance Agents (Prudential Insurance Co.)*, 119 NLRB 768, 773 (1957).

“(a) Agree to execute and abide by the collective-bargaining agreement described in paragraph 1(a) of this Order after those portions of article XXXII of the agreement pertaining to leasing, which effectively provide that the agreement shall be applicable to and binding on any lessee, have been deleted.”

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

APPENDIX B

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

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

Section 7 of the Act gives employees these rights.

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

WE WILL NOT withdraw recognition from or fail and refuse to recognize and bargain with International Brotherhood of Painters and Allied Trades, Local Union No. 970, AFL-CIO-CLC as the exclusive collective-bargaining representative of our employees in the following unit:

All employees of ours engaged in brush painting, air comp/operator roller painting & helpers, drywall pointers & tapers, dipping & mitten work, sprayer machine operator, taping machines mud mixer, pole sander & all helpers, tape & shackling teams, all synthetic interior & exterior work, sandblasters & helpers, water blasters & helper, steam jenny nozzles & helper, swinging scaffold & boatswain chair, window belt & window jack work, vinyl hangers & helpers, paper hangers & helpers within the geographic jurisdiction of the Union, but excluding all professional employees, guards and supervisors as defined in the Act.

WE WILL NOT fail and refuse to make the required benefit payments to the Pension Fund, Annuity Fund, Apprenticeship and Manpower Training, and the Health and Welfare Fund on behalf of the unit employees.

WE WILL NOT fail and refuse to make the required benefit payments to the Pension Fund, Apprenticeship Fund, Building and Trade Fund, and Substance Abuse/

Training Fund when unit employees are employed within the geographic jurisdiction of International Brotherhood of Painters and Allied Trades, Local Union 1144 pursuant to Local 1144's agreement with The Parkersburg-Marietta Contractors Association.

WE WILL NOT fail and refuse to calculate and pay overtime pay for unit employees employed within the geographic jurisdiction of the International Brotherhood of Painters and Allied Trades, Local Union 1144 pursuant to Local 1144's agreement with The Parkersburg-Marietta Contractors Association.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL execute and abide by the 8(f) collective-bargaining agreement negotiated on our behalf by the Charleston Chapter of the Painting and Decorating Contractors of America with the International Brotherhood of Painters and Allied Trades, Local Union No. 970, AFL-CIO-CLC which is effective for the period June 1, 1998, through May 31, 2001, after those portions of article XXXII of the agreement, pertaining to leasing, which effectively provide that the agreement shall be applicable to and binding on any lessee, have been deleted.

WE WILL give retroactive effect to the terms and conditions contained in the agreement, including but not limited to, making all required benefit payments to the various benefit funds contained therein and/or required when unit employees are employed in the geographic jurisdiction of Local 1144.

WE WILL make our unit employees whole for any loss of benefits, or expenses ensuing from our failure to make the required benefit payments.

WE WILL calculate and pay our unit employees overtime pay when they are employed in the geographic jurisdiction of Local 1144.

W.R. MOLLOHAN, INC.

Andrew L. Lang, Esq., for the General Counsel.

Forrest H. Roles, Esq., for the Company.

John F. Dascotti, Esq., for the Union.

BENCH DECISION

WILLIAM N. CATES, Administrative Law Judge. At the close of a 2-day trial in Charleston, West Virginia, on June 30, 1999, I rendered a Bench Decision in these consolidated cases. For the reasons stated by me on the record at the close of the trial I found in favor of the General Counsel (the Government) on all issues. Specifically, I concluded, as alleged in the consolidated complaint (the complaint), that W.R. Mollohan, Inc. (the Company) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act). I concluded the Company, which admittedly is an industrial exterior painting contractor, has been, and continues to be, engaged in the building and con-

struction industry. I concluded the Company was, at all times material herein, a member of the Charleston Chapter of the Painting and Decorating Contractors of America (the Association). I likewise concluded the Association is an organization composed of employers engaged in the construction industry and exists for the purpose, inter alia, of representing its employer members, including the Company herein, in negotiating and administering collective-bargaining agreements. See, e.g., *Bill O'Grady Carpet Service*, 185 NLRB 587, 590 (1970). I concluded the Company unequivocally authorized the Association to bargain collectively with International Brotherhood of Painters and Allied Trades, Local Union No. 970, AFL-CIO-CLC (the Union) concerning wages, hours, and other terms and conditions of employment of its employees in an appropriate unit which unit is as follows:

All employees of the Company engaged in brush painting, air comp/operator roller painting & helpers, drywall pointers & tapers, dipping & mitten work, sprayer machine operator, taping machines mud mixer, pole sander & all helpers, tape & shackling teams, all synthetic interior & exterior work, sand-blasters & helpers, water blasters & helper, steam jenny nozzles & helper, swinging scaffold & boatswain chair, window belt & window jack work, vinyl hangers & helpers, paper-hangers & helpers within the geographic jurisdiction of the Union, but excluding all professional employees, guards and supervisors as defined in the Act.

I concluded the Association and the Union on April 28, 1998, reached complete agreement on a collective-bargaining agreement covering the above-unit employees and on May 18, 1998, executed the agreement. The agreement is effective by its terms from June 1, 1998, through May 31, 2001. I concluded the Union, on May 19, 1998, requested, in writing, the Company execute and abide by the agreement negotiated on its behalf by the Association. I concluded the Company, in violation of Section 8(a)(5) and (1) of the Act, refused to agree to, abide by or execute the agreement. In disagreement with the Company, I concluded, as indicated above, it had historically delegated bargaining authority to the Association and had specifically done so for the most recent negotiations and had not timely withdrawn from multiemployer bargaining (or from the Association) and as such is bound by the agreement negotiated by the Association on its behalf.

I specifically found, as alleged in the complaint, the Company violated the Act by: since June 1, 1998, unilaterally deducting pension contributions from its bargaining unit employees and failing and refusing to make payments to the Union Pension Fund, Annuity Fund, Apprenticeship and Manpower Training Fund, and Health and Welfare Fund as required by the collective-bargaining agreement; and, since June 1, 1998, has failed to calculate overtime pay for its bargaining unit employees working within the jurisdiction of International Brotherhood of Painters and Allied Trades, Local Union 1144 (Local Union 1144) pursuant to Local Union 1144's agreement with The Parkersburg-Marietta Contractors Association, Inc. (PMC Assoc.) as called for in the agreement between the Company and the Union herein and has failed and refused to make the required contributions to the Local Union 1144/PMC Assoc.

Industry Pension Fund, Apprenticeship Fund, Building and Trades Fund, and Substance Abuse/Training Fund.

I rendered the Bench Decision pursuant to Section 102.35(a)(10) of the National Labor Relations Board's (the Board) Rules and Regulations.

I certify the accuracy of the portion of the transcript, as corrected,¹ pages 204 to 224, containing my Bench Decision, and I attach a copy of that portion of the transcript, as corrected, as "Appendix A."

CONCLUSION OF LAW

Based on the record, I find the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act; that it violated the Act in certain particulars and for the reasons stated at trial and summarized above, and its violations have affected, and unless permanently enjoined, will continue to affect commerce within the meaning of Section 2(2) and (6) of the Act.

REMEDY

Having found that the Company has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found the Company has violated Section 8(a)(5) and (1) of the Act, I shall recommend it be ordered to recognize the Union as the exclusive collective-bargaining representative of its employees in the specifically described unit. I also recommend the Company be ordered to agree to, execute and abide by the Association's and the Union's negotiated 8(f) agreement which is effective by its terms for the period June 1, 1998, through May 31, 2001. I recommend the Company be ordered to make its unit employees whole by making the required benefit contributions to the Pension Fund, Annuity Fund, Apprenticeship and Manpower Training Fund, and the Health and Welfare Fund. Likewise, I recommend the Company be ordered to further make its employees whole by making contributions to the Industry Pension Fund, Building and Trades Fund, Apprenticeship Fund, and Substance Abuse/Training Fund, applicable to unit employees when employed within the geographical jurisdiction of Local Union 1144 pursuant to Local Union 1144/PMC Assoc.'s agreement, including any additional amounts applicable to such delinquent contributions, as well as to all applicable funds, in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). In addition, the Company shall reimburse unit employees for any expenses ensuing from its failure to make the required contributions, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. 661 F.2d 940 (9th Cir. 1981), such amounts to be computed in the manner set forth in *Ogle Protective Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Further, I shall

¹ I have corrected the transcript pages containing my Decision. The corrections are as reflected in the attached Appendix C. [Omitted from publication.] The corrections have been made to conform to my intended words, without regard to what I may have actually said in the passages in question.

recommend the Company be ordered to calculate overtime pay for unit employees employed in the geographical jurisdiction of Local Union 1144 pursuant to its agreement with PMC Assoc. that it has unlawfully failed and refused to calculate, and pay in the manner set forth in *Ogle Protective Service*, supra, with interest as prescribed in *New Horizons for the Retarded*, supra. Finally, I recommend the Company be ordered, within 14 days after service by the Region, to post an appropriate notice to employees, copies of which are attached as "Appendix B"² for a period of 60 consecutive days in order that employees may be apprised of their rights under the Act and the Company's obligation to remedy its unfair labor practices.

On these conclusions of law, and on the entire record, I issue the following recommended³

ORDER

The Company, W. R. Mollohan, Inc., Charleston, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with the Union as the exclusive collective-bargaining representative of all employees in the unit described below by unlawfully withdrawing recognition from the Union and refusing to agree to, execute and abide by the terms of the 8(f) collective-bargaining agreement negotiated by the Association and the Union on its behalf which agreement is effective by its terms for the period June 1, 1998, through May 31, 2001. The appropriate unit is:

All employees of the Company engaged in brush painting, air comp/operator roller painting & helpers, drywall pointers & tapers, dipping & mitten work, sprayer machine operator, tapping machines mud mixer, pole sander & all helpers, tape & shackling teams, all synthetic interior & exterior work, sandblasters & helpers, water blasters & helper, steam jenny nozzles & helper, swinging scaffold & boatswain chair, window belt & window jack work, vinyl hangers & helpers, paper hangers & helpers within the geographic jurisdiction of the Union, but excluding all professional employees, guards and supervisors as defined in the Act.

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

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

(a) Forthwith agree to, execute and abide by the 8(f) collective-bargaining agreement described in paragraph 1(a) of this Order.

² If this Order is enforced by a judgment of the 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."

³ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Give retroactive effect to the terms and conditions of the 8(f) collective-bargaining agreement described in paragraph 1(a) of this Order, including, but not limited to, the provisions relating to wages and other terms and benefits as set forth in the remedy section of this decision.

(c) Make the required benefit payments to the Pension Fund, Annuity Fund Apprenticeship and Manpower Training Fund, and the Health and Welfare Fund on behalf of the unit employees, as set forth in the remedy portion of this decision.

(d) Make the benefit payments to the Pension Fund, Apprenticeship Fund, Building and Trades Fund, and Substance Abuse/Training Fund as required by the agreement, described in paragraph 1(a) of this Order, when unit employees are employed within the geographical jurisdiction Local Union 1144 pursuant to its agreement with PMC Assoc.

(e) Make whole unit employees for any loss of benefits or expenses ensuing from its failure to make the required benefits payments to the funds, as set forth in the remedy section of this decision.

(f) Calculate and pay unit employees overtime pay for work performed within the geographical jurisdiction of Local Union 1144 pursuant to its agreement with PMC Assoc.

(h) Within 14 days after service by the Region, post at its Charleston, West Virginia facility copies of the attached notice marked "Appendix B." Copies of the notice, on forms provided by the Regional Director for Region 9 after being signed by the Company's authorized representative shall be posted by the Company and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all unit employees employed by the Company on or at any time since May 22, 1998.

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

APPENDIX A

DECISION

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JUDGE CATES: This is my decision in the matter of W. R. Mollohan, Inc. and the International Brotherhood of Painters and Allied Trades, Local Union Number 970, AFL-CIO-CLC and International Brotherhood of Painters and Allied Trades, Local Union 1144, AFL-CIO-CLC, Cases 9-CA-36048-1, 9-CA-36358-1, and 9-CA-36358-2.

First let me state that it has been a pleasure to be in Charleston, West Virginia. It has been my experience that counsel in this area are some of the very finest. The counsel in this case have done an outstanding job representing the interests they represent. The three of you are a credit to the parties you represent. I thank you for your presentation of the evidence, and

your arguments in this case. If you will reflect back over the trial, I have asked few, if any, questions at all. And that is a real credit to counsel when they put the evidence in without the interruption or interference of the Judge. That is a credit to the three of you.

I find the charge in Case 9-CA-36048-1 was filed by International Brotherhood of Painters and Allied Trades, Local Union Number 970, AFL-CIO-CLC, hereinafter, the Union, on June 17, 1998, and thereafter timely served on the parties. The charge in 9-CA-36358-1 was filed by the Union on October 30, 1998, and thereafter timely served on the parties. The charge in 9-CA-36358-2 was filed by the International Brotherhood of

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Painters and Allied Trades, Local Union 1144, AFL-CIO-CLC, on November 13, 1998, and thereafter timely served on the parties.

The Regional Director for Region 9 of the National Labor Relations Board on behalf of the General Counsel of the National Labor Relations Board—(Board)—issued a consolidated complaint and notice of hearing on November 30, 1998 in which it is alleged W. R. Mollohan, Inc., hereinafter the Company, violated Section 8(a)(5) and (1) of the National Labor Relations Act, as Amended, (Act) by certain specific allegations outlined in the Complaint at Paragraphs 9, 10, 11, and 13.

More specifically, it is alleged the Company has refused to agree to, execute, or abide by the collective bargaining agreement that was arrived at on April 28, 1998.

Further, it is alleged the Company, since on or about June 1, 1998 unilaterally deducted pension contributions from paychecks issued to unit employees. It is further alleged the Company on or about June 1, 1998 unilaterally failed and refused to make payments to certain pension funds, annuity fund, to an apprentice program, and to a health and welfare fund as required by the collective bargaining agreement that the Government contends the Company is was and continues to be bound by.

Further, it is alleged the Company has failed and refused to calculate overtime for certain employees that have been working outside the jurisdiction of the collective bargaining agreement herein. The Government contends the Company is bound by, and is

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required to pay the employees by the provisions of an agreement arrived at with a separate association. The Government contends the failure on behalf of the Company to do as it has indicated—the Company failed to do—constitutes violations of the National Labor Relations Act, as Amended; hereinafter referred to as the Act.

The evidence establishes, and I find, the Company is a corporation with its principal place of business in Charleston, West Virginia. Vice President of Operations for the Company, Joe Beam, testified it is a heavy industrial corporation. Primarily the Company paints federal highway bridges, overpasses, and highway tunnels. The Company does the same type work, according to Beam, for state governments on state highways.

Vice President of Operations Beam testified the bulk of the Company's business is sandblasting and painting, and/or repainting bridges, tunnels and overpasses. The Company performs very little commercial painting of buildings or light industrial painting, and seldom if ever, engages in residential painting. During the twelve (12) month period preceding issuance of the Complaint herein the Company, in conducting its operations, purchased and received goods in the State of West Virginia valued in excess of fifty thousand dollars (\$50,000.00) directly from suppliers located outside the State of West Virginia.

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The evidence establishes, the parties admit, and I find the Company is engaged in commerce within the meaning of Section 2(2)(6) and (7) of the Act.

The Company appears, by its answer to the Complaint, to deny that it is engaged in the building and construction industry. The Board has long held that employers engaged in the type business as this Company is engaged in, painting contractor work, is engaged in the building and construction industry, and I so find.

The evidence establishes, the parties admit, and I find the International Brotherhood of Painters and Allied Trades, AFL-CIO-CLC, and its Locals 970 and 1144 are, and at times material herein have been, labor organizations within the meaning of Section 2(5) of the Act.

Company Vice President of Operations Beam testified he is forty-five (45) percent owner of the Company herein, with his wife owning the remaining interest in the Company. Beam asserts he makes the decisions for the Company. Accordingly, the evidence establishes, the parties admit, and I find that Company Vice President of Operations Beam is a supervisor and agent of the Company within the meaning of Section 2(11) and 2(13) of the Act.

It is alleged in the Complaint the following classifications of employees of the Company constitute a unit appropriate for the

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purposes of collective bargaining within the meaning of Section 9(b) of the Act. The unit, as amended at trial, is:

all employees of the Company including brush painting, air compressor operator, roller painting and helpers, drywall painters and tapers, dipping and mitten work, sprayer machine operator, tapping machines, mud mixer, pole sander and all helpers, tape and shacklin teams, all synthetic interior and exterior work, sandblasters and helpers, water blasters and helper, steam genie nozzles and helper, swinging scaffold and boatswain chairman, window belt and window jack work, vinyl hangers and helpers, and paperhangers and helpers. But excluding all professional employees, guards, and supervisors as defined in the Act.

The unit description is applicable to the geographic jurisdiction of the Union.

The Company denies such is an appropriate unit. But the Company admits that prior to 1995 it granted recognition to the Union as the exclusive bargaining representative of the unit,

and since such date the Union has been recognized as such by the Company without regard to whether the majority status of

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the Union had been established under the provisions of 9(a) of the Act.

The Company asserts it withdrew recognition from the Union in 1998.

First, with respect to the appropriateness of the unit, I note the parties have, over the years, negotiated the makeup of the recognized unit set forth, including exclusions and inclusions from the unit. The Company recognized such as an appropriate unit, for example, in the June 1, 1995 to June 1, 1998 collective bargaining agreement received in evidence as General Counsel Exhibit 20. Article I, Section 1, Page 1 of that agreement taken in conjunction with the classifications set forth on the last page, 30, of that same agreement is the classifications alleged by the General Counsel in the Complaint herein.

Company Vice President of Operations Beam's signature appears on the very page the classifications are set forth on. The Company recognized these classifications as an appropriate unit and abided by the provisions of the 1995 to 1998 collective bargaining agreement. I find the unit, as alleged, to be an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

I specifically reject the Company's contention, the unit, as I have found appropriate, is, in fact, inappropriate. The fact the Company may employ some employees that function, at least some of their working time, as truck drivers, boat operators, and

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traffic control employees does not compel the conclusion that this is an inappropriate unit. Nor does Company Vice President of Operations Beam's assertion he primarily employs only two classifications of employees, namely sandblasters and painters, warrant a conclusion that the unit, as I have found appropriate, is inappropriate.

It is alleged in the Complaint that the Charleston Chapter of the Painting and Decorating Contractors of America Association is an organization composed of employers in the construction industry and exists for the purpose inter alia of representing its employer members in negotiating and administering collective bargaining agreements. The Company denies this allegation.

In agreement with the General Counsel I find the Association does, in fact, exist in part for the purpose of representing its employer members in negotiating and administering collective bargaining agreements.

Twenty (20) year Association Secretary-Treasurer Ken Bowen testified the function of the Association was to negotiate collective bargaining agreements with the Union and to help administer a joint apprentice training program and a health and welfare fund. Bowen testified the Association placed three of the six members on the joint apprentice training program, as well as of the three members of the Health and Welfare Fund. Both programs are administered jointly by the Association and the Union.

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Bowen identified the mainstays among the Association as the company herein, and at least the company that he was associated with, which was the W. Q. Waters Company. Company Vice President of Operations Beam testified the company had been a member of the Association since approximately 1991, and that he, Beam, served as vice president of the Association in the early 1990's, and thereafter became president of the Association, as well as a negotiating committee member, and later a chief spokesperson for the Association.

I find the Association is composed of employers in the construction, painting industry, and exists in part for the purpose of representing its employer members in negotiating and administering collective bargaining agreements.

It is alleged in the Complaint the Association, at all times material herein, has been authorized by the Company to bargain collectively on its behalf with the Union concerning wages, hours and other terms and conditions of employment of the unit employees.

The Company contends no such consent was ever given by the Company to the Association. The Company argues consent is needed from three parties before it can be bound to agreements negotiated by the Association with the Union. The Company asserts the Union consented to the arrangement, but that neither the Company nor the Association ever gave such consent.

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The evidence, I am persuaded, compels the conclusion the Company authorized the Association to bargain on its behalf with the Union. First, as Company Vice President of Operations Beam testified, the Company was signatory for at least twelve (12) years to collective bargaining agreements negotiated for it by the Association. Beam explained the Company was signatory to collective bargaining agreements with the Union negotiated by the Association from at least 1986 until May 1998. Company Vice President of Operations Beam was intimately familiar with the Association and the tasks it performed and the services it rendered inasmuch as he was an official of the Association, at least from 1991 forward.

Mr. Beam knew the Association negotiated collective bargaining agreements in that he served on the negotiating committee for the Association, as well as from time to time acted as its chief spokesperson or negotiator. Vice President of Operations Beam not only helped negotiate and approve collective bargaining agreements for the Association, prior to 1998, but he then executed such collective bargaining agreements on behalf of the Company herein.

Union International Representative Clarence Mitchell testified Company Vice President of Operations Beam participated in Association negotiations with the Union in 1989, 1992, 1995, and 1998. Association Secretary-Treasurer Bowen testified among the mainstays of the Association in the '90's was the Company herein.

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By past practice it is clear the Company authorized the Association to negotiate on its behalf with the Union for the unit employees herein.

The fact the Company may have been a month late in executing the 1995 to 1998 collective bargaining agreement negotiated by the Association does not establish in any manner the Company had not given its consent to the Association or that it was not bound by the 1995 Association negotiated collective bargaining agreement. Company Vice President of Operations Beam was told by the Union, reference the 1995 to 1998 collective bargaining agreement, that the Company was bound to the agreement and he could not negotiate any different terms for his Company. Beam thereafter executed the 1995 to 1998 collective bargaining agreement that had been negotiated by the Association.

The record establishes the following sequence of events which took place with respect to negotiations for the 1998 to 2001 collective bargaining agreement. In a letter dated March 6, 1998 General President's representative George Galis notified Association President Beam as follows: I am writing to comply with Article 20 of the Collective Bargaining Agreement between Local Number 970 and the Painting and Drywall employers. This letter is official notification of Painters Local Union Number 970's desire to renegotiate the collective bargaining agreement. Please contact me at, certain numbers, in order to arrange a date, time and place to begin negotiations.

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In his letter Union Representative Galis advised the Company he had already notified the Federal Mediation and Conciliation Services and indicated he would like for the Association to notify him as to the members in whose behalf the Association would be negotiating.

Company Vice President of Operations and President of the Association Beam responded to the Union Representative Galis notification in a letter dated March 12, 1998, which letter was received by Galis on March 13, 1998. In his correspondence Beam stated, "Per Article 20 of the Collective Bargaining Agreement between the Charleston Chapter of the Painting and Decorating Contractors of America Local 970 I hereby notify Local 970 of PDCA's desire to open negotiations for the next contract period."

Association President Beam listed the negotiating committee members and listed himself as one of the four negotiating committee members. And Mr. Beam requested the Union contact him with respect to agreeable bargaining dates.

Union Representative Galis testified the Association and Union met for negotiations in early April, specifically April 7, 1998. Galis testified he and International Representative Mitchell represented the Union and Association President Beam and Secretary-Treasurer Bowen represented the Association. According to Union Representative Galis, Association President Beam acted as chief spokesperson for the Association at the April 7, 1998 negotiating session.

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Galis credibly testified he asked the Association's negotiators on whose behalf they were negotiating. According to Galis, Association President Beam and Secretary-Treasurer Bowen jointly responded they represented certain specific employers, namely W. Q. Waters Company, Inc., W. R. Mollohan, Inc., L. A. Sams, Inc., Specialty Group/Union Group, Inc., Wiseman Construction Inc., Commercial Sandblasting and Painting Company, Inc. in negotiations.

On April the 28th, 1998, Union Representative Galis followed up with a letter to Association Secretary-Treasurer Bowen on this very subject of who the Association represented. Galis' letter to the Association's Secretary-Treasurer Bowen in pertinent part identified seven specific employers, one of which was the company herein.

Galis credibly testified the Union presented the Association with a complete proposed collective bargaining agreement at the April 7, 1998 bargaining session. According to Galis the parties spent approximately two hours explaining and reviewing the Union's contract proposals. Association President and Company Vice President of Operations Beam and Association Secretary-Treasurer Bowen were specifically involved in those discussions.

Based on the above I find the Company herein specifically authorized the Association to negotiate on its behalf in that it had been its past practice to do so. And in this particular and specific negotiating session for the 1998 to 2001 contract

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Association President and Company Vice President of Operations Beam specifically indicated the Association was negotiating on behalf of, among other employers, the Company herein.

On April 17, 1998 Company Vice President of Operations Beam wrote the Association the following letter: "Dear Sirs, effective this date please be advised that Joe Beam is resigning from the PDCA-Negotiating Committee." On that same date, April 17, 1998, Company Vice President of Operations Beam wrote the Joint Apprentice Training Committee the following letter: "Dear Sirs, Effective this date be advised that Joe Beam is resigning from the JATC Committee."

On May 8, 1998 Company Vice President of Operations Beam wrote the Association to the attention of Association Secretary-Treasurer Bowen the following letter: "This letter is intended to clarify my letter of April 17, 1998. By it, W. R. Mollohan, Inc. did and now confirms it withdraws any authorization of the Painting and Decorating Contractors of America (PDCA) to bind it in collective bargaining. W. R. Mollohan, Inc. wishes to pay better wages and provide better benefits for its employees than the PDCA plans to offer and wishes to negotiate more efficient work rules applicable to its operations. Please refer all matters concerning bargaining related to W. R. Mollohan, Inc. directly to me."

Union Representative Galis testified he learned of the Company's attempts to withdraw from bargaining with the multi-

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employer group when he saw a copy of Beam's May 8, 1998 letter to Bowen just quoted above.

Union Representative Galis testified the Association and Union met for a second negotiating session for the 1998 to 2001 collective bargaining agreement on April 27, 1998. According to Galis the Association made a counter proposal at that meeting, and after approximately two hours of negotiations the parties arrived at a tentative collective bargaining agreement. Galis explained the only thing tentative about the agreement was that the Union membership had to ratify the agreement, which the Union thereafter did.

Galis forwarded a copy of the agreed upon collective bargaining agreement to the Association for Association Secretary-Treasurer Bowen to proofread, and thereafter execute. Bowen executed to 1998 to 2001 collective bargaining agreement on behalf of the Association on May 21, 1998. In a letter of that same date Bowen wrote Union Representative Galis the following letter, with attachments: "Please find enclosed two fully executed copies of agreement between IPTAT Local Union 970 and the Charleston Chapter of the PDCA."

On May 18, 1998 Union Representative Galis wrote to all members of the Charleston Chapter of the Association the following letter: "Enclosed please find two copies of the newly negotiated and ratified agreement for Local Union 970. Please

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fill in all the information requested on Page 30 of the agreement and sign where indicated for PDCA employers. Return both copies to me and I will then send you a fully executed copy for your files. As a PDCA member you are already bound to this agreement. However, I am asking for your cooperation in this matter in order to collect all pertinent information required on Page 30 of the agreement. "

On May 22, 1998 Company Vice President of Operations Beam wrote Union Representative Galis as follows: "W. R. Mollohan recently sent you a letter stating that we are no longer represented by the PDCA and ask that you contact us in regard to beginning negotiations for a future contract for our Company. Due to time constraints please contact me at your earliest convenience."

Union Representative Galis testified he and International Union Representative Mitchell met with Company Vice President of Operations Beam after Beams' May 22, 1998 letter for the purpose of getting Beam to sign the Association negotiated collective bargaining agreement. According to Galis, Beam complained that the money in the collective bargaining agreement was too high. Galis told Beam the Company was already bound to the contract. Galis testified no negotiations took place, and Beam did not negotiate with the Union regarding ceasing to pay into the contractually called for funds, nor did they negotiate regarding any escrow accounts established by the Company after the

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expiration of the prior collective bargaining agreement that was effective from 1995 until June 1, 1998.

Is the Company herein bound to the 1998 to 2001 collective bargaining agreement negotiated by the Association?

I am persuaded it is. Historically the Company agreed to negotiations by the Association on its behalf and it had executed

such agreements. When notified in March 1998 the Union wished to re-negotiate the collective bargaining agreement the Association, by its President Beam, responded in writing to the Union on March 12, 1998 that it also wanted to re-negotiate the collective bargaining agreement, and listed its negotiating team, which included Beam himself as a negotiator.

Company Vice President of Operations and Association President Beam, along with at least Association Secretary-Treasurer Bowen negotiated with the Union for a new contract on April 7, 1998. The negotiators specifically reviewed the Union's complete collective bargaining agreement proposal. At no time did the Association or Beam himself limit the employers the Association was negotiating for. When asked specifically who the Association was negotiating for Beam and Bowers listed the employers, specifically including the Company herein. Beam took no action that in any way expressed any indication on the Association or the Company herein's behalf, that the Company wanted to negotiate separately or would not be bound by any negotiated agreement of the Association.

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In fact, a collective bargaining agreement was arrived at between the Association of the Union on April 27, subject to Union ratification. Which was at a time before Union Representative Galis had even seen Company Vice President of Operations Beam's May 8, 1998 letter to the Association giving any indication he, on behalf of the Company, wished to negotiate in any other manner.

It is clear the Company was and is bound by the 1998 to 2001 collective bargaining agreement as an 8(f) agreement, and any belated action taken by it was ineffective to negate its obligation to execute as requested and abide by that agreement.

I specifically reject the Company's contention that what had historically taken place was just something that one might term as group bargaining. And at the conclusion of negotiations the agreements were tentative, both for the Company and the Union. Such contention is simply not supported by any credited testimony or documentary evidence. The only tentative condition of the collective bargaining agreement negotiated by the Union and the Association was the agreement had to be submitted to the Union, not the employers, for ratification.

May the Company, as it contends, be excused from executing and abiding by the 1998 to 2001 collective bargaining agreement because it contains, what the Company contends are unlawful provisions? I find it may not escape on such grounds, but must sign and abide by the agreement.

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First, the collective bargaining agreement contains a general savings clause, which is set forth at Article 33, Page 29. Which reads in pertinent part: "If any article or section of this agreement should be held invalid by operation or law or by any tribunal of competent jurisdiction or compliance with or enforcement of any article or section should be restrained by such tribunal, pending a final determination as to its validity, the remainder of this agreement, or the application of such article or section to persons or circumstances other than those as to which

it has been held invalid or as to which compliance with or enforcement of has been restrained, shall not be affected thereby." And then there are certain repetitions of that same savings clause.

Furthermore, I specifically reject the Company's contention that Article 16 at Pages 17 and 18 of the 1998 to 2001 collective bargaining agreement referred to generally as an anti-doublebreasting clause violates the Act. Specifically Section 8(e) of the Act. I do not find any violation of the Act therein. In so concluding I'm not unmindful that some U. S. Circuit Courts of Appeals find fault with some anti-doublebreasting language in certain collective bargaining agreements.

I, likewise, reject the Company's contention that the successorship clause in the 1998 to 2001 collective bargaining agreement, specifically Article 32, as it pertains to leasing, runs afoul of the Act. A reading of the successor clause appears

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to be one that if the Company herein is taken over by another entity in whole or in part, that new entity is bound by the agreement. The language speaks in terms of any lease or transfer or assignment, et cetera, "to evade this agreement".

Accordingly I am persuaded the Company asks that I make a finding of unlawfulness on this provision that is greater than what is set forth in the provisions of the successorship clause. In other words, the matters that are forbidden by the successorship clause would pertain only to an attempt by the Company to evade the agreement. In its full context I do not find that provision to run afoul of the Act.

Accordingly I conclude and find the Company is required to execute and abide by the Association negotiated collective bargaining agreement as an 8(f) agreement from June 1998 until 2001.

In so finding I shall order the Company the execute and abide by the 1998 to 2001 contract, and that it in doing so it recognize the Union as the collective bargaining representative for its employees. With the rights that the Union would have as or pursuant to an 8(f) agreement.

I further direct that the Company cease its unilateral deduction of pension contributions that are not turned over to and administered by the specific funds called for in the collective bargaining agreement.

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I further direct that the Company abide by the contract and make the necessary contributions retroactive to June 1, 1998 for the pension fund, the annuity fund, the apprentice training program, and the health and welfare fund, as spelled out in the collective bargaining agreement.

Further, I direct the Company compute and pay the specific overtime wages that the employees in the unit are entitled to for the time they worked in the geographic jurisdiction of Local 1144, as set forth in the Parkersburg-Marietta Contractors Association, Inc. agreement, by which the Company herein is bound pursuant to its own collective bargaining agreement.

When the Court Reporter serves on me a copy of the transcript I will certify those pages of the transcript that constitute

my decision. I will perhaps, as has been the case in the past, make corrections thereon. I will then serve on the parties my

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certification of the Bench Decision. It is my understanding the appeals period runs from that time. However, I invite your attention to the Board's Rules and Regulations, and if you com-

ply with them you will perhaps be in good stead rather than relying on my representation of what those rules call for.

And let me state again that it has been a pleasure being in Charleston, West Virginia.

And with that, this trial is closed.

(Whereupon, the hearing in the above entitled matter was closed at 10:40 a.m..)