

Gem Management Company, Inc. and Local 67, Operative Plasterers' and Cement Masons' International Association, AFL-CIO and Bricklayers' and Allied Craftworkers' Local Union No. 1, International Union of Bricklayers and Allied Craftworkers, AFL-CIO and Bricklayers and Allied Craftworkers' Local Union No. 9, International Union of Bricklayers and Allied Craftworkers, AFL-CIO. Case 7-CA-44509

June 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER
AND WALSH

On November 1, 2002, Administrative Law Judge Eric M. Fine issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent 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 exceptions¹ and briefs and has decided to affirm the judge's rulings, findings,² and conclusions and to adopt his recommended Order as modified.³

¹ There are no exceptions to the judge's unfair labor practice findings and conclusions.

² The General Counsel has excepted, *inter alia*, to the judge's findings that the Respondent was not bound by the June 1999 and November 2000 amendments to (respectively) the 1997 and 2000 collective-bargaining agreements (the ACT agreements) between the Architectural Contractors Trade Association (ACT) and Charging Party Plasterers Local 67.

We find it unnecessary to pass on whether the Respondent was bound by the June 1999 amendment to the 1997 ACT agreement, because resolution of that question would not affect the remedy.

We agree with the judge, for the reasons set forth in fn. 19 of his decision, that the Respondent was not bound by the November 2000 amendment to the 2000 ACT agreement. We find that the judge correctly interpreted the language in the Respondent's October 1999 "Agreement for Non-Association Members" (the "me-too" agreement, set out in full in sec. II of the judge's decision) as not encompassing the November 2000 amendment, and we adopt his analysis. By its letter agreement of October 1999, the Respondent became bound to the then-extant 1997-2000 contract. However, a reasonable reading of the language is that it binds the Respondent to changes to the 1997-2000 contract, and to the 2000 contract, but *not* to changes to the 2000 contract. Contrary to our colleague, we find that the proper inquiry is whether the language of the me-too agreement clearly established that non-member signatories were bound to amendments to or modifications of succeeding ACT agreements. We agree with the judge that it did not. We disagree with our colleague's contrary view that the test is whether a "reasonable inference" can be drawn that the Respondent bound itself to modifications of later contracts. Nor do we agree with our colleague's view that contractual language in the 2000 ACT agreement compels a different result. The 2000 ACT agreement provides that it "may only be modified, in writing, by the mutual consent of the parties." This language merely addresses the *mechanism* for contract

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, GEM Management Company, Inc., Clare, Michigan, 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) and reletter the subsequent paragraphs accordingly.

"(a) Honor the terms of the 2000 ACT agreement during the term of the agreement and any automatic renewal or extension of it, including by paying contractually required wages and fringe benefits.

"(b) Make whole, with interest, the unit employees for any loss of wages and other benefits they may have suffered as a result of its failure to abide by the 2000 ACT agreement, and any automatic renewal or extension of it, since May 1, 2001, as set forth in the remedy section of the judge's decision.

"(c) Make all contractually required fringe benefit fund contributions, if any, that have not been made on behalf of unit employees since May 1, 2001, and reimburse unit employees for expenses ensuing from its failure to make the required payments in the manner set forth in the remedy section of the judge's decision.

modification. It does not address *who* will be bound by such modifications or, specifically, whether nonmember signatories to the separate me-too agreement would be bound by such modifications. In sum, we agree with the judge that "me too" agreements are to be strictly confined to their precise terms, and that neither the language in that agreement, nor the 2000 ACT agreement, are precise enough for us to conclude that Respondent agreed to be bound to modifications (including the November 2000 amendment) to the 2000 ACT Agreement.

Contrary to his colleagues, Member Walsh finds that the Respondent was bound by the November 2000 amendment to the 2000 ACT agreement. He finds a reasonable inference that the parties intended the language in the October 1999 "me too" agreement binding the Respondent to "any successor agreements negotiated by [ACT and Plasterers Local 67]" to encompass modifications which they negotiated to those successor agreements as well. In Member Walsh's view, that language more broadly encompasses any future agreements negotiated by ACT and Plasterers Local 67 in the collective-bargaining context—specifically here, the negotiated and agreed-upon November 2000 amendment to the 2000 ACT agreement. In fact, the 2000 ACT agreement contains a provision, in Article VI, which expressly contemplates that such amendments could be negotiated by the parties: "This Agreement may only be modified, in writing, by the mutual consent of the parties." Member Walsh finds it more likely that the parties intended such a construction, rather than one that would bind the Respondent to the successor 2000 ACT agreement itself, but not to subsequent negotiated amendments to that agreement.

³ We shall modify the judge's recommended Order to conform to the remedy section of his decision and to the Board's standard remedial language.

“(d) Remit to Plasterers 67 the dues that employees through signed checkoffs authorized it to deduct from their wages, together with interest thereon, as provided in the remedy section of the judge’s decision.”

2. 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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT withdraw recognition from Local 67, Operative Plasterers’ and Cement Masons’ International Association, AFL-CIO (Plasterers 67) during the term of the collective-bargaining agreement between Plasterers 67 and Architectural Contractors Association (ACT), with effective dates of June 1, 2000, through May 31, 2003 (the 2000 ACT agreement), and during the term of any other agreement to which we are bound with Plasterers 67, absent timely notice to that union.

WE WILL NOT fail to apply the terms of the 2000 ACT agreement or refuse to recognize Plasterers 67 as the employee representative in the following appropriate unit:

All of our full-time and regular part-time journeymen and apprentice plasterers doing work described in Article IX, Section 2, of the 2000 ACT agreement employed at jobsites located in Michigan in Wayne, Oakland, Lapeer, Macomb, and St. Clair counties.

WE WILL NOT pay fringe benefits to the Bricklayers’ and Allied Craftworkers’ Local Union No. 9, International Union of Bricklayers and Allied Craftworkers, AFL-CIO (Bricklayers 9), contractual benefit funds and solicit Bricklayers 9 to sign up employees for work at jobsites covered by Plasterers 67’s collective-bargaining agreement and where Bricklayers 9 does not have a collective-bargaining agreement.

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 honor the terms of the 2000 ACT agreement during the term of the agreement and any automatic renewal or extension of it, including by paying contractually required wages and fringe benefits.

WE WILL make whole, with interest, the unit employees for any loss of earnings and other benefits they may have suffered as a result of our failure, since May 1, 2001, to abide by the 2000 ACT agreement and any automatic renewal or extension of it.

WE WILL make all contractually required fringe benefit fund contributions, if any, that have not been made on behalf of unit employees since May 1, 2001, and reimburse unit employees for expenses ensuing from our failure to make the required payments, with interest.

WE WILL remit to Plasterers 67 the dues that employees through signed checkoffs authorized us to deduct from their wages, with interest.

WE WILL make all our employees whole for all dues and fees paid by employees, who performed work for us at the Extended Stay America jobsite in 2001 in Macomb County, Michigan, that were paid to Bricklayers 9 for work falling within the above-described bargaining unit, except for payments that are shown to have been nonconcernive.

GEM MANAGEMENT COMPANY, INC.

Judith A. Schulz, Esq., for the General Counsel.

Thomas H. Weiss, Esq., of Mount Pleasant, Michigan, for the Respondent.

Frederick B. Gold, Labor Relations Consultant, of Farmington Hills, Michigan, for the Charging Party union.

DECISION

STATEMENT OF THE CASE

ERIC M. FINE, Administrative Law Judge. This case was tried in Detroit, Michigan, on June 5, 2002. The charge and amended charge were filed by Local 67, Operative Plasterers’ and Cement Masons’ International Association, AFL-CIO (Plasterers 67) resulting in the complaint which issued February 28, 2002, against Gem Management Company, Inc. (Respondent). Bricklayers’ and Allied Craftworkers’ Local Union No. 1, International Union of Bricklayers and Allied Craftworkers, AFL-CIO (Bricklayers 1) and Bricklayers’ and Allied Craftworkers’ Local Union No. 9, International Union of Bricklayers and Allied Craftworkers, AFL-CIO (Bricklayers 9) were each named as parties at interest in the complaint. However, neither of the Bricklayers locals made an appearance in these proceedings. The complaint alleges that Respondent, an employer

engaged in the building and construction industry, signed an agreement with Plasterers 67 on October 2, 1999, granting recognition to that union as the exclusive collective-bargaining representative of a unit appropriate for collective bargaining, and thereby entered a collective-bargaining agreement with Plasterers 67 for the period of June 1, 1997, to March 31, 2000, without regard to the majority status of that union being established under Section 9(a) of the Act. It is alleged that the recognition required that Respondent be bound to subsequent agreements, the most recent covering the period of June 1, 2000, to May 31, 2003. It is alleged that since October 2, 1999, under Section 9(a) of the Act, Plasterers 67 has been the exclusive collective-bargaining representative of the employees in bargaining unit set forth in the complaint and that Respondent failed to apply the collective-bargaining agreement for all the bargaining unit work described in that agreement and failed to pay benefits required by the agreement to Plasterers 67 and to the bargaining unit employees in violation of Section 8(a)(1) and (5) of the Act. It is alleged that on June 2, 2000, Respondent entered into a collective-bargaining agreement with Bricklayers 1, containing a union-security clause and that Respondent has applied the collective-bargaining agreement entered into with Bricklayers 1 to Plasterers 67's unit work and is paying the benefits provided for in that agreement. It is also asserted that Respondent has paid money to Bricklayers 9 to cover fringe benefits for employees covered by its agreement with Plasterers 67. It is alleged that by this conduct Respondent has been rendering unlawful assistance to labor organizations in violation of Section 8(a)(1) and (2) of the Act.

On the entire record,¹ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, Plasterers 67, and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, engages in construction with a facility in Clare, Michigan, where during the preceding 12 months of the filing of the charge, Respondent purchased goods and materials valued in excess of \$50,000 from Midwest Building Supply which purchased those materials from out-of-state suppliers. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that Plasterers 67, Bricklayers 1, and Bricklayers 9 are each labor organizations within the meaning of Section 2(5) of the Act.

¹ On June 10, 2002, following the close of the hearing, Respondent tendered as Jt. Exh. 8 a Michigan Department of Transportation map of Michigan for admission into evidence. No party having objected Jt. Exh. 8 is received into evidence.

II. ALLEGED UNFAIR LABOR PRACTICES²

George Moore is the president and sole shareholder of Respondent, which came into existence as a corporation in 1999. Respondent is primarily engaged in the installation of a synthetic form of plaster. Respondent performs work throughout the State of Michigan. Respondent's work force fluctuates from 1 to 50 employees, with an average of 6 to 8 on staff. Respondent's plasterers apply the synthetic plaster and Respondent consistently employs at least a couple of employees performing this work.

Moore signed an agreement on February 9, 1999, agreeing to be bound to the Michigan Council of Employers' 1997 to 2000 agreement with Bricklayers 9 (the 1997 MCE agreement).³ Moore testified that, based on his signing the 1997 MCE agreement, he later became bound to Bricklayers 9's agreement with the MCE running from the period of June 22, 2000, to August 1, 2003 (the 2000 MCE agreement). The 2000 MCE agreement states in article II, that "[t]his Agreement shall be in effect within the boundaries of the State of Michigan, excluding all the counties in the Upper Peninsula and excluding the counties of Wayne, Oakland, Macomb, and Monroe in the Lower Peninsula. All other Michigan counties are included."

Former Plasterers 67 Business Manager Charles Novak was a member of Plasterers 67's bargaining committee for the negotiation of collective-bargaining agreements with the Architectural Contractors Association (ACT).⁴ Novak, on behalf of Plasterers' 67, executed a collective-bargaining agreement with ACT with effective dates of June 1, 1997, through May 31, 2000 (the 1997 ACT agreement). The agreement states that ACT was formerly known as the Detroit Association of Wall and Ceiling Contractors. The 1997 ACT agreement contains a union-security clause requiring employees who are union members on the effective date of the agreement to remain members as a condition of employment. New employees were required to become union members following the 8th day of their employment as defined in the agreement. The 1997 ACT agreement provides, in pertinent part:

Article IX entitled "Jurisdiction" Section 12. "Detroit Trade Area":

The area in which these working rules apply is all of Wayne County and those parts of Macomb and Oakland counties which lie south of Thirteen Mile Road.

² In making the findings below, I have reviewed the complete record, considered established and admitted facts, the inherent probabilities, and have considered the testimony and demeanor of all witnesses. Testimony in contradiction to that which my factual findings are based has been considered but discredited. My failure to credit certain aspects of a witness's testimony does not mean that I have rejected all of their testimony. See *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950). As necessary, specific credibility resolutions will be discussed in more detail in the body of this decision.

³ Bricklayers 9 maintains a location in Saginaw, Michigan. A copy of the 1997 MCE agreement was not placed in evidence.

⁴ Plasterers 67 employed Novak until he retired in January 2001.

On June 30, 1999, Novak and a representative of ACT signed off on an amendment to the 1997 ACT agreement which expanded Plasterers 67's territorial jurisdiction. The amendment provides as to article IX, section 12 that "[t]he geographic territory governed by this agreement consists of Wayne, Oakland, Lapeer, Macomb and St. Clair Counties."

Novak testified that, toward the latter part of 1999, he met with some of Respondent's employees at one of its jobsites.⁵ This prompted Novak to call Moore and state Moore would have to enter into an agreement with Plasterers 67 in order to work in the area. Moore told Novak that he had a collective-bargaining agreement with Bricklayers 9 in Saginaw, Michigan.⁶

Novak testified that he mailed Moore a copy of the 1997 ACT agreement, the June 30, 1999 amendment to the 1997 ACT agreement, and the agreement's signature page for non-association members.⁷ However, when Novak was shown a copy of the nonassociation member signature page with Moore's signature dated October 2, 1999, he was unable to explain why the document contained fax transmission identification for both Respondent and Plasterers 67. On review of the document, Novak testified that it was possible that he faxed rather than mailed Moore the signature page, which Moore signed and faxed back to him. Nevertheless, Novak maintained that he was sure that he mailed the 1997 ACT agreement and its June 30, 1999 amendment to Moore.

The document Moore signed on October 2, 1999, and faxed to Novak on October 8, 1999, is entitled, "AGREEMENT FOR NON-ASSOCIATION MEMBERS." It reads as follows:

This is to certify that I have read the Agreement between the Detroit Association of Wall and Ceiling Contractors and Plasterers' Local Union No. 67 and I agree to be bound by all provisions contained in this Agreement and any changes that may be made in the future by mutual consent of said parties for the life of this Agreement and any successor agreements negotiated by them.

I hereby specifically submit to the jurisdiction of the joint Negotiating Committee and further agree that, with regard to the provisions of the Agreement relating to the settlement of grievances, the Association Representatives shall be deemed my Representative.

Moore testified that in October 1999, Novak told him that Plasterers 67's jurisdiction was Wayne, Macomb, Oakland, and Monroe Counties south of 13 Mile Road and that Bricklayers 1 has jurisdiction north of 13 Mile Road. Moore testified that he received a copy of the signature page for "Agreement for Non-Association Members" of the 1997 ACT agreement from No-

vak by fax, that he signed it and faxed it back to Novak. He testified that Novak did not mail him a copy of the 1997 ACT agreement until 4 months after Moore signed the "Agreement for Non-Association Members" in October 1999.⁸ Moore testified that Novak never provided him with a copy of the June 30, 1999 amendment to the 1997 ACT agreement.

The forgoing reveals certain variances between the testimony of Novak and Moore. Considering their demeanor, the content of their testimony, and the documentary evidence, I have credited Moore that Novak faxed rather than mailed him a copy of the signature page for the 1997 ACT agreement. Moore signed the document on October 2, 1999, and faxed it back to Novak on October 8, 1999. I find little else of Moore's testimony about this transaction to be worthy of belief. The document Moore signed on October 2, 1999, specifically states he had read Plasterers 67's collective-bargaining agreement. However, despite this written acknowledgement, Moore testified that he did not receive the document until 4 months later.⁹ Moreover, Novak signed an amendment to the 1997 ACT agreement on June 30, 1999, expanding Plasterer 67's jurisdiction to all of "Wayne, Oakland, Lapeer, Macomb and St. Clair Counties," and I do not believe that Novak, in these circumstances would have purposely mislead Moore by telling him in October 1999 that Plasterers 67's jurisdiction was limited to those counties south of 13 Mile Road as Moore testified. I also do not credit Moore's claim that they discussed Bricklayers 1's jurisdiction. First, Respondent did not have a contract with Bricklayers 1 at the time of this conversation. Second, the territory of Bricklayers 1 that Moore claims Novak related to him varies from the territorial jurisdiction contained in the contract that Moore subsequently signed with Bricklayers 1.

On the other hand, Novak's testimony because of poor recollection was not as precise as it might have been. He was corrected as to the location of the jobsite on which he initially saw Respondent's employees working, and he belatedly admitted that he may have faxed Moore the signature page for the 1997 ACT agreement rather than mailing it to Moore with two other documents as he initially testified. He failed to testify that he informed Moore that there was a June 30, 1999, amendment to the 1997 ACT agreement during their conversation and his record keeping was poor in that he was not aware of whether he sent Moore a cover letter which would have shown the date and description of any documents he sent to Moore. In these circumstances, and in the face of Moore's denial, I do not find that

⁸ Moore testified that he reviewed the 1997 ACT agreement when he received it, but that he did not really read it for its jurisdictional language.

⁹ While the nonassociation members agreement Moore signed on October 2, 1999, references the Detroit Association of Wall and Ceiling Contractors which was the prior name of ACT, Respondent does not dispute that Moore's signature bound Respondent to the 1997 ACT agreement. In this regard, Moore did not protest the name change to the union when he received the 1997 ACT agreement and he testified that he followed the agreement for a period of time. Moreover, by letter dated November 30, 2001, to the Regional Office, Respondent's attorney, Thomas Weiss, acknowledged that Respondent had an agreement with Plasterers 67, and on March 12, 2002, Moore signed off on a letter to Plasterers 67 providing for Respondent's termination of the 1997 ACT agreement with that union.

⁵ Novak's testimony, due to the lack of specificity of his recollection, vacillated as to the time and location of this meeting.

⁶ Novak testified that, at that time, Plasterers 67's jurisdiction did not include Saginaw. When shown a copy of the 2000 MCE agreement, during his testimony, Novak testified that the scope of Bricklayer 9's jurisdiction set forth in the agreement surprised him.

⁷ Novak initially testified that he thought that he mailed two amendments to Moore, but then stated that the second amendment was entered into at a later date. Novak could not recall whether he sent a cover letter to Moore with the documents.

the General Counsel has established that Novak mailed a copy of the June 30, 1999 amendment to the 1997 ACT agreement to Moore.

On May 31, 2000, Novak signed off on a new collective-bargaining agreement between Plasterers 67 and ACT (the 2000 ACT agreement). The 2000 ACT agreement has a June 1, 2000 effective date and a May 31, 2003 expiration date. The 2000 ACT agreement provides that, “[t]he geographic territory governed by this agreement consists of Wayne, Oakland, Lapeer, Macomb and St. Clair Counties.”

In November 2000, Novak and ACT President George Stripp signed off on an amendment to the 2000 ACT agreement. The amendment, has an effective date of November 21, 2000, and changed article IX, section 12, to read as follows:

Section 12. Territorial Coverage of the Agreement

The geographic territory governed by this Collective Bargaining Agreement consists of Wayne, Oakland, Lapeer, Macomb, St. Clair, Washtenaw, Sanilac and Livingston Counties excluding in Livingston County the townships of Conway, Cohoctah, Deerfield, Handy, Hartland, Osceola, Tyrone and Howell and the City of Howell.

Novak testified that he mailed all signatory contractors, including Respondent, a copy of: the 2000 ACT agreement, a 2-page summary of the agreement, and the November 2000 amendment to the agreement. However, Moore denied receiving these documents in the mail.¹⁰ I do not find that the General Counsel, in the face of Moore’s denial, has established that Novak mailed Moore these documents. In this regard, Novak had no specific recollection of mailing them to Moore other than his testimony that he mailed these documents to all signatory contractors based on a list Novak maintained at the union hall. However, Novak’s list of contractors was not produced at the hearing, nor were any cover letters produced verifying that the documents were mailed to individual contractors. Moreover, I was not impressed with the quality of Plasterers 67’s record keeping in that a list of signatory contractors maintained by Novak’s successor in 2002 inexplicably omitted Respondent’s name as well as the names of other contractors.

Novak testified that Plasterers 67 does not operate an exclusive hiring hall. Rather, signatory employers can call Plasterers’ 67 for referrals of employees, or they can hire employees off the street, who are required to become union members under the collective-bargaining agreement’s union-security provision.

On June 2, 2000, Moore signed off on a collective-bargaining agreement with Bricklayers 1. Article II, section 1 of the agreement provides that Respondent recognizes Bricklayers 1 for all persons employed performing plasterers’ work:

... on all present future jobsites within the geographic area of Wayne, Oakland, Macomb, and Monroe Counties, Michigan, based upon the fact, acknowledged by the Employer to be

¹⁰ Moore testified that he first saw the 2000 ACT agreement in Respondent Attorney Thomas Weiss’ office 6 or 7 months before the June 5, 2002 unfair labor practice trial, and that he did not see the November 21, 2000 amendment until around a month or two before the trial.

true, that the Union has represented and continues to represent a majority of those employees within the meaning of Section 9(a) of the National Labor Relations Act. The Employer further agrees that any dispute concerning its obligation to recognize the Union as sole and exclusive bargaining representative will be resolved solely under Article XIV, Grievances. The Employer expressly waives any right to abrogate or repudiate this agreement during its effective term or to seek a National Labor Relations Board election during the term of this Agreement.¹¹

Terry Van Allen replaced Novak as the business manager for Plasterers 67 in January 2001. In early June 2001, Van Allen came across one of Respondent’s jobsites in Lapeer County for work being performed at the Lapeer Vocational Technical School (the LVTS jobsite). The plasterers on the job told Van Allen they were not being paid Plasterers 67’s contract rates. Van Allen threatened the superintendent of the general contractor with a picket line. However, Van Allen did not picket the jobsite. Van Allen testified Plasterers Local 67 did not receive contractual fringe benefits or dues from Respondent for work performed at this jobsite.¹²

Moore wrote Van Allen a letter, dated June 25, 2001, which reads as follows: “Attention Local 67: As of June 25, 2001, GEM Management no longer wishes to have an agreement with your local.” On July 20, 2001, Van Allen wrote Moore and referenced Moore’s June 25, 2001, letter while stating that “[a]ccording to the termination language in the Collective Bargaining Agreement we did not receive your letter in a timely fashion. Therefore Gem Management is still bound by the agreement.”

Around August 2001, Van Allen found a jobsite located just south of 13 Mile Road in Macomb County where Respondent was performing work at an Extended Stay America Hotel (the ESA jobsite). Van Allen testified that the project lasted around 3 months and that there were employees on the site performing work covered by Plasterers 67’s contract. However, Plasterers 67 did not receive dues or fringe benefits for this project. Van Allen testified that he met Respondent’s attorney, Thomas Weiss, at the ESA jobsite around October 14, 2001. Van Allen testified that, “I threatened for a picket line and nobody wanted a picket line on a project. I said well, I will not picket the job if you give me a copy of the contract.” Van Allen testified that, when he met Weiss at the ESA jobsite, Bricklayers 9 representatives may have been there and Van Allen was aware that Bricklayers 9 members were performing work at the site. Weiss faxed Van Allen a letter dated October 16, 2001. The letter states that Respondent’s contract with Bricklayers 1 is dated June 2, 2000, and that jurisdiction clause covers Wayne,

¹¹ While Moore did not sign off on Bricklayers 1’s agreement until June 2, 2000, the agreement by its terms expired on May 31, 2000. The agreement does contain an automatic renewal provision absent 60 days written notice prior to the expiration date. It also contains a provision, absent proper notice, binding an employer to any subsequent agreement reached between that union and management committee named in the contract.

¹² Moore testified that it was his opinion that Lapeer County was covered by Bricklayers 9’s agreement.

Oakland, Macomb, and Monroe Counties. The letter had two pages of the Bricklayers 1 agreement attached. Van Allen testified that prior to receiving Weiss' October 16 letter, he had no knowledge that Respondent had entered into an agreement with Bricklayers 1.

Weiss testified as a witness for Respondent.¹³ Weiss testified Moore called him in October 2001, told him there was a labor dispute at the ESA jobsite and asked Weiss to go to the jobsite and meet with business agents of Bricklayers 9. Weiss met Bricklayers 9 officials in the ESA hotel lobby and Van Allen was there. Weiss testified an argument ensued and he then conversed with Van Allen in an empty guest room. Van Allen asked Weiss to furnish him with some documents from other unions, which Weiss faxed to Van Allen. Weiss testified that, during the conversation, Van Allen told him that Plasterers 67's jurisdiction "covered the area South of 13 Mile Road." Weiss testified that the ESA jobsite was just south of 13 Mile Road. At that time, Van Allen provided Weiss with a copy of the 2000 ACT agreement. Weiss testified that that was the first time that he received any documentation concerning this matter.¹⁴

Moore testified that he is aware that there were two of Respondent's projects for which Plasterers 67 asserted jurisdiction and for which there was a dispute. He testified that the Lapeer County job was outside of Plasterers' 67's jurisdiction as defined in the preamended 1997 ACT contract. Moore initially equivocated as to the location of the ESA project saying it was on 13 Mile Road in Macomb County and that it was between the jurisdiction of Bricklayers 1 and Plasterers 67. When pressed, however, Moore admitted that the ESA jobsite was south of 13 Mile Road and that it was within Plasterers 67's jurisdiction under his view of the preamended 1997 ACT contract.¹⁵

Moore testified that Bricklayers 9 is the primary supplier of Respondent's plasterers and that all of Respondent's employees performing plasterer's work at the ESA jobsite save one were assigned to Bricklayers 9, even though the project was not in Bricklayers 9's jurisdiction. He testified that all of Respondent's employees were performing plasterers work at the ESA site. Moore testified three of Respondent's ESA jobsite employees were Bricklayers 9 members who transferred to the ESA jobsite from another of Respondent's locations. Moore testified that five or six employees who worked at the ESA jobsite were hired off the street by Respondent and then signed

¹³ Weiss also served as Respondent's representative during the hearing.

¹⁴ Weiss testified that he obtained a copy of the June 30, 1999 amendment to the 1997 ACT agreement, which contained an indication that it was faxed from ACT's office on September 24, 2001. Weiss denied that he had any communication with ACT and he testified that the document was not faxed to him. Weiss could not explain how or from whom he received this document. Moore testified the first time he saw the June 30, 1999 amendment to the 1997 ACT agreement was in Weiss' office in the year 2001 right at the time the labor controversy began.

¹⁵ It is Moore's contention that, despite what is stated in their contracts, Plasterers 67 has jurisdiction for the area south of 13 Mile Road and Bricklayers 1 has jurisdiction for the area north of 13 Mile Road.

up by Bricklayers 9. Moore notified Bricklayers 9 about these employees so that they could sign them up. Moore testified that members of Bricklayers 9 performing work on this job had their fringe benefits paid to funds under that Union's contract. He testified that there was one member of Plasterers 67 performing work on that job, and that Union's funds were paid for the employee's fringe benefits.¹⁶ Moore testified that there were no Bricklayers 1 members who performed work at the ESA jobsite.

Moore explained that he had Bricklayers 9 sign up the new employees at the ESA jobsite because that union works in Respondent's area. He testified that if Plasterers 67 signed these employees up they would not have transferred north to Respondent's area when the ESA project was finished because they would have received lower wages when they transferred. Moore testified that Plasterers 67's contractual wages are about \$2 to \$3 an hour higher than that of Bricklayers 9. Moore testified that he was not aware of any agreement between Bricklayers 1 and Bricklayers 9 where Respondent could use Bricklayers 9 members in an area covered by Bricklayers 1's contract.

On November 30, 2001, Weiss wrote a letter to NLRB Region 7 Investigator Carolyn Van Ness. In the letter, Weiss asserts that Plasterers 67 committed unfair labor practices in violation of Section 8(b)(4)(D) of the Act and requests a 10(k) hearing to determine the work jurisdiction of Plasterers 67 and Bricklayers 1. Weiss states in the letter that:

2. GEM is a signatory and party to agreements with two labor unions which assert jurisdiction in Macomb County, Michigan:

- A. Local #67 of the Operative Plasterers; and
- B. Local #1 of Michigan, Bricklayers and Allied Craftworkers International Union of North America, AFL-CIO.

...

4. GEM utilized plasterers at a job located in Macomb County, Michigan, specifically on 13-Mile Road at I-94;

...

5. GEM depended and relied upon both Local #67 and Local #1 to provide those plasterers;

6. It is the employer's, GEM's preference that employees represented by Local 1 perform the disputed work, in accordance with GEM's previous assignment[.]

The following exchange occurred when the November 30, 2001, letter was introduced into evidence:

JUDGE FINE: Was an unfair labor practice Charge ever filed?

MR. WEISS: That is the only document that was filed with the Court.

JUDGE FINE: For the Board or the Region?

MR. WEISS: With the Region. I am sorry. With the Region and—

¹⁶ Moore testified that the Plasterers 67 member approached Moore directly and that Moore did not contact that union's hiring hall about referring this employee.

JUDGE FINE: You had already filled out a Charge form and filed it with the Region.

MR. WEISS: I was dissuaded from doing so because the explanation that was given to me is that this matter was inappropriate for the Charge being made and the 10-K Hearing request.

JUDGE FINE: All right but you never took it on your own initiative after that to file a Charge.

MR. WEISS: I was relying upon the statement of the investigator.

JUDGE FINE: But you did not file a Charge?

MR. WEISS: We simply filed that letter.

JUDGE FINE: Right.

MR. WEISS: There is no separate Charge form filed.

JUDGE FINE: Right. Okay. So, there was never any investigation on the 10-K.

MR. WEISS: That is correct, Your Honor.

JUDGE FINE: By the Region.¹⁷

Moore testified that he directed Weiss to write the November 30, 2001 letter after the dispute arose at the ESA project. Despite the representations in the letter, Moore testified as follows:

Q. You believed—did you believe, at that time, that Bricklayers' Local 1 had jurisdiction on that job?

A. No.

Q. Did you believe that Local 67 had jurisdiction on that job?

A. Yes.

Q. Did you believe that Local 9 had jurisdiction on that job?

A. No.

On March 12, 2002, Moore signed off on a detailed letter to Van Allen, drafted by Weiss, notifying the Union that Respondent was terminating its contractual relationship with Plasterers 67 under the 1997 ACT agreement. Respondent argued in the letter that it was not bound by the 2000 ACT agreement and therefore was providing timely notice of termination under article VIII of the 1997 ACT agreement, which Respondent contended had automatically renewed itself on an annual basis. By letter dated March 14, 2002, Plasterers 67 Representative Frederick Gold wrote Weiss stating it was the Union's position that the attempted termination was untimely because, pursuant to the nonassociation employer agreement Moore had signed, Respondent was bound by the 2000 ACT agreement.

A. Analysis

In *NLRB v. Strong Roofing & Insulating*, 393 U.S. 375 (1969), an employer tried to escape its contractual obligations when it untimely attempted to withdraw from an employer association that had negotiated a collective-bargaining agree-

¹⁷ While Weiss conceded that he never filed a charge on the Board's form, he went on to state at the hearing that the Board's policy is that a charge can be filed in an informal fashion and that a standardized charge form is not required. Weiss contended that his November 30, 2001 letter was sufficient to constitute the filing of an unfair labor practice charge and a request for a 10(K) hearing. Weiss did not continue this argument in Respondent's posthearing brief.

ment. The Court found the employer's refusal to execute the collective-bargaining agreement violated Section 8(a)(1) and (5) of the Act. The Court, in reversing the court of appeals, also affirmed the Board's order that the employer "'pay to the appropriate source any fringe benefits'" required by the contract. *Id.* at 358. The Court held at 361–362 that:

... the business of the Board, among other things, is to adjudicate and remedy unfair labor practices. Its authority to do so is not "affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. . . ." Section 10(a), 61 Stat. 146, 29 U.S.C. Section 160(a).

... the Board may proscribe conduct which is an unfair labor practice even though it is also a breach of contract remediable as such by arbitration and in the courts. *Smith v. Evening News Assn.*, 397 U.S. 195, 197–198 (1962). It may also, if necessary to adjudicate an unfair labor practice, interpret and give effect to the terms of a collective bargaining contract. *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967).

In *NLRB v. C & C Plywood Corp.*, supra, the Court approved the Board's finding that the employer's institution of a premium pay plan during the term of a collective-bargaining agreement violated Section 8(a)(1) and (5) of the Act. The Board, in construing the terms of the collective-bargaining agreement, concluded that the union had not ceded power to the employer to unilaterally change the wage system during the term of the agreement.

In the *Wightman Center for Nursing & Rehabilitation*, 301 NLRB 573, 575 (1991), the administrative law judge, with approval of the Board, concluded that:

An employer's unilateral change of unit employees wage rates during the term of a collective-bargaining agreement amounts to a repudiation of the agreement which is not merely a breach of contract but "amounts, as a practical matter, to the striking of a death blow to the contract as a whole, and is, thus, in reality, a basic repudiation of the bargaining relationship." *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063, 1064 (1973), *enfd. mem.* 505 F.2d 1302 (5th Cir. 1974), *cert. denied* 423 U.S. 826 (1975).

See also *Nittany Manor Care Associates*, 337 NLRB 432 (2002), where a unilateral increase in rates of pay during the term of a collective-bargaining agreement was held to violate Section 8(a)(1) and (5) of the Act; and *Scapino Steel Erectors, Inc.*, 337 NLRB 992 (2002), where the Board found that an employer violated Section 8(a)(1) and (5) of the Act by failing to pay the wage rates set forth in a union's contract and by refusing to make the contractually mandated fringe benefit contributions. In *Scapino*, the Board majority concluded that the respondent employer had no intention of applying the collective-bargaining agreement at any of the jobsites in question, and that the respondent's actions were violative of Section 8(a)(5) of the Act because "it goes to the heart of the collective-bargaining relationship." *Id.* at 993 fn. 3.

In *Oklahoma Fixture Co.*, 333 NLRB 804, 807 (2001), the following principles were set forth:

Under Section 8(f) of the Act, employers and unions in the construction industry are permitted to enter into collective-bargaining agreements before the union has established its majority status. Either party is free to repudiate the collective-bargaining relationship once an 8(f) contract expires by its terms. *John Deklewa & Sons*, 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB*, 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988). However, an automatic renewal clause in an 8(f) agreement will be given effect and operates to bind the parties to a continuation of the agreement. *Cedar Valley Corp.*, 302 NLRB 823 (1991), enfd. 977 F.2d 1211 (8th Cir. 1992), cert. denied 508 U.S. 907 (1993); *Fortney & Weygandt*, 298 NLRB 863 (1990). When an employer repudiates a collective-bargaining agreement during its term, it violates Section 8(a)(5) and (1) of the Act. See *John Deklewa*, supra, 282 NLRB at 1385.

It is a relatively common practice in the construction industry for an employer, which is not a member of an employer association, to bind itself to agreements negotiated between an employer association and a union. These employers will do so by signing what is referred to as a “me too” or “short form” agreement. These “me too” agreements often bind employers to successor master contracts negotiated between the employer association and union and are enforced by the Board. See *W. J. Holloway & Son*, 307 NLRB 487, 489 (1992), where an acceptance agreement bound an employer to a master agreement and successor agreements; *Construction Labor Unlimited*, 312 NLRB 364, 367 (1993), enfd. 41 F.3d 1501 (2d Cir. 1994), where an acceptance agreement bound an employer to the current master agreement and “any successor agreement(s)”; *Neosho Construction Co.*, 305 NLRB 100 (1991), where a stipulation bound an employer to “all future master agreements;” and *Z-Bro, Inc.*, 300 NLRB 87, 89 (1990), enfd. 950 F.2d 726 (8th Cir. 1991), where an agreement bound an employer to the current master agreement and to “any renewals, additions, modifications, extensions and subsequent [master] agreements.”

In determining a party’s obligation under a “me too” agreement the Board will look to the language of the agreement itself as well as to the underlying master agreement where applicable. For example, in *Oklahoma Fixture Co.*, supra at 807–808, an employer was found by the language of its “me too” agreement to be bound to a master labor agreement then in effect and to the 1975 to 1978 successor agreement subsequently negotiated by the union and employer association. The Board majority held that:

By entering the me-too agreement, OFC unequivocally accepted the as-yet unknown results of the negotiations underway in July 1975 between the NTCA and the Union. That acceptance demonstrated OFC’s intent to enter into a collective-bargaining relationship with the Union on the basis of the 1975–1978 agreement, regardless of the terms of that agreement ultimately reached by the parties to the master contract negotiations.

....

In finding that OFC was bound to a series of year-to-year renewals of the 1975–1978 master agreement, we necessarily disagree with the General Counsel’s conten-

tion that OFC was bound to a series of successor master agreements negotiated by NTCA and the Union. As stated above, in the me-too agreement, OFC agreed to be bound to “the terms and conditions of [the 1975–1978] agreement.” Significantly, the me-too agreement contained no terms indicating that OFC was consenting to be bound to any successors to the 1975–1978 master agreement.

In the instant case, on October 2, 1999, Moore signed an agreement with Plasterers 67 for nonassociation members, which reads, in pertinent part, as follows:

This is to certify that I have read the Agreement between the Detroit Association of Wall and Ceiling Contractors¹⁸ and Plasterers’ Local Union No. 67 and I agree to be bound by all provisions contained in this Agreement and any changes that may be made in the future by mutual consent of said parties for the life of this Agreement and any successor agreements negotiated by them.

On June 25, 2001, Moore wrote Van Allen a letter seeking to terminate Respondent’s collective-bargaining agreement with Plasterers 67. Van Allen wrote back stating that “[a]ccording to the termination language in the Collective Bargaining Agreement we did not receive your letter in a timely fashion. Therefore Gem Management is still bound by the agreement.” Van Allen testified that Moore missed the March 2000 window period for terminating the contract. Van Allen was clearly referencing article VIII of the 1997 ACT agreement, entitled “Term of Contract,” which reads as follows:

It is mutually agreed that this Agreement and the provisions herein contained shall be in force and effect until May 31, 2000 and that unless notice of change is given not less than sixty (60) days nor more than ninety (90) prior to the date of such expiration of this Agreement, by either party to the other, the Agreement shall automatically renew itself from year to year after such expiration of this Agreement, or until a new Agreement is mutually agreed to by the parties.

While the “Agreement for Non-Association Members” Moore signed on October 2, 1999, contains no provisions on the manner in which Respondent and Plasterers 67 were to terminate their contractual relations, the parties are in apparent agreement that the procedures are governed by article VIII of the 1997 ACT agreement for which there is identical language in the 2000 ACT agreement. In this regard, Respondent does not claim that Moore’s June 25, 2001 letter ended the parties’ contractual relationship. In fact, by letter dated November 30, 2001, Respondent Attorney Weiss wrote Region 7 that Respondent is signatory to a contract with Plasterers 67. By letter dated, March 12, 2002, Moore wrote Van Allen that Respondent was providing timely termination notice pursuant to article VIII of the 1997 ACT agreement. It was Respondent’s position therein that it was not bound by the 2000 ACT agreement and that its notice of termination was timely under the automatic

¹⁸ As set forth above, the name of the employer association referenced in the agreement had changed to ACT and there is no dispute between the parties here that the October 1999 agreement Moore signed was referencing the 1997 ACT agreement.

renewal provisions in article VIII of the 1997 ACT agreement. Plasterers 67 responded that this notice of termination was untimely because Respondent was bound by the 2000 ACT agreement since Respondent had not filed a timely notice during the window period of the 1997 ACT agreement. Plasterers 67's letter went on to state that, unless a timely notice is filed, Respondent would be bound to any successor collective-bargaining agreement negotiated between Plasterers 67 and ACT. Thus, here again Plasterers 67 did not take issue with the assertion that article VIII governed the time requirements for rescinding the parties' contractual relationship. Rather, the Union argued that Respondent had not met the time requirements of that article. See *Fortney & Weygandt*, 298 NLRB 863 (1990), and *C.E.K. Industrial Mechanical Contractors*, 295 NLRB 635 (1989), where employers that signed letters of assent were found to be governed by termination notification requirements in the underlying master labor agreements between a union and an employer association.

Respondent cites language contained at page 23 of the 1997 ACT agreement which it contends should be read in conjunction with article VIII in support of its argument that it was never bound to the 2000 ACT agreement. The language reads:

IT IS HEREBY MUTUALLY UNDERSTOOD AND AGREED by and between the undersigned and Local Union No. 67 . . . for and in consideration of services performed and to be performed by plasterers for the undersigned and that the undersigned employer agrees to be bound by all terms and conditions including the payment of all WAGES AND fringe benefits, wherever the work is performed.

Respondent contends that this language when read in combination with article VIII supports a finding that Respondent, as an employer, was a party to the 1997 ACT agreement within the meaning of article VIII. Respondent contends that it is not bound by the 2000 ACT agreement unless it was "mutually agreed to by the parties" as required by article VIII. Respondent argues, that as a party under article VIII it never agreed to be bound to the 2000 ACT agreement, it therefore remained a party to the 1997 ACT agreement when it automatically renewed itself on an annual basis under the provisions of Article VIII. Respondent asserts that its March 2002 notice of termination was timely pursuant to article VIII of the 1997 ACT agreement.

I do not find Respondent's argument to be persuasive. Assuming Respondent, as it contends, was a party to the 1997 ACT agreement within the meaning of article VIII, I find that Respondent "mutually agreed" to be bound to the 2000 ACT successor agreement when Moore agreed to the language contained in the nonassociation members agreement stating that Moore had read the 1997 ACT agreement between Plasterers 67 and the employer association and agreed to be bound by its provisions and "any changes that may be made in the future by mutual consent of said parties for the life of this Agreement and any successor agreements negotiated by them." The language in the nonassociation member agreement is clearly referring to ACT and Plasterers 67 as the parties who negotiated the underlying master agreement and was committing Respondent to successor agreements negotiated by ACT and Plasterers 67.

Since the Board has repeatedly held that an employer can bind itself to agreements negotiated in the future between an employer association and a union, the General Counsel has established that any mutuality requirements of article VIII have been met by Moore's signature on the "non-association members agreement."

I therefore find that, by the terms of the nonassociation member agreement Moore signed in October 1999, Respondent was bound to the 1997 Act agreement and then became bound to the successor 2000 ACT agreement negotiated between Plasterers 67 and ACT. Since both Plasterers 67 and Respondent acknowledge that the provisions of article VIII govern termination of those agreements, I find that Respondent's June 25, 2001, and March 12, 2002 letters did not constitute timely notice of termination of either of those agreements.¹⁹

Respondent contends that it should not be bound by the 1997 or 2000 ACT agreements because when Plasterers 67 and ACT expanded the Union's jurisdiction either by amendments or the successor agreement itself this constitutes a material change in the agreement and thereby terminates Respondent's contractual obligations. However, *Seymour v. Coughlin Co.*, 609 F.2d 346 (9th Cir. 1979), and *Operating Engineers Pension Trust v. Cecil Backhoe Services*, 795 F.2d 1501, 1506 (9th Cir. 1986), cited by Respondent do not support this contention and are clearly distinguishable from the facts presented here. In *Seymour v. Coughlin Co.*, supra at 349-350, the court found that an employer was not bound by a successor master collective-bargaining agreement where the short form agreement the employer signed contained a provision that the agreement "shall continue in effect for the same term as the applicable multiple-employer labor agreements and for any renewals or extensions thereof." The court concluded that the effect of this language was that parties' agreement was "to terminate if the original MLA was not renewed or extended, and instead was modified." In fact, the court distinguished that case from its prior decision in *Calhoun v. Bernard*, 333 F.2d 739 (9th Cir. 1964), on appeal from remand 359 F.2d 400 (9th Cir. 1966). In *Calhoun* the court found that an employer was bound to amendments to a master agreement where the short form agreement it signed provided, after the elimination of a typographical error, "that

¹⁹ I do not, however, find that Respondent was bound by the June 30, 1999 amendment to the 1997 ACT agreement or to the November 2000 amendment to the 2000 ACT agreement. The "me too" agreement Moore signed on October 2, 1999, certified that Moore had read the master labor agreement then in effect, and he agreed that Respondent was to be bound to "any changes that may be made in the future by mutual consent of said parties for the life of this Agreement and any successor agreements negotiated by them." Since Moore had only agreed to bind Respondent to future changes in the 1997 ACT agreement, Respondent was not bound to the June 30, 1999 amendment which was negotiated in the past. For similar reasons, although I find that Respondent is bound by the successor 2000 ACT agreement, the "me too" agreement Moore signed did not provide that Respondent would be bound by any amendments to the successor agreement. Accordingly, I do not find that Respondent is bound to the November 21, 2000 amendment to the 2000 ACT agreement. In this regard, the Board has demonstrated it will strictly construe "me too" agreements and limit them to the precise terms of what a party has actually agreed to. See *Oklahoma Fixture Co.*, 333 NLRB 804, 807-808 (2001).

the employer would be bound by the master agreement and ‘any modification or changes’ therein.” See also *Construction Teamsters Health & Welfare v. CFCC*, 657 F.2d 1101, 1103 (9th Cir. 1981), where in finding, based on the signing of a short form agreement, that the employer there was bound to successive master labor agreements the court held that, “It is clear that a signatory to a Short Form Agreement can agree to be bound by future modifications, extensions and renewals of an MLA.” *Operating Engineers v. Cecil Backhoe Services*, supra at 1506, cited by Respondent, also does not require a different result. There the court held, citing *Con Form Const. Corp.*, “that a case by case analysis of the agreements involved provides the best evidence of the parties intent.”²⁰ Thus, the Ninth Circuit, as has the Board, has found that depending on the language in the agreement a party signs it can bind itself to future master agreements or amendments thereto. Considering the language of the October 1999 agreement Moore signed, I do not find that modifications contained in the 2000 ACT agreement extinguished Respondent’s bargaining obligation with Plasterers 67.²¹

Respondent also contends, in its brief, that Plasterers 67 seeks to have the Board validate territorial jurisdiction that would place Respondent in breach of its agreements with Bricklayers 1 and 9, thereby “subjecting the employer to double or triple liability for the payment of dues and fringes. This inequitable result cannot stand.” (R. Br. at 8.) There are several aspects of this case which serve to undercut Respondent’s position. First, I have discredited Moore’s testimony that, at the time, he entered the agreement with Plasterers 67 that Novak informed him that that Union’s jurisdiction was limited to work south of 13 Mile Road. Moreover, while Moore signed off on the agreement with Plasterers 67 in October 1999, he did not sign off on an agreement with Bricklayers 1 until June 2, 2000, or 8 months after he signed on to the 1997 ACT agreement. The jurisdictional language of the contract Moore signed with Bricklayers 1 contains territorial conflicts with the preamended 1997 ACT agreement. Thus, Moore willingly entered into a subsequent agreement with Bricklayers 1 which conflicted with the area which even he conceded was covered by the 1997 ACT agreement with Plasterers 67. I do not find Moore’s claim that he failed to read either agreement in detail as particularly persuasive when Respondent relies on equities as an argument to

limit its contractual obligations.²² Moore, by his own admission, had a copy of the 1997 ACT agreement at the time he signed on with Bricklayers 1.

Respondent also asserts, as a defense, that under Van Allen’s leadership Plasterers 67 engaged in “bad faith in picketing the jobs outside of its territory, sending unqualified people to the job site, and publishing a ‘contractors list’ of approved contractors that omitted the name of the Respondent evidences bad faith and is a breach of the contract.” (R. Br. at 13.) Respondent cites no contractual provisions in support of its breach of contract theory. Moreover, while he threatened to picket at the LTVS and ESA jobs, there is no evidence that Van Allen caused any of Respondent’s jobs to be picketed and article V of the 1997 and 2000 ACT agreements specifically excludes disputes over wages and fringe benefits from the protection of their no strike provisions. Therefore, I cannot find that Van Allen acted in bad faith by attempting to enforce the provisions of the 2000 ACT agreement for the LTVS and ESA locations. While Respondent’s name was omitted from a list of contractors that the Plasterers 67 circulated to general contractors in 2002, Respondent cites no contractual provision that Van Allen breached by this omission. I also do not credit Moore’s testimony that Plasterers 67 sent Respondent substandard workers. Moore testified that he used 11 or 12 referrals from that union who exhibited poor workmanship, but never informed the union officials of these employees’ performance problems. I find this self-serving declaration by Moore to be pretextual, and part of an effort to escape his obligations under the contract. See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

1. The LTVS jobsite

Van Allen’s credited testimony reveals that in early June 2001, he discovered that Respondent was performing plasterers’ work on the LTVS jobsite located in Lapeer County. Van Allen testified that Plasterers 67 did not receive payment into the union’s contractual fringe benefit funds or dues payments for this project, and the plasterers on the job informed him that they were not being paid at the contractual rates. Van Allen threatened the superintendent of the general contractor with a

²⁰ See also *Kennis v. McGoldrick*, 767 F.2d 594 (9th Cir. 1985).

²¹ Respondent argues that both the 1997 and 2000 ACT agreements recognize Michigan law. Respondent then cites Michigan case law for the proposition that “A material alteration of a contract after its execution without the consent of the complaining party bars an action on it against the party not consenting to the change.” *Anderson v. Donato*, 193 N.W. 805 (1923) (R. Br. at 5). I do not find these principles serve to prevent Respondent from being bound by the 1997 ACT agreement or its successor the 2000 ACT agreement. In this regard, the short form agreement Moore signed acknowledged that he had read the master labor agreement then in effect, that that he agreed to be bound by all of its provisions and any future changes made thereto by mutual assent of Plasterers 67 and the employer association, and any successor agreements negotiated by them. Respondent’s commitment is clear and unambiguous and the fact that the union and association negotiated a new master agreement does not constitute a material alteration to the contract to which Respondent originally assented.

²² Of note, pertaining to Moore’s penchant for signing contracts which he later claims not to have read, the court in *Cecil Backhoe*, supra at 1505 held that, “A party who signs a contract is bound by its terms regardless of whether he reads it or considers the legal consequences.” The court also held that “It is not a defense to claim that a union representative misrepresented the effect of signing an agreement.” Similarly, *Stark v. Kent Products, Inc.*, 233 NW2d 643 (1975), cited by Respondent, provides that, “One who signs a contract will not be heard to say, when enforcement is sought, that he did not read it, or that he supposed it was different in terms.” See also *W. J. Holloway & Son*, 307 NLRB 487, 489 (2002), where it was not a defense for an employer’s failure to follow a master labor agreement when the employer was not shown a copy of the master agreement at the time it entered into a nonassociation member agreement with a union. The Board also approved the administrative law judge’s conclusion that the employer was bound to the agreement he signed rather than the representations made by a union representative at the time of the signing. It was stated that, if the employer official had not read the agreement before he signed it, “he should have.”

picket line before leaving the jobsite. Moore acknowledged that Respondent had a jobsite in Lapeer County for which there was a dispute with Plasterers 67. Moreover, I have concluded that Moore reacted to Van Allen's visit to this jobsite when he wrote Van Allen on June 25, 2001, that Respondent wanted to terminate its contract with Plasterers 67. Noticeably absent from Moore's letter was any claim that the Lapeer County jobsite was outside of Plasterers 67's jurisdiction. While Moore testified that he believed that Bricklayers 9 had jurisdiction over this jobsite, it was not established on this record that payments for the work performed there were made to that Union's benefit funds.²³

Lapeer County is not covered by the territorial jurisdiction set forth in the 1997 ACT agreement.²⁴ However, I have concluded that Respondent is bound by the 2000 ACT agreement, which has an effective date of June 1, 2000, by the terms of the nonassociation member agreement Moore signed binding Respondent to successor agreements between ACT and Plasterers 67. The 2000 ACT agreement states that Plasterers 67's jurisdiction includes Lapeer County, as well as other areas not specified in the 1997 ACT agreement. While I have concluded that the General Counsel has failed to establish that Plasterers 67 provided Respondent with a copy of the 2000 ACT agreement until Van Allen presented Weiss with a copy on about October 14, 2001, at the ESA project, I nevertheless find that Respondent was bound by the 2000 ACT agreement during the term of its work at LTVS jobsite. It was stated in *Cedar Valley Corp.*, 302 NLRB 823, 830 (1991), *enfd.* 977 F.2d 1211 (8th Cir. 1992):

When the 8(f) agreement expires and the employer served timely notice of contract termination, nevertheless, the Board has held the designation of bargaining authority continues. That is, the Board has held that an employer is bound to successive agreements negotiated by the association until the employer withdraws bargaining authority from the association in a timely manner. [Citations omitted.]

The effect of the decisions cited above is clear. Here, Respondent signed collective-bargaining agreements with Operating Engineers 537 and with Laborers 309, and each contract contained an express commitment to abide by the terms of successor association agreements. Respondent never terminated this delegation of bargaining rights in the contractually prescribed manner. Under the cases cited above, Respondent's obligation to be bound by successor agreements continued to the present.

Similarly in *Twin City Garage Door Co.*, 297 NLRB 119 *fn.* 2 (1989), the Board held that since the respondent had signed an independent agreement binding itself to the current and successor association contracts "it could not repudiate its 8(f) relationship with the union until it provided timely notice of termina-

²³ Respondent's initial contract with Bricklayers 9 was also not put into evidence and therefore it is unclear whether that Union's territory changed over time as had Plasterers 67's.

²⁴ The June 30, 1999 amendment to the 1997 ACT agreement for the first time extended Plasterers 67's territorial jurisdiction to Lapeer County.

tion." See also *Carthage Sheet Metal Co.*, 286 NLRB 1249, 1251 (1987), where pursuant to a settlement agreement it had signed an employer was found bound to a contract as well as its successor agreement.

I therefore find that the October 2, 1999, nonassociation member agreement Moore signed bound Respondent to the 2000 ACT agreement which covered plasterers work performed in Lapeer County and that by failing to apply the 2000 ACT agreement to the work performed at the LTVS jobsite Respondent violated Section 8(a)(1)(5) and (d) of the Act. In this regard, Respondent failed to give timely notice to sufficient to terminate its collective-bargaining relationship with Plasterers 67 prior to the time that the 2000 ACT agreement came into effect. See *Cedar Valley Corp.*, *supra*; *Twin City Garage Door Co.*, *supra*; and *Carthage Sheet Metal Co.*, *supra*. While I have concluded that the General Counsel has failed to establish that Respondent was presented with a copy of the 2000 ACT agreement until mid-October 1991, the agreement Moore signed in October 1999 with Plasterers 67 does not create a condition precedent for the union to provide Respondent with a copy of the successor agreement in order for Respondent to be bound by its terms. See *W. J. Holloway & Son*, 307 NLRB 487, 489 (2002), where an employer was found to be bound by his signature to a letter of assent to an association master agreement, although he had not been presented with a copy of the master agreement at the time of his signature. It was held there that, "the circumstances that obtained at the time of the agreement's execution by the Respondent are altogether commonplace in the building and construction industries, as are the terms of the agreement."²⁵

2. The ESA jobsite

Around August 2001, Van Allen discovered the ESA jobsite, which Moore testified was located South of 13 Mile Road in Macomb County. Moore admitted that all of Respondent's employees who worked at the jobsite performed plasterers' work. Van Allen met Weiss at the jobsite around October 14,

²⁵ While there was insufficient evidence to establish that Novak mailed the 2000 ACT agreement to Respondent, I have concluded that Moore knew more or should have known more than he was willing to admit concerning the implementation of that agreement. The 1997 ACT agreement, of which Moore was admittedly provided a copy, contains a May 31, 2000 expiration date as well as an automatic renewal clause absent the negotiation of a successor agreement. This information was sufficient to place Respondent on notice of the possibility of a change in its contractual obligations following the May 31, 2000 termination date. Moreover, although Weiss admitted to possession of a copy of the June 30, 1999 amendment to the 1997 ACT agreement, and Moore testified that he reviewed a copy of that document in Weiss' office around the time of the labor dispute with Plasterers 67, neither individual could explain how Weiss obtained a copy of the document suggesting that Moore had more information at his disposal than he was willing to reveal at the hearing. I would also note that, whether Novak presented Moore with a copy of the 2000 ACT agreement, it is highly unlikely that Moore, as a contractor in the industry, would not have heard that a successor agreement to the 1997 ACT agreement had been negotiated. In any event for the reasons set forth above, I have concluded that it was not a condition precedent for Plasterers 67 to present Respondent with a copy of the 2000 ACT agreement in order for Respondent to be bound by its terms.

2001. At the time, Weiss was meeting with Bricklayers 9 officials, and Moore testified that, with the exception of one individual, employees who were members of Bricklayers 9 staffed the job. Moore testified that there were no Bricklayers 1 members working on the job. Despite meeting with Bricklayers 9 officials and the job being staffed by Bricklayers 9 members, when Van Allen asked Weiss for a copy of the contract covering the job, Weiss faxed Van Allen a few pages from the Bricklayers 1 contract, including the territorial page, rather than pages from Bricklayers 9 contract. Weiss' action here was clearly misleading because although Bricklayers 9's members were working at this jobsite, that Union's jurisdiction did not cover the site, while Bricklayers 1's contract did. Moore also testified that he was aware of no understanding between Bricklayers 1 and Bricklayers 9 were the latter union was permitted to perform work in Bricklayers 1's territory.

On November 30, 2001, Weiss wrote a letter to NLRB Region 7 asserting that Plasterers 67 committed unfair labor practices in violation of Section 8(b)(4)(D) of the Act and requesting a 10(k) hearing to determine the work jurisdiction of Plasterers 67 and Bricklayers 1. Moore testified that the letter was referencing the work performed at the ESA jobsite. In the letter, Weiss stated that Respondent had separate collective-bargaining agreements with Plasterers 67 and Bricklayers 1 each for plasterers worked performed in Macomb County. Weiss went on to state that Respondent relied on both Plasterers 67 and Bricklayers 1 to provide plasterers to perform work for a jobsite specifically on 13 Mile Road.

Weiss' representations in the November 30, 2001 letter to the Region were undercut by Moore and Weiss' testimony at the hearing.²⁶ Moore testified that Plasterers 67 did not supply Respondent with any employees for this job. Rather, Moore hired one employee directly who told Moore that he was a member of Plasterers 67.²⁷ Moore also testified that no Bricklayers 1 members performed any work on this job. Rather, members of Bricklayers 9 members performed the work; a union which Respondent has never claimed had any contractual claims for this worksite. Finally, Moore testified that it was his understanding that Bricklayers 1's jurisdiction was north of 13 Mile Road and Plasterers 67's jurisdiction was south of 13 Mile Road. Moore also testified that the ESA project was south of 13 Mile Road and under Plasterers 67's jurisdiction not that of Bricklayers 1. Yet, Weiss represented in his November 30, 2001 letter that there was a jurisdictional dispute between Bricklayers 1 and Plasterers 67 over the work performed at the ESA project and requested a 10(k) hearing.²⁸ Respondent's

²⁶ Weiss testified he met Bricklayers 9 officials, not those of Bricklayers 1, at the jobsite.

²⁷ Contrary to Moore, Van Allen testified that Plasterers 67's fringe benefit funds received no payments for work performed on the ESA jobsite, and that the union received no dues payments for this work.

²⁸ Weiss testified that when he met Van Allen at the jobsite in October 2001, Van Allen told him that Plasterers 67's jurisdiction was south of 13 Mile Road. I place no weight on this statement in determining the scope of Plasterers 67's territory. First, the jobsite in dispute was south of 13 Mile Road so Van Allen had no reason to go into detail as to the total scope of Plasterers 67's jurisdiction. Second, Van Allen provided Weiss with a copy of the 2000 ACT agreement, during their

shifting positions create an air of pretext in its efforts to defeat the unfair labor practice complaint.

I find that Respondent violated Section 8(a)(1)(5) and (d) of the Act by its failure to apply to the 2000 ACT agreement to the work performed at the ESA jobsite. Moore's admission reveals that this jobsite came within Plasterers 67's territory even as described by the 1997 ACT agreement. Moreover, he testified that it was his belief that Plasterers 67, not Bricklayers 1 or 9 had jurisdiction over this jobsite. He also testified that he used Bricklayers 9 members due to the fact that its collective-bargaining agreement called for lower rates of pay than that required by Plasterers 67's contract. I do not find that this constitutes a valid basis for his failure to apply the 2000 ACT agreement, and I have previously discredited Moore's claim that Plasterers 67 had furnished Respondent with poor workers. Moreover, Novak's testimony is undisputed that Plasterers 67 did not operate an exclusive hiring hall and therefore Moore could have hired employees off the street and still applied the provisions of the 2000 ACT agreement.²⁹

conversation, clearly displaying to Weiss that Plasterers 67's jurisdiction was not limited to an area south of 13 Mile Road. Finally, in his November 30, 2001 letter, Weiss represented that Plasterers 67's was asserting jurisdiction over Macomb County and that there was a dispute between two unions over a jobsite on 13 Mile Road. In other words, Weiss did not assert that Plasterers 67's claim of jurisdiction was limited to areas south of 13 Mile Road, nor do I find that he thought it was so limited since he had requested and received a copy of the 2000 ACT agreement. Weiss stated, at the hearing, that Respondent never filed an 8(b)(4)(D) unfair labor practice charge based on the advice of a Board agent that the matter was not appropriate for a charge. However, Weiss argued at the hearing that his November 30, 2001 letter is sufficient to constitute a charge in an apparent effort to argue that filing the letter constitutes a defense to Plasterers 67's unfair labor practice charge. Regardless of any statements alleged on the part of the Board agent, Weiss admitted that it was Respondent's decision not to file a charge. Moreover, the Board has held that a respondent is not entitled to rely on the advice of Board agents as a defense to unfair labor practice allegations. See *Aroostook County Regional Ophthalmology Center*, 332 NLRB 1616 (2001), and *Martel Construction, Inc.*, 311 NLRB 921, 927 (1993), *enfd.* 35 F.3d 571 (9th Cir. 1994). Finally, most of the representations in Weiss' November 30, 2001, were not born out by Moore's testimony. Accordingly, I do not find the Region's failure to initiate 10(k) proceedings based on Weiss' November 30, 2001, serves as a defense to unfair labor practice allegations set forth in the complaint.

²⁹ I find that it was Respondent's intent to repudiate its collective-bargaining agreement with Plasterers 67. In June 2001, Moore failed to apply the 2000 ACT agreement to the LTVS jobsite. Van Allen protested Moore's action and on June 25, 2001, Moore wrote Plasterers 67 seeking to terminate Respondent's contract. Van Allen replied that the letter was untimely. Nevertheless, Respondent subsequently failed to apply Plasterers 67's contract to the ESA jobsite, although Moore testified that he thought the jobsite was within that union's jurisdiction. On November 30, 2001, Weiss wrote the Region that it was Respondent's preference that Bricklayers 1 perform the work at the ESA jobsite over Plasterers 67, although Moore testified that no Bricklayers 1 members performed work at the site. In March 2002, Moore again wrote Plasterers 67 seeking to terminate Respondent's contract with that union. Accordingly, I find that by failing to apply Plasterers 67's contract, and its failure to pay that contract's wage rates and benefits at the LTVS and ESA projects Respondent has repudiated its collective-bargaining agreement and relationship with Plasterers 67 in violation of Sec.

Counsel for the General Counsel argues that Respondent violated Section 8(a)(1) and (2) of the Act by unlawfully assisting Bricklayers 9 by paying it fringe benefits and dues for work at the ESA jobsite for which it had no agreement with that union, and which was covered by Plasterers 67's agreement. Section 8(f) of the Act reads in part:

It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement.

In *John Deklewa & Sons*, 282 NLRB 1375, 1885, (1987), enfd. 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988), the Board stated 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 reject (decertify) or change their bargaining representative. Neither employers nor unions who are party to 8(f) agreements will be free unilaterally to repudiate such agreements.

The Board went on to state:

In our view, however, it is both reasonable and desirable to adopt a rule that constitutes a *limited* application of Section 8(a)(5)'s contract enforcement mechanisms by virtue of the strictly limited 9(a) representative status that we believe a 8(f) signatory union necessarily possesses.

....

The enforceable Section 9(a) status we confer on signatory unions is also only coextensive with the bargaining agreement that is the source of its exclusive representational authority. Beyond the operative term of the contract, the signatory union acquires no other rights and privileges of a 9(a) exclusive representative. *id.* at 1386–1387.

In *Deklewa* the Board held that if a union loses a Board election during the term of an 8(f) contract that “[f]ailure to terminate the 8(f) relationship or its premature reestablishment after an election will subject 8(a)(2) and 8(b)(1)(A) liability.” *Id.* at 1385.

In *Freeman Decorating Co.*, 336 NLRB 1, 13–14 (2001), it was held that the respondent employers had unlawfully with-

8(a)(1) and (5) of the Act. See *Wightman Center for Nursing & Rehabilitation*, 301 NLRB 573, 575 (1991); *Oak Cliff-Golman Baking Co.*, 207 NLRB 1063, 1064 (1973), enfd. mem. 505 F.2d 1302 (5th Cir. 1974), cert. denied 423 U.S. 826 (1975); *Nittany Manor Care Associates*, 337 NLRB 432 (2002); and *Scapino Steel Erectors, Inc.*, 337 NLRB 992 (2002).

drawn recognition from a union following the expiration of their collective-bargaining agreement because the union had previously obtained 9(a) status prior to the expiration of the contract. The Board majority found that the employers and the Carpenters union had violated Section 8(a)(2) and 8(b)(1)(A) of the Act by entering into a contract because the employers had unlawfully withdrawn recognition from another union. It was concluded that it was therefore unnecessary to determine whether the contracts with the Carpenters would have otherwise been permissible under Section 8(f) of the Act.

It is clear from the forgoing that the Board views an 8(f) contract enforceable under Section 8(a)(5) of the Act, and that a union that enters into an 8(f) contract with an employer has a limited 9(a) status for the duration of that agreement. I find, in agreement with the General Counsel, that Respondent violated Section 8(a)(1) and (2) of the Act by unlawfully assisting Bricklayers 9 by violating its contract with Plasterers 67 and notifying Bricklayers 9 of the ESA site in order for that union to sign up new hires, and by paying fringe benefits to Bricklayers 9's contractual funds when Respondent admittedly had no collective bargaining agreement with Bricklayers 9 covering the work performed at the ESA jobsite. See *Wecco Cleaning Specialists*, 308 NLRB 310, 320 (1992), and *Freeman Decorating Co.*, supra at 13–14. In this regard, Moore testified that he paid fringes and benefits for worked performed by Bricklayers 9 members at the ESA to Bricklayers 9. While Moore never specifically testified that he checked off dues from these employees and tendered those dues to Bricklayers 9, he testified that three Bricklayers 9 members transferred to the ESA jobsite and he hired five or six employees directly and notified Bricklayers 9 of their hiring then Bricklayers 9 signed them up. Implicit in Moore's testimony was that Respondent checked off dues for these employees and referred the money to Bricklayers 9, along with the fringe benefits he paid that union's funds for their work.

3. Other complaint allegations

Counsel for the General Counsel states the following in the remedy section of her brief:

The Administrative Law Judge need not decide the effect of Respondent's contracts with other related unions—Local 9, Local 1, and Local 16. First, these contracts cover different geographical territories, not all of which are in conflict. Second, despite Respondent's claim to the contrary, it had actual or constructive knowledge even prior to Local 67's amendments that Local 67's geographical area conflicted to some extent with that of Locals 1 and 9. Third to the extent that the geographical areas of the unions overlap, Respondent is free to file 8(b)(4) charges in the future and request a 10(k) hearing. [GC Br. at 18.]

This position runs counter to certain allegations in the complaint which assert that Respondent's entering into and maintaining a contract with Bricklayers 1 on June 2, 2000, and applying that contract to work covered by the Plasterers 67's agreement constitutes independent violations of Section 8(a)(1) and (2) of the Act. It is further asserted in the remedial section of the complaint that Respondent be required to:

(a) Withdraw recognition from and void any agreements entered into by Respondent with Bricklayers' 1 for Unit work.

I find that, by the inclusion of these remarks in counsel for the General Counsel's posthearing brief, the above complaint allegations and related requests for affirmative relief have been withdrawn and are therefore dismissed.

4. Unit and related issues

For reasons set forth above, I have concluded that the appropriate unit description is the one set forth in the preamended 2000 ACT agreement, which is described as follows:

All full-time and regular part-time journeymen and apprentice plasterers doing work described in Article IX, Section 2, of the 2000 ACT agreement employed by Respondent at its jobsites located within the Michigan counties of Wayne, Oakland, Lapeer, Macomb, and St. Clair counties.

The complaint fails to state the period of time which the alleged unfair labor practices begin for remedial purposes. I will therefore limit any remedy herein to commence on about May 1, 2001, the beginning of the 10(b) for the filing and service on Respondent of the initial unfair labor practice charge. See *A.T. Electric Construction Corp.*, 338 NLRB 340, 345 (2002); and *Neosho Construction Co.*, 305 NLRB 100, 103 (1991).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and is an employer engaged in the building and construction industry within the meaning of Section 8(f) of the Act.

2. By refusing to apply the 2000 ACT agreement since on about May 1, 2001, to its jobsites, including but not limited to the LTVS and ESA jobsites, Respondent has repudiated its collective-bargaining relationship with Plasterers 67 and has engaged in unfair labor practices within the meaning of Section 8(a)(1), (5), and (d) of the Act.

3. By paying fringe benefits to Bricklayers 9's benefit funds and soliciting Bricklayers 9 to sign up employees for work at the ESA jobsite, a location covered by Plasterers 67's agreement and where Bricklayers 9 does not have a collective-bargaining agreement, Respondent has aided and assisted Bricklayers 9 in violation of Section 8(a)(1) and (2) of the Act.

4. The complaint is dismissed insofar as it alleges violations of the Act not specifically found.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. I shall recommend that Respondent be ordered to reimburse all its unit employees employed since May 1, 2001, for the deficiencies in their wage rates and other benefits, including, but not limited to overtime, holidays, shift work, as required by the 2000 ACT agreement. As for contractual benefit funds and other payments, the determination of which such payments the Respondent should have made and the amounts necessary to remedy Respondent's fail-

ure to comply with its contractual obligations under the 2000 ACT agreement will be left to the compliance stage. See *Merryweather Optical Co.*, 240 NLRB 1213, 1217 fn. 7 (1979).³⁰ Respondent shall comply with the provision of information requirements of the 2000 ACT agreement in order to allow Plasterers 67 and the benefit funds trustees to calculate funds due and owing under the 2000 ACT agreement consistent with the findings and conclusions of this decision. Respondent shall also be required to make employees whole by reimbursing them for any expenses resulting from the Respondent's failure to make required benefit fund payments in the manner prescribed in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2, (1980), enf. 661 F.2d 940 (9th Cir. 1981), with interest interested as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Respondent shall be required to reimburse employees for dues and fees paid by those employees, who performed work for Respondent at the ESA jobsite, to Bricklayers 9 to the extent that such payments are not shown by Respondent to have been noncoercive. This issue shall also be deferred to the compliance stage. See, *Freeman Decorating Co.*, 336 NLRB 1, 14 (2001).³¹

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³²

ORDER

The Respondent, Gem Management Company, Inc., Clare, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Withdrawing recognition from Local 67, Operative Plasterers' and Cement Masons' International Association, AFL-

³⁰ The General Counsel and Plasterers 67 request that the union be made whole for the loss of contractual dues payments. However, the Board does not order a union be reimbursed for dues unless employees have individually signed dues-checkoff authorizations. See *W. J. Holloway & Son*, 307 NLRB 487 fn. 3.

³¹ No party briefed the impact of a paragraph in the 2000 ACT agreement art. I, sec. 2 on the proposed remedy in this proceeding. The applicable provisions reads:

When during the term of this agreement when the employer employs out of town and/or B.A.C. members on any working jobsite within the jurisdiction of Plasterers' Local 67, not less than fifty percent (50%) shall be members of Plasterers' local 67, as long as there are Plasterer Local 67 members available. Plasterers' Local 67 shall also reserve the right to the "odd man" of the site.

Accordingly, the impact of this provision on any required remedy will be left to the compliance stage. The provision does not affect my underlying unfair labor practice findings as Respondent clearly repudiated its contract with Plasterers 67 and failed to follow the provisions of 2000 ACT agreement at the LTVS and ESA jobsites. While Van Allen testified that Respondent made no fund or dues payments for work at the ESA jobsite under the 2000 ACT agreement, and Moore testified that Respondent made Plasterers 67 payments for only one employee, under the testimony of either witness the 2000 ACT agreement was not followed for the ESA jobsite. Moreover, the parties' records will resolve this testimonial dispute at the compliance stage.

³² 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.

CIO (Plasterers 67) during the term of the collective-bargaining agreement between Plasterers 67 and Architectural Contractors Association (ACT), with effective dates of June 1, 2000, through May 31, 2003 (the 2000 ACT agreement) and during the term of any other agreement to which we are bound with Plasterers 67, absent timely notice to that union.

(b) Failing to apply the terms of the 2000 ACT agreement and refusing to recognize Plasterers 67 as the employee representative in the following appropriate unit:

All full-time and regular part-time journeymen and apprentice plasterers doing work described in Article IX, Section 2, of the 2000 ACT agreement employed by Respondent at its jobsites located within the Michigan counties of Wayne, Oakland, Lapeer, Macomb, and St. Clair counties.

(c) Paying fringe benefits to Bricklayers' and Allied Craftworkers' Local Union No. 9, International Union of Bricklayers and Allied Craftworkers, AFL-CIO (Bricklayers 9) contractual benefit funds and soliciting Bricklayers 9 to sign up employees for work at jobsites covered by Plasterers 67's collective-bargaining agreement and where Bricklayers 9 does not have a collective-bargaining agreement.

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

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

(a) Make employees whole for any losses suffered as a result of Respondent's failure to honor the 2000 ACT agreement with Plasterers 67 and make contractually required payments to the benefit funds described in that agreement in the manner specified in the remedy section of this decision.

(b) Make employees whole for all dues and fees paid by employees who performed work for Respondent at the Extended Stay America jobsite in 2001 in Macomb County, Michigan, that were paid to Bricklayers 9 for work falling within the above-described bargaining unit, to the extent that such payments are not shown by Respondent to have been noncoercive.

(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay and other payments due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its current jobsites within the geographical area encompassed by the appropriate unit herein and at its facility in Clare, Michigan copies of the attached notice marked "Appendix."³³ Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 1, 2001.

(e) 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 Respondent has taken to comply.

³³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."