D. A. Nolt, Inc. *and* Local Union No. 30, United Union of Roofers, Waterproofers and Allied Workers. Cases 4–CA–30325–1 and 4–CA–30325–2

December 15, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On July 18, 2002, Administrative Law Judge Margaret M. Kern issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs, and the Roofing Contractors Association, amicus curiae, filed a brief in support of the General Counsel's and the Charging Party's position. The Respondent filed a brief in answer to the exceptions and a brief in answer to the amicus brief. The General Counsel and the Charging Party filed reply briefs.

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

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[2]

The General Counsel and the Charging Party (the Union) except to the judge's finding that the Respondent did not violate Section 8(a)(5) and (1) of the Act when it refused to apply the terms of a collective-bargaining agreement negotiated by the Roofing Contractors Association (RCA) and the Union covering employees in the commercial bargaining unit. The General Counsel and the Union argue that the judge erred in finding that the Respondent lawfully withdrew from the RCA because the RCA and the Union had engaged in secret negotiations. We find merit to the exceptions and find that the Respondent is bound to the new multiemployer collective-bargaining agreement.[3]

I. BACKGROUND

The Respondent, a commercial roofing contractor in the greater Philadelphia metropolitan area, has been signatory to an agreement which binds it to contracts between the Roofing Contractors Association and the Union covering commercial roofing. The contracts terminated on April 30, 2001.

In June 1999, the Respondent signed a bargaining agent authorization (BAA) with the RCA, allowing the RCA to negotiate a new commercial roofing contract with the Union on behalf of the Respondent. The terms of the BAA allowed the Respondent to terminate this authority up until 90 days prior to the existing contract's expiration.

In June 2000,[4] 10 months before the commercial contract's expiration, Richard Harvey, executive director of the RCA, and Tom Pedrick, vice president of the Union, began negotiations for a successor agreement. During the course of negotiations, union officials told Harvey that they did not want the union membership to find out about the negotiations.[5] The union officials asked Harvey to keep the negotiations confidential because they were afraid that if the RCA members knew about the negotiations, the employees would eventually find out as well. Therefore, at the Union's request, Harvey did not tell any employer members, other than those on the RCA's bargaining committee, about the negotiations.

On July 5, the Union and the RCA reached a tentative agreement for an 8-year contract. Harvey faxed the agreement to the RCA bargaining committee members, who unanimously approved it.

Having secured the bargaining committee's approval, Harvey sent a cover letter and ballot to the rest of the RCA's members on July 12, instructing them to return the ballot by July 14. The letter stated that a tentative contract had been agreed upon. The ballot contained three options: "accept," "reject," or "withdraw" from the RCA. The cover letter included a reproduced portion of the original BAA, which included the statement that members were allowed to withdraw from the RCA up to 90 days prior to contract termination, i.e., no later than

[1] No exceptions were filed to the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by withdrawing recognition and refusing to bargain with the Union as the exclusive representative of the employees in the residential bargaining unit. However, the General Counsel argued in his brief in support of exceptions that the judge erroneously failed to find that the Respondent's refusal to bargain concerning the residential bargaining unit occurred on March 2, 2001, rather than on May 10, 2001, as found by the judge. We find it unnecessary to pass on when this violation occurred because a finding that the refusal to bargain in the residential unit occurred earlier than May 10 would not affect the remedy for that violation. We note that the General Counsel has not requested a monetary remedy for any unilateral changes made by the Respondent in the residential unit after the expiration of the Delaware Valley Roofing Contractors' Association (DVRCA) collective-bargaining agreement on April 30, 2001.

[2] In accordance with this decision, we have included an amended remedy, a new Order, and a new notice to conform to the language in the Order.

[3] No exceptions were filed to the judge's findings that (1) the relationship between the Respondent and Union is governed by Sec. 9(a) of the Act; (2) the Respondent violated Sec. 8(a)(5) of the Act by refusing to recognize the Union as the collective-bargaining representative of the employees in both the commercial and residential bargaining units of the Respondent; and (3) the Respondent violated Sec. 8(a)(5) of the Act by refusing to bargain with the Union for both units.

[4] All dates are in 2000 unless otherwise noted.

[5] The record does not make clear which union official made the request to keep the negotiations confidential.

January 30, 2001. However, the text of the cover letter specifically instructed members that if they wished to withdraw authorization from the RCA to negotiate on its behalf, they must do so now, and not vote "accept" or "reject."

According to Steven Consalvo, the Respondent's vice president, David Nolt initially expressed some reluctance to sign an 8-year agreement, but had no problem with the negotiated wage rates and ultimately indicated he would sign the agreement. The Respondent voted to "accept."

Before the Union's ratification vote, the Union requested from the RCA a list of contractors who had agreed to the contract. The RCA faxed to the Union the ballots cast in July, including the Respondent's vote to "accept." On September 26, the union membership ratified the contract.

From the time the Respondent received its ballot through January 30, 2001, it gave no indication to the RCA or to the Union that it had any intention of withdrawing from the RCA or that it would not honor the new contract on expiration of the current agreement. Indeed, between October 2000 and January 2001, the Respondent held numerous discussions with RCA official Harvey concerning various matters, but there was never any discussion about the balloting procedure or about the Respondent's withdrawing from the RCA. Rather, the discussions concerned issues regarding the administration of employee benefits, the scope of work under the residential and commercial roofing contracts, and a confrontation between one of Respondent's employees and Union Business Manager Michael McCann. These issues were straining the relationship between the Respondent and the Union.

On January 30, 2001, the Respondent sent a letter to the RCA and the Union stating that, as provided for in the BAA, it was withdrawing its authorization from the RCA to negotiate on its behalf and consequently would not be bound to the successor agreement.

As noted, the existing contract expired on April 30, 2001. On May 1, 2001, the Respondent did not apply the terms of the new commercial contract to its employees, stopped payments to the union benefit funds, and told its employees that it was now a nonunion contractor. On May 10, 2001, in a letter to the Union, the Respondent stated that it was not bound to the terms of the new commercial contract, nor was it obligated to bargain with the Union.

The judge determined that the Respondent violated Section 8(a)(5) of the Act by refusing to recognize and bargain with the Union.[6] The judge also concluded, however, that the Respondent's refusal to apply the terms of the commercial contract did not violate Section 8(a)(5) of the Act. Citing *Retail Associates*, 120 NLRB 388 (1958), and *Chel LaCort*, 315 NLRB 1036 fn. 5 (1994), the judge found that the Respondent lawfully withdrew from the RCA and was not bound to the contract negotiated by the RCA. The judge noted that, under *Retail Associates*, supra, once multiemployer bargaining begins, a member of a multiemployer association may not withdraw absent mutual consent or "unusual circumstances." The judge further noted that in *Chel*, the Board suggested, in dicta, the possibility that "collusion or conspiracy" might constitute "unusual circumstances" justifying an otherwise untimely withdrawal.[7] The judge found that the RCA and the Union secretly negotiated an agreement, and that these secret negotiations constituted "unusual circumstances" justifying the Respondent's withdrawal on January 30, 2001. The judge reasoned that because negotiations were completed before the Respondent even knew of them, the Union and the RCA had precluded the Respondent of any opportunity to participate in the bargaining process.

The judge found no significance to the fact that the Respondent voted to "accept" rather than to "withdraw" on its ballot. Noting that, under *Retail Associates*, supra, the Respondent was bound to the outcome of the negotiations absent mutual consent or "unusual circumstances," the judge relied on her finding of "unusual circumstances," and accordingly found that the Respondent's withdrawal on January 31, 2001, occurred at a reasonable time, because it was in accord with the BAA's provision for withdrawal. Consequently, the judge concluded that the Respondent was not bound to the agreement negotiated by the RCA, and did not violate Section 8(a)(5) when it refused to apply its terms.

II. ANALYSIS

Contrary to the judge, we find that the Respondent did not effectively withdraw from the RCA, and is, therefore, bound to the contract negotiated by the RCA.

In *Retail Associates*, supra**,** 120 NLRB at 395, the Board announced "ground rules" governing timely withdrawal from multiemployer bargaining. Specifically, the Board said that "[w]here actual bargaining negotiations based on the existing multiemployer unit have begun, we would not permit, except on mutual consent, an abandonment of the unit upon which each side has committed itself to the other, absent unusual circumstances." Id. Subsequent cases applying this standard have found "unusual circumstances" where there were dire economic consequences (such as bankruptcy or imminent plant

[6] As noted above, this conclusion has not been challenged.

[7] See *Chel*, supra at fn. 5.

shutdown) or fragmentation of the multiemployer unit. *El Cerrito Mill & Lumber Co.*, 316 NLRB 1005, 1005–1006 (1995); *Chel LaCort*, supra; *Hi-Way Billboards, Inc.*, 206 NLRB 22, 23 (1973), enf. denied 500 F.2d 181 (5th Cir. 1974).

In *Chel*, supra, relied on by the judge, the Board found there were no "unusual circumstances" where an employer attempted to withdraw after the multiemployer association "fail[ed], *either deliberately* or otherwise, to inform its employer-members of the start of negotiations." Id. at 1036 (emphasis added). In so finding, the Board stated that "[w]hether and to what extent a multiemployer association communicates with its members is an internal association matter which is properly and readily resolved by and between the multiemployer association and its members." Id. at 1036–1037. In dicta, the Board added, "there is no evidence in this case of collusion or conspiracy involving the Union. We leave to another case to decide whether or when such evidence would be sufficient to show 'unusual circumstances.'" Id. at fn. 5.

Contrary to the judge, we find that the conduct at issue here does not constitute collusion as contemplated under the *Chel* dicta, and, thus, there are no "unusual circumstances" present here permitting the Respondent's otherwise untimely withdrawal. The record clearly shows that the effort to have secrecy in the negotiations was directed at the Union's membership, not at the Respondent or at other employer-members of the RCA. Indeed, there is no evidence of intent to deny the Respondent its withdrawal rights by conducting "secret" negotiations, or of any other actions that were specifically directed at the Respondent. To the contrary, the record shows that the RCA told the Respondent of the contract and gave each of its members the option of withdrawing authorization from the RCA. Thus, the ballot sent to the Respondent and the other employer members demonstrates a good-faith attempt by the RCA to allow its members to timely withdraw if they so desired.

Concededly, the conduct of the Union and the RCA resulted in a temporary denial of information to the Respondent and other employer-members. However, it is clear that neither party intended to harm the Respondent. And, by allowing the members to subsequently withdraw, the RCA took measures to ensure that the Respondent and other employer-members would not be prejudiced. The "collusion or conspiracy" referred to by the *Chel* Board's dictum clearly contemplates actions by the union and the employer association that are deliberately intended to prevent an employer from exercising its right to withdraw. The evidence here does not establish any such intent on the part of RCA and the Union.[8] We also find no merit to the Respondent's argument that the RCA's withholding of information about the negotiations necessarily interfered with the Respondent's ability to withdraw from the RCA in time to escape being bound by the successor contract. That is the same argument that we rejected in *Chel.* There, the Board specifically rejected the notion that "unusual circumstances" should be extended to these situations, and held that the failure of a multiemployer association to tell its members about negotiations is an internal matter to be resolved between the association and its members. 315 NLRB at 1037.

Moreover, even assuming arguendo that the conduct by the RCA and the Union constituted "unusual circumstances," the Respondent by its own conduct forfeited any right to withdraw. Instead of withdrawing from the RCA promptly after it learned of the new agreement in July 2000—the point at which "unusual circumstances" became known—the Respondent approved the contract. Not until 7 months later, after its relationship with the Union had soured, did the Respondent decide to withdraw. Whatever confusion the Respondent might have felt about its ability to withdraw did not privilege its opportunistic attempt to enjoy the "best of two worlds": voting to accept the contract while assertedly preserving its right to opt out of the agreement. *Michael J. Bollinger Co.*, 252 NLRB 406, 407 (1980), enfd. mem. 705 F.2d 444 (4th Cir. 1983).

In this sense, the Respondent's reliance on the provision of the BAA allowing it to withdraw up to 90 days before the expiration of the contract is misplaced, because the Respondent was obligated to announce its intention to withdraw its authorization from the RCA as soon as the "unusual circumstances" became manifest. See *Gary Jasper Enterprises*, 287 NLRB 746, 747 (1987) (finding that "[the employer] acted as expeditiously as possible in 'withdrawing' from multiemployer bargaining 2 weeks after bargaining had commenced").

Thus, contrary to the judge's finding, the Respondent's actions, once it was informed of the negotiations, were significant. The Respondent indicated to the Union and the RCA that it agreed to be bound by the successor contract by voting "accept" on its ballot. At no time afterwards did the Respondent ever indicate either an intention to withdraw or a belief that it was not bound by the

[8] We disagree with the dissent's contention that collusion existed because the RCA and the Union deliberately decided that information would be withheld from the Respondent. As noted above, there is no evidence of an intent to harm the Respondent by their confidentiality restrictions. Moreover, there is no evidence that the Respondent's ability to timely withdraw was compromised by the confidentiality agreement.

new contract. Compare, *Electrical Workers Local 952 (D & R Electric)*, 275 NLRB 319**,** 321 (1985) ("no evidence . . . Employer conducted itself in a manner that would have led the [union] to believe that it intended to be bound").

Even if the Respondent was surprised at receiving the ballot regarding the new contract, the record demonstrates that the Respondent's vote reflected careful deliberation rather than forced decision making. As noted above, the record shows that the Respondent weighed the favorable terms in the contract against the less desirable fact that the duration was for 8 years, and ultimately decided to vote to accept the contract. Indeed, the Respondent never informed the RCA or the Union that the negotiated agreement had placed the Respondent in a difficult position, and Nolt admitted that he had read the ballot and cover letter several times before voting to "accept" the new agreement. Nolt also admitted that he knew the Union wanted to know, and would be told, his vote before it conducted its ratification vote among the union members. Thus, far from complaining, the Respondent considered the advantages of accepting the contract and cast its ballot accordingly.

We further note that "multiemployer bargaining is a voluntary arrangement which constitutes a vital factor in the effectuation of national labor policy promoting peace through collective bargaining." *El Cerrito*, supra at 1005–1006. We find nothing in the record before us that warrants disrupting the voluntary arrangement of the parties. In accordance with the Board's decision in *Chel*, we find that by voting, after careful consideration, to "accept" the new contract, the Respondent was bound; thereafter, its attempted withdrawal, a full 7 months later, was untimely.[9]

Accordingly, based on the foregoing, we find that the Respondent was bound to the successor agreement negotiated by the RCA, and that it violated Section 8(a)(5) when it refused to apply the terms of that agreement to unit employees.[10]

[9] We find *Acropolis Painting*, 272 NLRB 150 (1984), relied on by our dissenting colleague, entirely inapposite in this case. In *Acropolis*, the Board found that the respondent employers' withdrawal from multiemployer bargaining was lawful because language in the collective-bargaining agreement between the employer association and the union constituted mutual consent to the withdrawal. Id. at 156–157. There is no similar "consent" language in the relevant collective-bargaining agreement in this case. The withdrawal language in the BAA, on the other hand, was part of an agreement between the Respondent and the RCA. The Union was not a party to it, and, thus, none of its language represented consent by the Union.

[10] In light of our finding that the Respondent was bound by the 2001–2009 successor multiemployer agreement, we find it unnecessary to consider the General Counsel's alternative argument that the Respondent should be ordered to reinstate the terms of the expired 1997–2001 multiemployer agreement in the commercial unit (and make those employees whole for its failure to abide by those terms) while it bargains with the Union for a new contract. As set forth below, the Respondent shall be ordered to abide by the terms of the 2001–2009 successor agreement in the commercial unit, and to make those employees whole for the failure to abide by the terms of the successor agreement.

AMENDED REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(5) and (1) by withdrawing recognition from the Union as the exclusive collective-bargaining representative of its employees in the commercial and residential units, we shall order the Respondent to recognize the Union as the exclusive representative of the employees in both units. As to the residential unit, we shall order the Respondent**,** on request of the Union, to bargain collectively and in good faith with the Union concerning terms and conditions of employment of unit employees and, if an understanding is reached, to embody it in a signed agreement. As to the commercial unit**,** having found that the Respondent has violated Section 8(a)(5) and (1) by failing and refusing to comply, since May 1, 2001, with the terms of the 2001–2009 commercial roofing collective-bargaining agreement, we shall order the Respondent to honor the terms of the 2001–2009 commercial roofing collective-bargaining agreement. We shall also order the Respondent to make whole its employees for any loss of earnings and other benefits they may have suffered as a result of the Respondent's failure to honor the terms of the 2001–2009 commercial roofing contract. In addition, we shall order the Respondent to make whole its employees by making any contractually required fringe benefit fund contributions that have not been made on behalf of employees since May 1, 2001, including any additional amounts applicable to such delinquent payments in accordance with *Merryweather Optical Co.*, 240 NLRB 1312, 1316 (1979).[11] Further, we shall require the Respondent to reimburse its employees for any expenses ensuing from its failure to make the required contributions since May 1, 2001, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981). All payments to unit employees shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd.

[11] To the extent that an employee has made personal contributions to a benefit or other fund that has been accepted by the fund in lieu of the Respondent's delinquent contributions during the period of the delinquency, the Respondent will reimburse the employee, but the amount of such reimbursement will constitute a setoff to the amount that the Respondent otherwise owes the fund.

444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

ORDER

The National Labor Relations Board orders that the Respondent, D. A. Nolt, Inc., Berlin, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain with the Union as the exclusive collective-bargaining representative of its employees in the following appropriate units:

> *Residential unit*: All journeymen roofers, helpers, foremen and all employees performing residential roofing, residential re-roofing, and slate, tile and shingle work on any job or project within the jurisdiction of the Union; excluding office clerical personnel, principals, guards and supervisors as defined in the Act.
>
> *Commercial unit*: All journeymen roofers, apprentices and foremen and all employees performing commercial roofing work within the jurisdiction of the Union.

(b) Failing and refusing to comply with the terms of the 2001–2009 commercial roofing collective-bargaining agreement.

(c) In any like or related manner interfering with, restraining, or coercing its 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) Recognize the Union as the exclusive collective-bargaining representative of the employees in the above-described residential and commercial units.

(b) On request, bargain with the Union as the exclusive representative of its employees in the residential bargaining unit, set forth above, concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

(c) Honor the terms of the 2001–2009 commercial roofing agreement.

(d) Make whole the commercial unit employees for any loss of earnings and other benefits they may have suffered as a result of its failure and refusal to comply with the 2001–2009 commercial roofing collective-bargaining agreement since May 1, 2001, with interest, as set forth in the amended remedy section of this decision.

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

(f) 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 due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its facility in Berlin, New Jersey, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by the Respondent's authorized representative, shall be posted by the Respondent 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.

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

CHAIRMAN BATTISTA, dissenting.

The judge found that the Union and the Roofing Contractors Association (RCA) engaged in secret negotiations, and that these facts constituted "unusual circumstances" which justified the Respondent's withdrawal from the RCA. Contrary to the judge, my colleagues find no unusual circumstances because, in their view, there was no collusion between RCA and the Union. I agree with the judge that there were "unusual circumstances" justifying a withdrawal from the RCA.

In my view, the *Retail Associates* rule (no withdrawal from multiemployer bargaining after negotiations have begun[1]) should not operate to preclude withdrawal

[12] 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."

[1] 120 NLRB 388 (1958).

where, as here, the employer association and the Union have begun early negotiations and have deliberately decided to keep those early negotiations secret from the employer-members.[2] That conduct is collusive. In my view, such collusion privileges an untimely withdrawal from multiemployer bargaining.[3]

My colleagues say that the Union and the employer association did not deliberately intend to prevent the Respondent from withdrawing from the association. However, they did deliberately keep the Respondent in the dark about the start of negotiations and, under the *Retail Associates* rule, this interfered with the Respondent's right to withdraw from the association prior to the start of negotiations.

The record clearly establishes collusion. The evidence shows that, 10 months before the expiration of the contract, the RCA and the Union met secretly to negotiate a new contract. At the request of the Union, the RCA agreed to deliberately withhold this knowledge from its (RCA's) members, including the Respondent.

On July 12, 2000,[4] after the RCA and the Union reached an agreement on terms of a new contract, they informed the Respondent and other employer-members about the negotiations. A ballot was sent to all members including the Respondent. The choices on the ballot were "accept," "reject," or "withdraw." The cover letter accompanying the ballot included a provision stating that each employer could withdraw from the RCA until 90 days before the present contract's expiration, i.e., until January 30, 2001.[5] However, the letter *also* stated, inconsistently, that if the employer wished to withdraw from the RCA it must do so *immediately*. The Respondent voted to "accept." It is not clear that what the Respondent intended when it voted to "accept" the 8-year contract. The option of "acceptance" is confusing when it is coupled with a right to withdraw on January 30 of the next year. In any event, the confusion was caused by the drafters of the letter.

On January 30, 2001, pursuant to the instructions set forth in the cover letter to the ballot, and within the time period specified in the BAA, the Respondent withdrew from the RCA.

As explained above, I believe that the Respondent was free to withdraw from the association, even after negotiations had begun. This was so for two reasons. First, those negotiations were early and were deliberately kept secret from the Respondent. Second, the BAA provided that the Respondent could withdraw until January 30, 2001. Where parties have set a date for withdrawal, that date governs, even if early negotiations have begun. See *Acropolis Painting*, 272 NLRB 150 (1984).[6]

Of course, an employer who *could* timely withdraw may nonetheless be bound to multiemployer bargaining if, after learning of the secret negotiations, he voluntarily chooses to stay in the association. In the instant case, it is argued that the Respondent chose on July 18 to stay in the association. However, the letter to the Respondent was confusing. Indeed, it was internally inconsistent. It said that a withdrawal could be effectuated at any time prior to January 30, 2001. This was a reaffirmation of the original BAA. The letter also said that withdrawal had to be done immediately.

Where, as here, the association and the union have concealed early negotiations from an employer, I believe that they can bind the employer only by "coming clean," i.e., by informing the number of those negotiations and then offering a clear and unambiguous choice to stay in the association or withdraw. In the instant case, the choice was confusing and internally inconsistent. Accordingly, the Respondent could opt to withdraw according to the terms of the original BAA. The Respondent did so on January 30.[7] Accordingly, it was no longer a part of the RCA and was not bound to the RCA-Union contract.[8]

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

[2] My colleagues say that the intention was to keep the negotiations secret from the Union's membership. However, to that end, the Union and the association vowed to keep the negotiations secret from the employer-members as well.

[3] See *Chel LaCort*, 315 NLRB 1036 fn. 5 (1994).

[4] All dates are in 2000, except where noted.

[5] This was consistent with the bargaining agent authorization (BAA) originally signed by the Respondent.

[6] My colleagues seek to distinguish *Acropolis* on the ground that the BAA was between the Respondent and the RCA, as distinguished from an agreement between the Union and RCA. That is, the Union here was not a party to the BAA. However, the significant point is that the RCA *and the Union* colluded to keep RCA members in the dark, and this fact operated to prevent the Respondent from withdrawing from the RCA at the *Retail Associates* time, i.e., prior to the start of multiemployer negotiations.

[7] The Respondent waited until then because that was an appropriate date for withdrawal under the BAA.

[8] See *Acropolis Painting*, supra.

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 refuse to recognize and bargain with Local Union No. 30, United Union of Roofers, Waterproofers and Allied Workers as the exclusive collective-bargaining representative of our employees in the following appropriate units:

Residential unit: All journeymen roofers, helpers, foremen and all employees performing residential roofing, residential re-roofing, and slate, tile and shingle work on any job or project within the jurisdiction of the Union; excluding office clerical personnel, principals, guards and supervisors as defined in the Act.

Commercial unit: All journeymen roofers, apprentices, and foremen and all employees performing commercial roofing work within the jurisdiction of the Union.

WE WILL NOT fail and refuse to comply with the terms of the 2001–2009 commercial roofing collective-bargaining agreement.

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

WE WILL recognize the Union as the exclusive collective-bargaining representative of the employees in the above-described units.

WE WILL on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the residential bargaining unit, described above.

WE WILL honor the terms of the 2001–2009 commercial roofing collective-bargaining agreement.

WE WILL make whole the commercial unit employees for any loss of earnings and other benefits they may have suffered as a result of our refusal to comply with the commercial roofing collective-bargaining agreement since May 1, 2001, with interest.

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

D. A. NOLT, INC.

William Slack, Esq., for the General Counsel.
Marc Furman, Esq. and *Thomas C. Zipfel, Esq.*, for the Respondent.
Laurence M. Goodman, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARGARET M. KERN, Administrative Law Judge. This case was tried before me in Philadelphia, Pennsylvania, on January 23 and 24, 2002.[1] The complaint, which issued on August 9, 2001, was based upon unfair labor practice charges filed on May 2, 2001, by Local Union No. 30, United Union of Roofers, Waterproofers and Allied Workers (the Union or Local 30) against D. A. Nolt, Inc. (Respondent). A timely answer was filed. The General Counsel alleges that the Union is the 9(a) representative of two units of employees employed by Respondent. With respect to the unit known as the residential unit, it is alleged that since February 27, 2001, Respondent has failed to meet and bargain for a successor collective-bargaining agreement, and that on May 10, 2001, Respondent unlawfully withdrew recognition from the Union. With respect to the unit known as the commercial unit, it is alleged that on April 30, 2001, Respondent unlawfully withdrew recognition from the Union and since that date has refused to comply with the terms of a collective-bargaining agreement negotiated between the Union and a multiemployer association of which Respondent is a member. It is the General Counsel's position that Respondent's withdrawal from the association was untimely.

Respondent contends that its relationship with the Union in both units is an 8(f) relationship, not a 9(a) relationship. With respect to the residential unit, Respondent takes the position that upon the expiration of the collective-bargaining agreement, it was free to withdraw recognition from the Union and was under no obligation to negotiate a successor agreement. If, however, it is determined that the relationship is a 9(a) relationship, Respondent advances two alternative arguments. The first is that it never actually refused to bargain with the Union, and second, even if a refusal-to-bargain violation is found, a bargaining order remedy may not issue because there were no employees in the bargaining unit after April 30, 2001. With respect to the commercial unit, Respondent contends that its withdrawal from the association, after bargaining for a successor agreement had commenced, was justified by unusual circumstances. Specifically, Respondent asserts that the Union and the association conspired and colluded to conceal the fact that negotiations were taking place in order to prevent Respondent from withdrawing from the association.

Procedural Issue

At the commencement of the hearing, Respondent's counsel made application that these proceedings be deferred pending an investigation into the Regional Director's earlier dismissal of a decertification petition. The facts are as follows: On May 23, 2001, Petitioner William Morgey filed a decertification petition

[1] The General Counsel's unopposed motion to correct the transcript, dated March 12, 2002, is granted and received in evidence as GC Exh. 61.

involving employees of Respondent in Case 4–RD–1909. It is not clear from the record whether the petition was filed for the residential unit or the commercial unit. A hearing was held on June 8, 2001, at which the Petitioner was represented by counsel. On August 10, 2001, the Regional Director for Region 4, conditionally dismissed the petition pending the outcome of the unfair labor practice charges underlying the complaint in this case. That determination was appealed and the Board denied review on September 13, 2001.

Respondent's counsel represented that on January 22, 2002, the day before the opening of the hearing in this case, it was learned that there had been an earlier attempt by employees of Respondent to file a decertification petition, in late March or early April. According to counsel, these employees were informed by a member of the regional staff that the petition was untimely as it was within the 60-day period prior to the expiration of the collective-bargaining agreement. This information was in error, according to Respondent, because the then extant collective-bargaining agreement was a 4-year agreement, and did not serve to bar the filing of the petition at that time. The General Counsel acknowledged that Respondent's counsel had brought this matter to his attention the day before the hearing in this case, but had not yet had an opportunity to fully investigate the matter.

Respondent requested that these proceedings be deferred pending further examination of this issue by the Regional Director, and pending a request of the Board to reconsider its denial to review the dismissal of the petition. I declined to defer these proceedings. Respondent further requested that I not render a decision in this case until such time as the Board ruled on the prospective appeal. I denied that application as well. In its brief, Respondent represents that it has filed a request for review of this matter with the Regional Director.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent is engaged in commercial, industrial, and residential roof repair and installation. It is agreed that Respondent is an employer engaged primarily in the building and construction industry within the meaning of Section 8(f). David Nolt, president, incorporated the business in 1990. Prior to that time, Nolt was a journeyman roofer and a member of the Union for 10 years. At the time of the hearing, Respondent employed between 20 and 30 roofers.

B. The Residential Unit

1. The facts

The Delaware Valley Roofing Contractors' Association (DVRCA) and the Union have been party to a series of collective-bargaining agreements, including agreements effective July 1, 1994, to April 30, 1997 (1994–1997 DVRCA agreement), May 1, 1997, to April 30, 2001 (1997–2001 DVRCA agreement), and May 1, 2001, to April 30, 2005 (2001–2005 DVRCA agreement). These agreements cover residential work which is defined as roofing work done on residential premises, and shingle, slate, and tile roofing done on either commercial or residential premises. Historically, negotiations are conducted between the Union and the DVRCA and after an agreement is reached, copies of the agreement are sent to independent employers for their acceptance and execution. At the time of the hearing, there were approximately 12 employer-members of the DVRCA and approximately 30 signatories to the DVRCA agreements.

Respondent has never been a member of the DVRCA.[2] On October 6, 1994, Nolt signed an assent to be bound to the terms of the 1994–1997 DVRCA agreement, and on August 1, 1997, he signed an assent to be bound to the 1997–2001 agreement. Respondent abided by the terms of those agreements through April 30, 2001.

In article II of both DVRCA agreements executed by Respondent, the Union was recognized as the sole and exclusive bargaining representative in the following unit:

> All journeymen roofers, helpers, foremen and all employees performing residential roofing, residential re-roofing, and slate, tile and shingle work on any job or project within the jurisdiction of the Union; excluding office clerical personnel, principals, guards and supervisors as defined in the Act.

In both agreements, the following language also appeared in article II:

> Inasmuch as the Union has submitted proof, and the Association and Employer is satisfied, that the Union represents a majority of its employees in the bargaining unit described herein, the Employer recognizes the Union as the exclusive collective bargaining agent for all employees within that bargaining unit, on all present and future job sites within the jurisdiction of the Union, unless and until such time as the Union loses its status as the employees exclusive representative as the result of an NLRB election.

On February 27, 2001, the Union sent a letter to Respondent terminating the 1997–2001 DVRCA agreement upon its expiration, and requesting Respondent negotiate a successor agreement. There was no response from Respondent. On April 30, 2001, Michael McCann, the Union's business manager, forwarded to Respondent a copy of the just negotiated 2001–2005

[2] On January 30, 2001, Nolt sent a letter to John Biasini, president of the DVRCA, advising him that Respondent was resigning its membership in the association and terminating DVRCA's bargaining authority on its behalf. It is not disputed that Respondent was never a member of the DVRCA and that Nolt was under the misapprehension that Respondent was a member when he sent this letter.

DVRCA agreement. McCann wrote, "If this agreement meets with your approval, please execute the enclosed agreement and assent page and return it to me at the below address. If you have any questions, or are in need of a copy of your original agreement, please do not hesitate to contact me." Respondent did not respond to either letter.

As previously noted, Respondent abided by the terms of the 1997–2001 DVRCA agreement through April 30, 2001, but not thereafter. By letter dated May 7, 2001, McCann demanded Respondent reinstate the terms of the agreement and agree to negotiate a successor agreement. In a letter dated May 10, 2001, counsel for Respondent advised the Union that since the bargaining relationship between Respondent and the Union was pursuant to Section 8(f), Respondent was free to repudiate the collective-bargaining agreement upon expiration, and was under no obligation to bargain with the Union for a successor agreement.

The evidence shows that with the exception of 1 month, Respondent made uninterrupted monthly payments to the Union's benefit funds from February 1995 through May 2001.[3] Respondent also reported the number employees who performed residential work and their hours. The figures for 2001 show that in January, 18 employees performed 947.5 hours of residential work; in February, 14 employees performed 1,087.5 hours; in March, 14 employees performed 1,420.5 hours; and in April, 15 employees performed 2001.25 hours. Nolt admitted under cross-examination that there was no change in his business after May 1, 2001. He also admitted employees continued to perform shingle, slate, and tile work after April 30, 2001, and that the work they performed would have fallen under the 1997–2001 DVRCA agreement.

2. Analysis

Respondent is an employer engaged in the construction industry and in the absence of evidence to the contrary, the Board presumes that the parties intended their relationship to be governed by Section 8(f), rather than Section 9(a). The burden of proving the existence of a 9(a) relationship is on the party asserting that such a relationship exists. *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); *H. Y. Floors & Gameline Painting*, 331 NLRB 304, 305 (2000). A 9(a) relationship may be established in one of two ways, either through a Board-certified election, or through an employer's voluntary grant of recognition. *J & R Tile*, 291 NLRB 1034, 1036 fn. 11 (1988). To satisfy the voluntary recognition option, the party asserting the 9(a) relationship must unequivocally show that (1) the union requested recognition as the majority or 9(a) bargaining representative of the unit employees; (2) the employer recognized the union as the majority or 9(a) bargaining representative; and (3) the employer's recognition was based on the union's having shown, or having offered to show, evidence of its majority support. These requirements may be established by the written agreement of the parties. *Staunton Fuel & Material*, 335 NLRB 717, 721 (2001). It is not necessary for the written agreement to refer explicitly to Section 9(a), provided the agreement conclusively notifies the parties that a 9(a) relationship is intended. *Nova Plumbing, Inc.*, 336 NLRB 633, 637 (2001).

In this case, it is the General Counsel who asserts the existence of a 9(a) relationship in the residential unit, and, thus, bears the burden of proof. The General Counsel submits that the language of article II in the two DVRCA agreements signed by Respondent satisfy the *Staunton Fuel* test of 9(a) status. I agree.

The first prong of the *Staunton Fuel* test is whether the language unequivocally indicates that the union requested recognition as the majority or 9(a) representative. Article II states that the Union submitted proof that it represented a majority of unit employees, the employer was satisfied with that proof, and recognition was extended. It can fairly be implied from these words that the Union demanded recognition as the majority representative, and I find the first prong is met.

The second prong is whether the language demonstrates that the employer recognized the union as the majority or a 9(a) representative. Although there is express language that the employer recognized the union, the answer to the question of whether that recognition was as the majority or 9(a) representative must be inferred from the overall context. The provision states that the employer was satisfied, by virtue of the proof submitted, that the union was the majority representative of unit employees. The only logical inference that can be drawn from these words is that the recognition that was extended to the Union was as the majority representative, and on this basis I find the second prong is met.

The third prong, that the employer's recognition was based on the union's having shown, or offered to show, evidence of its majority support, is met by the express language of the provision. In further support of the conclusion that the recognition extended to the Union was as the majority representative is the final clause of the provision that states the Union will retain that status until such time as it is lost through a Board election. This language is consistent with the statutory scheme of Section 9(a), specifically that a union enjoys a continuing presumption of majority status after contract expiration, a status it would not enjoy if the parties intended for the relationship to continue as an 8(f) relationship.

The language in the DVRCA agreement is very similar to the language considered by the Third Circuit in *Sheet Metal Workers Local 19 v. Herre Bros.*, 201 F.3d 231, 242 (3d Cir. 1999), and the court's analysis is properly applied here. The intent and content of the language implies a demand for recognition by the Union, and the provision clearly recites that the Union submitted proof that it represented a majority of its employees and that the employer was satisfied with that proof. Article II further states that the employer recognizes the Union as the exclusive representative of the employees in the bargaining unit until such time as the Union loses that status in an NLRB election. The Third Circuit concluded that the language in *Herre Bros.*, supra, which is almost identical to the language of article II, unequivocally demonstrated the parties' intent to create a 9(a) relationship. I reach the same conclusion in this case with respect to the residential unit and I find that by executing the

[3] It is agreed that the payment in May 2001 was for work performed through April 30, 2001.

DVRCA agreements containing article II, Respondent unequivocally extended 9(a) recognition to the Union. Upon the expiration of the 1997–2001 agreement between Respondent and the Union on April 30, 2001, the Union therefore enjoyed a continuing presumption of majority status.

Respondent argues, in the alternative, that if it is found that the language of article II establishes a 9(a) relationship, the Union never made an actual showing of majority support, and that in the absence of such demonstration, the recognition of the Union as the 9(a) representative, which dates back to at least 1994, was unlawful. Respondent's challenge to the Union's actual majority status, and to the lawfulness of the Union's recognition, comes long after the expiration of the 10(b) period for such a claim, and it cannot be entertained. *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411 (1960).

Respondent further argues that the filing of the decertification petition on May 23, 2001, demonstrates the Union's loss of majority support in the residential unit. This argument is without merit. It is not clear from the record for what unit the petition was filed. Assuming it was filed in the residential unit, there is no evidence of how many employees were in the unit at the time or how many signatures supported the petition. The filing of the petition therefore does not demonstrate that the Union lacked majority support as of May 23, 2001, or at any time thereafter. *Hospital Metropolitano,* 334 NLRB 555, 557 (2001).

Turning to the specific complaint allegations, it is alleged that Respondent has refused to meet and bargain with the Union since February 27, 2001, the date the Union served notice of termination of the existing agreement. Although it is true Respondent did not respond to that request for over 2 months, the evidence firmly establishes Respondent's refusal to bargain as of May 10, 2001, the date of counsel's letter advising the Union that Respondent would not negotiate a successor agreement. I, therefore, find Respondent has failed and refused to meet and bargain with the Union since May 10, 2001, in violation of Section 8(a)(5) and (1) of the Act. I further find, as alleged in the complaint, that Respondent unlawfully withdrew recognition from the Union as of that same date, in violation of Section 8(a)(5) and (1).[4]

There is no factual basis from which to conclude that there were no employees employed in the residential unit after April 30, 2001. First, although Nolt testified that after April 30, 2001, he no longer recognized the distinction between the commercial unit and the residential unit, and that he considered all of his employees as performing commercial work in the generic sense, he admitted employees continued to perform shingle, slate, and tile work after April 30, 2001, and that the work they performed would have fallen under the 1997–2001 DVRCA agreement. He further admitted there was no change in his business after May 1, 2001. Second, the benefit funds payments show that Respondent's employees had consistently performed residential work for more than 6 years and that in April 2001, employees performed 2001.25 hours of residential work. It is highly improbable that Respondent would have gone from 2001.25 hours of residential work to zero hours between May 1 and 10, 2001, the date Respondent withdrew recognition from the Union. Finally, Respondent offered no documentary support for its assertion no employees were employed in the residential unit after April 30, 2001. For these reasons, I find Respondent's argument that there were no employees employed in the residential bargaining unit after April 30, 2001, without merit.

C. The Commercial Unit

1. The facts

The Roofing Contractors' Association (RCA) and the Union have been party to a series of collective-bargaining agreements, including agreements effective from 1993 to April 30, 1997 (1993–1997 RCA agreement), May 1, 1997, to April 30, 2001 (1997–2001 RCA agreement), and May 1, 2001, to April 30, 2009 (2001–2009 RCA agreement). These agreements cover commercial work which is defined as low-slope or flat roofing done on commercial premises, excluding shingle, slate, and tile roofing. Similar to the bargaining pattern with the DVRCA, after an agreement is reached between the Union and the RCA, copies of the agreement are sent to independent employers for their acceptance and execution. At the time of the hearing there were 19 employer-members of the RCA and approximately 80 signatories to the RCA agreements.

In article III of both the 1993–1997 and the 1997–2001 RCA agreements, the Union was recognized as the sole and exclusive bargaining representative in the following unit:

> All journeymen roofers, apprentices and foremen and all employees performing commercial roofing work within the jurisdiction of the Union.

On May 24, 1994, Nolt signed an assent binding Respondent to the terms of the 1993–1997 RCA agreement. In September 1994, Respondent applied and was admitted to membership in the RCA, and Nolt signed a bargaining agent authorization. The concluding paragraphs of that authorization stated in relevant part:

> The undersigned agrees to abide by all decisions of the Association . . . provided such decisions are made in good faith and in accordance with the By-laws and Constitution of the Association.
>
> This authorization may only be revoked by written notice from the undersigned to the Association not less than ninety (90) days prior to the expiration of the current labor agreement between the Association and Union (April 30, 1993). Upon the giving of such notice to the Association, this authorization will terminate for all purposes.

In January 1997, Nolt withdrew from membership in the RCA and withdrew the RCA's bargaining authority. He also advised the Union he was exercising Respondent's option not to renew the 1993–1997 RCA agreement.

The negotiations between the RCA and the Union for the 1997–2001 RCA agreement took place from mid-March to early May 1997. Two proposals advanced by the Union were

[4] The filing of the decertification petition on May 23, 2001, occurred after Respondent's unlawful refusal to bargain and withdrawal of recognition on May 10, 2001. This is an additional reason to reject Respondent's argument that the petition evidenced the Union's loss of majority support.

the adoption of more restrictive double-breasting language, and the incorporation of 9(a) recognitional language. Richard Harvey, executive director for the RCA, testified that the members of the negotiating committee consulted with counsel and were aware of the significance of converting the existing 8(f) relationship into a 9(a) relationship. They were also confident the Union would not have any problem showing majority status in all of the member shops. The RCA took the position that it would agree to the inclusion of 9(a) language if the Union dropped the double-breasting proposal. The Union agreed, and the following language was incorporated in article III:

> Inasmuch as the Union has demanded recognition from the Employer as the exclusive bargaining representative of the Employer's employees in the bargaining unit described herein under Section 9(a) of the National Labor Relations Act, and the Employer is satisfied and has verified that the Union represents a majority of its employees in the bargaining unit described herein, the Employer hereby recognizes the Union as the exclusive collective bargaining representative of its employees on all present and future job sites within the jurisdiction of the Union, unless and until such time as the Union loses its status as the employee's exclusive representative.

In October 1997, Nolt signed an assent to be bound to the terms of the 1997–2001 RCA agreement that included the 9(a) language. In June 1999, Respondent reapplied and was readmitted to membership in the RCA, and Nolt again signed a bargaining agent authorization. The concluding paragraphs of the bargaining agent authorization that Nolt signed in 1999 contained the same revocation language as appeared in the bargaining agent authorization that Nolt signed in 1994, that is, that the authorization could only be revoked by written notice submitted not less than 90 days prior to the expiration of the current collective-bargaining agreement and that the association member was bound only to those decisions of the RCA made in good faith.

In October 1999, the Sheet Metal Workers Local 19 filed a petition seeking to represent sheet metal workers employed by Respondent and by Safe, Inc., a company owned by David Nolt's wife. At a hearing in that matter, Nolt was asked to read the language of article III relating to Section 9(a) into the record. He was then asked if he "agreed with that statement" and he said yes. After the hearing, the petition was dismissed by the Regional Director based on a finding that there were no unit employees, and the petitioner's request for review was denied by the Board. In the course of those proceedings, Respondent filed a brief with the Regional Director, and a statement in opposition to the petitioner's request for review with the Board. In both documents, Respondent made the representation that article III conferred Section 9 status on the Union. During his testimony in this case, Nolt was asked when he read the article III language at the representation hearing in October 1999, if he understood what the language meant. Nolt testified that he did not, and that he had "not a clue" as to the difference between an 8(f) agreement and a 9(a) agreement in October 1999. Nolt claimed the first time he became aware of the distinction was after the unfair labor practice charges were filed in this case.

In mid June 2000, Tom Pedrick, vice president of the Union, initiated a discussion with Harvey about a successor agreement to the 1997–2001 RCA agreement which was not due to expire for another 10 months. They talked about bargaining patterns that were emerging in other trades, and Pedrick asked if the association would be interested in a long-term agreement. Harvey asked what kind of numbers he was talking about, and Pedrick suggested $1.50 for 6 years. Harvey said he would talk to the board of directors. In the summer of 2000, there were 18 employer-members of the RCA. Eight members were on the board of directors, which also served as the negotiating committee.

After speaking with the members of the board, Harvey told Pedrick they would consider $1 a year for 8 years. The parties went on to discuss other proposals and counterproposals, although it is not clear if these discussions took place between Harvey and Pedrick, between the two negotiating committees, or both. The substance of the discussions centered around increases in travel pay and board money (payment for overnight lodging for long-distance jobs), and there was discussion about open shop companies and the difficulty the Union would have in getting them to sign an 8-year agreement. It was agreed that if a contractor had not been a signatory for 5 years, the Union could offer that contractor a 48-month agreement. A memorandum of agreement was drafted by Harvey incorporating the agreed-upon terms and ratification by the RCA membership and the union membership was required.

When asked why the RCA engaged in negotiations 10 months prior to the contract expiration, Harvey testified that the terms being offered by the Union were very favorable from management's perspective. According to Harvey, it was "an excellent offer, an outstanding opportunity to stabilize the industry and set labor costs at a very attractive level." Harvey was aware that the General Building Contractors Association and the Carpenters Union had recently reopened their agreement, added a $.25 increase and signed a new 3-year agreement. The Operating Engineers had recently settled a 4-year contract for $1.50, $1.50, $1.60, and $1.60. The electricians had settled at $2, $2, and $2. The bricklayers had settled at $1.85, $2, and $2.25. There was a BNA report that in the Midwest an employer had signed a 10-year agreement. Given these bargaining results, Harvey testified the RCA wanted to take advantage of the Union's offer. Harvey denied that the decision to negotiate early was made in order to prevent Respondent from being able to withdraw from the RCA, and he denied ever being told by Nolt to let him know when negotiations would begin for a successor RCA agreement.

When McCann was asked why negotiations took place so early, he testified that by negotiating early, contractors would know their labor costs going into the spring bidding season. McCann also testified that a lot of other union were getting $2 to $3 increases and were "pricing themselves out of the box." He felt the terms offered by the Union to the RCA would make union contractors competitive with the nonunion sector.

Harvey testified that in the course of the negotiations, Union officials told him they did not want the union membership to become aware of the terms being discussed, and they asked if

the RCA would keep the negotiations confidential. Harvey explained:

> The union had expressed their concern that word of the proposal not reach the men, for whatever their reasons were at that time. The men—the members of the union—they didn't want that out there yet . . . there was concern that if the word went to all the employers, the word would get to the men. So, the way we tried to develop it first was, well, let's discuss it with the negotiating committee first, which is the board of directors, which is what I did. After several conversations, we developed the dollar a year for eight years, $5.50 a day travel. Hey, get a memorandum drafted. Get the union's signature on it and let's vote it by the membership. . . . We need[ed] to keep it under wraps so the membership of the union didn't find out about it until the employer side had a chance to vote on ratification.

In contrast to Harvey's testimony about the Union's request to keep the negotiations "under wraps," McCann denied the negotiations were kept secret from the union membership. Pedrick, who was an active member of the Union's negotiating team, did not testify.

On July 5, Harvey faxed a memorandum of agreement incorporating the agreed-upon terms to the Union. That same day, he faxed the agreement, together with a cover letter and a ratification ballot, to the eight employer-members of the negotiating committee and requested that they return their completed ballots by July 7. The vote of the bargaining committee was unanimous in favor of ratification. By operation of a weighted voting system, the votes cast by the members of the negotiating committee made up more than 50 percent of the total number of votes held by all association members. The negotiating committee's vote in favor of ratification was therefore determinative.

Following the vote of the negotiating committee members, the balloting was extended to the ten other employer-members. According to Harvey, there was continued concern that word of the agreement would get out to the employee-members of the Union. To avoid that possibility, Harvey testified he and his staff called each owner and told them to stand by their fax machines to receive the memorandum of agreement, the ballot and a cover letter. Owners reached on July 11 were asked to return their ballots by July 13; owners reached on July 12 were asked to return their ballots by July 14. Nolt was included in the group that was reached on July 12 and he was asked to return his ballot by July 14.

In the cover letter, Harvey set forth, verbatim, the concluding two paragraphs of the bargaining agent authorization. He also notified the employers that the negotiating committee had voted unanimously in favor of ratification. He then instructed each member to vote for one of three options: acceptance of the tentative agreement, rejection of the agreement, or withdrawal of the member's bargaining agent authorization from the RCA. Regarding the last option, Harvey wrote:

> Members who wish to exercise their right to withdraw their bargaining agent authorization from the Association for the collective bargaining agreement that will become effective May 1, 2001 must do so at this time and should not vote to accept or reject the tentative agreement, but rather should use the ballot form to provide written notice to the Association of their decision to resign from Association membership. Please note that should your firm decide to exercise its right to withdraw from the Association at this time, the company will continue to be bound by the current labor agreement which expires at midnight on April 30, 2001.

Harvey testified to the reasons why members were given the third option of withdrawing from the Association:

> Under normal circumstances—if I can use the term 'normal'—negotiations wouldn't commence until after you were past the 90-day window that the bargaining agent allows you to withdraw. So, in most other instances, anybody that wanted to withdraw would have already notified us of their decision to withdraw prior to our commencing negotiations. In this instance, because of the way the negotiations occurred, [they] hadn't been afforded the opportunity—members hadn't been afforded the opportunity to withdraw and we are asking them to ratify an agreement that was developed in the course of about three weeks. So, it's pretty likely that many of them weren't aware that we were negotiating. So we wanted to make sure we preserved their right to withdraw if for some reason they didn't want to be bound by this new tentative agreement that we were proposing. . . . [A]s I indicated earlier, these negotiations for the 2001 through 2009, occurred in a somewhat unusual fashion. The members had not yet been informed and we didn't want to bind anybody to an agreement they didn't want to be bound to. . . . But at the same time, the negotiating committee didn't want to lose the opportunity to take advantage of this offer. So, we used the ballot to say to members, because the bargaining agent authorization says that you can withdraw not less than 90 days prior to the expiration, we used the ballot to inform the membership, "If you wish to withdraw, you have the opportunity to do so at this time."

Harvey was asked if the RCA had the Union's consent to allow employers to withdraw from the association, and he testified there was no such discussion.

Steven Consalvo was Respondent's vice president in the summer of 2000. Consalvo recalled speaking with Nolt about the terms of the tentative RCA agreement on two or three occasions. Nolt told Consalvo he did not have a problem with the wage increases that were in line with what other trades were getting, but he was not happy with the fact that the agreement was for an 8-year term. Nolt told Consalvo that he was nevertheless going to sign the agreement. Nolt cast his ballot on July 18, 2001, and checked the box that he accepted the terms of the agreement. By July 20, all ballots had been cast and the vote was unanimous in favor of ratification.

During the course of the negotiations, Pedrick had told Harvey that he wanted to move quickly on ratification and to have a vote of the union membership by the end of July. For reasons that are not clear in the record, the Union's ratification vote did not take place until September 26. On that day, McCann called Harvey and asked for a list of employers that the RCA represented. Harvey faxed him copies of every ballot cast by the RCA's members, including Respondent's ballot. The Union membership ratified the new agreement by a vote of 250 to

100. On October 26, 2000, the RCA and the Union executed a memorandum of agreement incorporating the new contract terms.

Between October 2000 and January 2001, Harvey and Nolt spoke on a number of occasions about various matters. There was no discussion about the balloting procedure and no mention by Nolt that he was contemplating withdrawing from the RCA.

In a letter dated January 30, 2001, Nolt advised Harvey that Respondent was resigning from membership in the RCA and terminating its delegation of bargaining authority. Nolt sent a copy of the letter to the Union. Respondent continued to abide by the terms of the 1997–2001 RCA agreement through to its date of expiration. On April 30, 2001, Nolt sent a letter to his employees advising them that as of May 1, 2001, the Company would no longer be a union contractor. Nolt testified that after he sent this notice out, approximately 10 to 12 employees left.

By letter dated May 7, 2001, McCann demanded Respondent abide by the terms of the 2001–2009 RCA agreement. In two letters dated May 9 and 10, 2001, counsel for Respondent advised the Union that Respondent was not bound to the terms of the 2001–2009 RCA because Respondent had timely withdrawn from the association. Counsel further stated that since the bargaining relationship between Respondent and the Union in the commercial unit was governed by Section 8(f), Respondent was under no obligation to bargain for a successor agreement.

Nolt gave several reasons why he voted to accept the terms of the 2001–2009 agreement rather than opting to withdraw from the RCA in July 2000. First, he claimed that when he read the ballot, he did not understand it and did not know what it was. Second, he was pressured by Harvey to cast his ballot and he did not have time to consult with an attorney. Third, Nolt did not think he would be precluded from withdrawing from the association at a later time, provided he withdrew prior to the 90-day period. Fourth, he feared that if he withdrew from the association 9 months prior to the expiration of the existing agreement, his already strained relationship with the Union would worsen and his business would have been negatively affected.[5] Nolt testified, "[T]he union would know that I am voting against the contract and that I am opting to get out. The third option [to withdraw from the RCA] was not even an option. I mean, they are asking me to give up all of my rights to the Association and tell the Union, in the middle of the summer during my busiest season, that I do not want you guys no more. I mean, I would have pretty much been out of business."

[5] Nolt's relationship with the Union was a strained one. Nolt testified the Union sent him unqualified roofers who not only did substandard work, but were disruptive on his jobsites. He described an incident on Thanksgiving weekend 2000 when McCann allegedly threatened to throw one of Nolt's employees off a roof. Both the employee involved, Harry Van Scriver, and McCann testified about this incident. Suffice it to say Van Scriver said McCann threatened him, and McCann denied it.

2. Analysis

a. The 9(a) versus 8(f) relationship

The General Counsel submits that article III of the 1997–2001 RCA agreement establishes the existence of a 9(a) relationship in the commercial unit. Applying the principles of *Staunton Fuel & Material, Inc.*, 335 NLRB 717 (2001), I find the three-prong test is met. First, it is expressly stated that the Union demanded to be recognized under Section 9(a). Second, upon the Union's demand for 9(a) recognition, the employer verified the Union represented a majority, and, upon that verification, extended recognition. It would be a strained interpretation to read this language to mean that 9(a) status was demanded, majority status was proven, but the employer agreed only to continue the preexisting 8(f) relationship. To the extent that there is any ambiguity on this point, however, it is proper to consider extrinsic evidence. *Staunton Fuel*, supra at fn. 15. Harvey testified that in the negotiations that led up to the inclusion of article III in the collective-bargaining agreement, he and the members of the negotiating committee were fully aware that they were agreeing to convert the relationship from an 8(f) relationship to a 9(a) relationship. The second prong of the test is therefore satisfied. Third, article III states the employer "verified that the Union represents a majority of its employees." The Board has found similar language sufficient to satisfy the third prong of the *Staunton Fuel* test. *Nova Plumbing, Inc.*, 336 NLRB 633 (2001). Finally, there is language that the relationship will continue until such time as the Union "loses its status" as the employee's exclusive representative. Collective-bargaining relationships in the construction industry are presumed to be 8(f) relationships unless and until the Union achieves 9(a) status. In the context of this particular provision, in which it is explicitly stated that the Union demanded 9(a) recognition, that the Union's majority status was verified, and that upon that verification recognition was extended, I find that the reference to "a loss in status" refers to a loss in 9(a) status. Considering all of the words of the provision, I conclude the union unequivocally demanded recognition as the employees' 9(a) representative and that the RCA unequivocally accepted it as such. In October 1997, Nolt signed the assent form agreeing to be bound to the 1997–2001 RCA agreement, and thereby accepted the Union's demand for 9(a) recognition. *Reichenbach Ceiling & Partition Co.*, 337 NLRB 125, 128 (2001).

I am not persuaded by Respondent's argument that Nolt did not understand the significance of the 9(a) language when he signed the assent. The first time there was an expression of a lack of understanding on his part was in this litigation. Prior to Nolt's testimony in this case, there was no inquiry by Nolt into the meaning of this provision or an expression of confusion, either contemporaneous with his signing the assent form, or at any time thereafter. Nolt was specifically asked during the course of the October 1999 representation hearing to read the 9(a) language into the record. He was then asked if he agreed with the language, and he testified that he did. Implicit in his statement that he agreed with the statement is that he understood the statement, because a person cannot agree with something he doesn't understand. In connection with that same representation case, in both the brief filed with the Regional Direc-

tor, and in the opposition statement filed with the Board, Respondent took the position that the RCA contract language conferred Section 9 status on the Union. Given these circumstances, I find Nolt's testimony in this case that he was unaware of the difference between Sections 8(f) and 9(a) when he signed the assent forms unpersuasive.

Respondent makes the same alternative argument with respect to the commercial unit as it did for the residential unit, that is, if it is found that the language of article III establishes a 9(a) relationship, the Union never made an actual showing of majority support, and that in the absence of such demonstration, the recognition of the Union as the 9(a) representative by the RCA on May 1, 1997, was unlawful. Respondent's challenge to the Union's actual majority status, and to the lawfulness of the Union's recognition, again comes long after the expiration of the 10(b) period for such a claim, and it cannot be entertained. *Machinists Local 1424 (Bryan Mfg. Co.) v. NLRB*, 362 U.S. 411 (1960).

Respondent further argues that the filing of the decertification petition on May 23, 2001 demonstrates the Union's loss of majority support in the commercial unit. As previously discussed in connection with the residential unit, it is not clear from the record for what unit the petition was filed. Assuming it was filed in the commercial unit, there is no evidence of how many employees were in the unit at the time or how many signatures supported the petition. The filing of the petition therefore does not demonstrate that the Union lacked majority support as of May 23, 2001, or at any time thereafter. *Hospital Metropolitano*, 334 NLRB 555, 557 (2001).

b. The Retail Associates analysis

In *Retail Associates, Inc.*, 120 NLRB 388 (1958), the Board stated that, in accordance with the Act's fundamental purpose of fostering and maintaining stability of bargaining relationships, it would refuse to permit withdrawal of an employer or union from an established multiemployer bargaining unit, "except upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations." The Board further stated that "where actual bargaining negotiations based on the existing multiemployer unit have begun, we would not permit, except on mutual consent, an abandonment of the unit upon which each side has committed itself to the other, absent unusual circumstances." Id. at 395. In *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 410–411 (1982), the Supreme Court noted that the *Retail Associates* rules "permit any party to withdraw prior to the date set for negotiation of a new contract or the date on which negotiations actually begin, provided that adequate notice is given. Once negotiations for a new contract have commenced, however, withdrawal is permitted only if there is 'mutual consent' or 'unusual circumstances.'" The "unusual circumstances" exception has historically been limited to only the most extreme situations, such as where the employer is subject to extreme financial pressures or where the multiemployer unit has dissipated to the point where the unit is no longer a viable bargaining entity. Id. at 410–411.

In *Chel LaCort*, 315 NLRB 1036 (1994), the Board had the opportunity to address the issue of whether a multiemployer association's deliberate failure to notify its members that negotiations had commenced constituted unusual circumstances such that would excuse a member's attempted withdrawal from the association. The Board held that there was no precedent which would support extending the "unusual circumstance" exception to situations where the multiemployer association fails, deliberately or otherwise, to inform its employer-members of the start of negotiations, and the Board declined to extend the exception to the circumstances in that case. The Board noted, however, that there was no evidence of collusion or conspiracy involving the Union in that case, and it was left to another case to decide whether or when such evidence would be sufficient to show "unusual circumstances." Id. at fn. 5.

Respondent's president Nolt did not receive notice of the start of negotiations which commenced 10 months prior to the previous agreement's expiration, and 7 months before negotiations had been conducted in the past. He was not made aware of the fact that negotiations had taken place until after the RCA and the Union had reached a total and complete agreement. Nor was he aware that an agreement had been reached until after the association, by a majority vote of the board of directors, had effectively ratified the agreement. The reason Nolt was unaware of these events was because of a secret agreement between the RCA's negotiating committee and the Union to conceal the negotiations from their respective memberships. I credit Harvey's testimony over that of McCann when Harvey testified that the RCA and the Union had agreed to "keep [the negotiations] under wraps so the membership of the Union didn't find out about it until the employer side had a chance to vote on ratification."[6] The RCA went to some lengths to accommodate the Union's request. Not only did the board of directors not advise any of the employer-members of the negotiations while they were ongoing, when Harvey and his staff faxed the terms of the agreement, the ballot and the cover letter to the employers on July 12 and 13, 2000, the employers were told to stand by their fax machines so as to ensure that word of the agreement would not leak out to employees.

Respondent argues that the secret arrangement between the RCA and the Union amounted to collusion, and that as a direct result of that collusion, Respondent was confronted with a fait accompli on July 12: a completely negotiated agreement, effectively ratified by the RCA, and subject only to ratification by the union membership. It is Respondent's position that this constituted "unusual circumstances" as contemplated in footnote 5 of *Chel LaCort*, 315 NLRB 1036 (1994).

The General Counsel concedes that Respondent was not given notice of the onset of negotiations, but argues that Respondent "learned of the bargaining shortly after it started." This is factually incorrect. Harvey credibly testified that his discussions with Pedrick began in mid-June 2000. Respondent did not learn of the negotiations until July 12, 2001, after they had been completed. The facts of this case are therefore materially different than those in *Chel LaCort*, supra. In that case, the

[6] Harvey testified he had been approached by Pedrick about this arrangement, not McCann, and Pedrick did not testify. Harvey testified he was never given a reason why the Union wanted the RCA to keep the negotiations concealed from its membership and he never asked.

employer sought to withdraw from the association after one negotiation session had been held, and before an agreement had been reached. Here, negotiations were completed by the time Respondent found out about them, and Respondent was deprived of any participation whatsoever in the bargaining process because of the RCA and Union's agreement to keep the negotiations secret from its respective memberships.

The General Counsel further argues that regardless of how the negotiations were conducted, Respondent waived any objection he may have had when he cast his ballot in favor of accepting the agreement, and that it is equitable to hold Respondent to that acceptance. I disagree. The cover letter accompanying the ballot reiterated the provision of the bargaining agent authorization stating that the authorization could only be revoked in writing "not less than ninety (90) days prior to the expiration of the current labor agreement between the Association and Union." In the very next paragraph, however, the letter stated that if the employer wanted to withdraw from the RCA, it had to indicate that by choosing the third option on the ballot. I disagree with the General Counsel that this letter was unequivocal notice to Respondent that it was "now or never." It was a mixed message, and there was an objective basis for Respondent's reliance on the RCA's reiteration of the 90-day withdrawal provision. I further disagree with the General Counsel that the equities run against Respondent on this issue. The fact is, it did not matter how Nolt cast his ballot, he was bound to the agreement at that point regardless of whether he voted for it or against it. The only contingency remaining as of July 12, 2000, was the ratification of the agreement by the union membership.

Harvey testified that the reason the third option appeared on the ballot, allowing an employer to indicate that it wished to withdraw from the RCA, was because having concealed the negotiations from its members, "we wanted to make sure we preserved their right to withdraw." It was not, however, a right the RCA could retroactively preserve. Under *Retail Associates*, supra, once negotiations in this case commenced in mid-June, Respondent was bound to the outcome of those negotiations absent mutual consent or unusual circumstances. To accept the argument that a multiemployer association can, absent mutual consent, internally preserve the rights of its members not be bound to an agreement ultimately reached between the association and the Union, undermines the stability in collective-bargaining relationships that *Retail Associates* seeks to achieve. The third option on the ballot evidenced the RCA's consent to allow employers' to withdraw at that time, but it did not constitute the mutual consent required for withdrawal under *Retail Associates*. The Union was never consulted about whether it would allow employers to withdraw from the RCA after negotiations were completed, and it never consented. Again, it did not matter how Nolt cast his ballot. This was a ratification vote, and once a majority of the votes were cast in favor of the agreement, which occurred prior to July 12, it did not matter how Nolt voted on July 18. Regardless if he had voted to accept the agreement, to reject the agreement, or to opt out of the RCA, he was bound to the agreement that had been negotiated absent mutual consent, which did not exist, or unusual circumstances.

I find unusual circumstances existed on July 12, 2000, when Nolt was made aware of the existence of the fully negotiated agreement that had been effectively ratified by a majority of the voting members of the association. The essential fact that distinguishes this case from the facts in *Chel LaCort* is that this was not merely an internal failure on the part of the RCA to communicate with its members. The RCA entered into a surreptitious agreement with the Union whereby both sides agreed to conceal negotiations from their respective member-ships. This constituted unusual circumstances.

Having found that unusual circumstances existed on July 12, 2000, the question is whether those unusual circumstances justified Respondent's withdrawal from the RCA on January 30, 2001. The General Counsel argues that assuming unusual circumstances existed in July 2000, Respondent did not indicate its intention to withdraw from the association until January 2001, and that by waiting 6 months, Respondent waived its ability to assert the claim. I find the General Counsel's argument that Respondent was obligated to act within a reasonable period of time persuasive. Reasonableness, however, should be determined in the particular circumstances of the case and I find it was not unreasonable for Respondent to act when it did. Nolt served notice of his intention to withdraw from the RCA 90 days prior to the expiration of the existing agreement. This was within the time limits prescribed by the RCA's bargaining agent authorization, and was one month prior to the notification of termination date set forth in the collective-bargaining agreement.[7] I do not view these dates as controlling deadlines by which Respondent had to act, but I do consider them in terms of assessing the reasonableness of Respondent's action. Nolt committed to abide by the terms of the existing agreement through to its expiration, which commitment he fulfilled. I conclude that Respondent acted in a sufficiently timely manner in withdrawing from the RCA on January 30, 2002, based upon the existence of unusual circumstances.

c. Respondent's refusal to bargain as an individual employer

Having found that the relationship between Respondent and the Union in the commercial unit is governed by Section 9(a) and not by Section 8(f), upon the expiration of the 1997–2001 agreement on April 30, 2001, the Union enjoyed a continuing presumption of majority status and Respondent was obligated to bargain with the Union. By refusing to bargain for a successor agreement, which refusal was conveyed to the Union by letter dated May 10, 2001, Respondent violated Section 8(a)(5) and (1).

CONCLUSIONS OF LAW

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

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

[7] Art. XXXIX, sec. 2 of the 1997–2001 agreement stated in relevant part: "This Agreement may be terminated by either party upon written notice duly given to the other party on or before March 1 of the particular calendar year when it expires."

3. The following units of employees are appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> *Residential unit*: All journeymen roofers, helpers, foremen and all employees performing residential roofing, residential re-roofing, and slate, tile and shingle work on any job or project within the jurisdiction of the Union; excluding office clerical personnel, principals, guards and supervisors as defined in the Act.
>
> *Commercial unit*: All journeymen roofers, apprentices and foremen and all employees performing commercial roofing work within the jurisdiction of the Union.

4. The Union is the exclusive representative of the employees in the residential and commercial units for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. Since on or about May 10, 2001, Respondent has violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union in the residential and commercial units.

6. Since on or about May 10, 2001, Respondent has violated Section 8(a)(5) and (1) of the Act by failing and refusing to meet and bargain with the Union as the exclusive bargaining representative of its employees in the residential and commercial units.

7. Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

An affirmative bargaining order is the traditional, appropriate remedy for an 8(a)(5) refusal to bargain with the lawful collective-bargaining representative of an appropriate unit of employees. It is appropriate in this case as a remedy for the Respondent's unlawful withdrawal of recognition from the Union. First, an affirmative bargaining order in this case vindicates the Section 7 rights of the unit employees who were denied the benefits of collective bargaining by the Respondent's unlawful withdrawal of recognition from the Union. At the same time, an affirmative bargaining order does not unduly prejudice the Section 7 rights of employees who may oppose continued union representation because its attendant status is temporary. Second, an affirmative bargaining order serves the important policies of the Act to foster meaningful collective bargaining and industrial peace. The temporary decertification bar inherent in this order removes the Respondent's incentive to further delay bargaining or to engage in any other conduct that would further undercut employee support for the Union. It also ensures that the Union will not be pressured, by the possibility of a decertification petition, to achieve immediate results at the bargaining table following the Board's resolution of its unfair labor practice charges and issuance of a cease-and- desist order. Providing this temporary period of insulated bargaining will also afford employees a fair opportunity to assess the Union's performance in an atmosphere free of the Respondent's unlawful conduct. In this regard, I note that following Respondent's notification to its employees on April 30, 2001, that it was withdrawing recognition from the Union, 10 to 12 employees left Respondent's employ. It is particularly appropriate to provide an insulated period in which the Union can rebuild its support free from the pressure of possible decertification. Third, a cease-and-desist order, alone, would be inadequate to remedy Respondent's refusal to bargain with the Union in these circumstances because it would permit a decertification petition to be filed before Respondent had afforded the employees a reasonable time to regroup and bargain through their chosen representative in an effort to reach a collective-bargaining agreement. Indeed, permitting a decertification petition to be filed immediately might very well allow the Respondent to profit from its own unlawful conduct. These circumstances outweigh the temporary impact the affirmative bargaining order will have on the rights of employees who oppose continued representation by the Union. For all of these reasons, an affirmative bargaining order, with its temporary decertification bar, is necessary to fully remedy the Respondent's unlawful refusal to bargain with the Union in the residential and commercial units. *Bridgestone/Firestone, Inc.*, 337 NLRB 133 (2001); *Caterair International*, 322 NLRB 64 (1996).

Respondent is required to, on request, recognize and bargain with the Union as the exclusive representative of the employees in the residential and commercial units concerning their terms and conditions of employment for a reasonable period of time, and to embody any understanding reached in signed agreements.

Because a number of employees left Respondent's employ after they received Respondent's April 30, 2001 letter advising them that the Company was going nonunion, Respondent should be required to mail the attached notice marked "Appendix" to all employees who left Respondent's employ on or after April 30, 2001. If there is a dispute as to the identity of these employees, the matter is best resolved at the compliance stage.

[Recommended Order omitted from publication.]