**HCL, Inc. a/k/a A.B., Inc. *and* Laborers International Union of America, AFL–CIO, Local 576.** Case 9–CA–39526

December 10, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND WALSH

On April 17, 2003, Administrative Law Judge Arthur J. Amchan issued the attached decision. The General Counsel and the Charging Party filed exceptions and supporting briefs. The Respondent filed an answering brief.

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

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

The judge dismissed allegations that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to sign a collective-bargaining agreement with the Union, and by bypassing the Union and dealing directly with its bargaining unit employees concerning their terms and conditions of employment. For the reasons set forth below, we reverse and find the violations as alleged.

Background

The facts are not in dispute.[1] In May or June, 2001, the Respondent recognized the Union as the exclusive representative of its employees pursuant to Section 8(f), and it signed a collective-bargaining agreement with the Union expiring on June 30, 2002 (the 1999–2002 agreement). On March 4, 2002, the Union sent the signatory employers, including the Respondent, a letter informing them that it wanted to enter into negotiations for a new agreement. On June 14, 2002, the Respondent and the Union signed the following Letter of Intent:

> The Employer signatory below, hereby agrees to become signatory to and be bound by the new Collective bargaining Agreement effective July 1, 2002, which is reached by and between the Kentucky Laborers' District Council, for and on behalf of Laborers' Local Union #576, which shall replace the current Collective bargaining Agreement between the parties mentioned above, and shall make all monetary adjustments retroactive back to July 1, 2002.
>
> The Employer will be protected in the continuation of work in progress and any new work to be undertaken during the existence of this Letter of Intent which shall expire at the execution of the new Collective Bargaining Agreement once it is reached.

On June 25, 2002, the Union sent a letter to all signatory contractors advising them of an amendment to article 28 of the 1999–2002 contract to be effective July 1, 2002. The parties' stipulation states that "[a]bout July 1, 2002, the Union reached a new agreement on terms and conditions of employment of the unit to be incorporated in a collective-bargaining contract which Respondent was obligated to execute based on the [June 14, 2002] 'Letter of Intent.'" The new agreement was effective from July 1, 2002, through June 30, 2005. On July 23, 2002, the Union sent a letter to all contractors, including the Respondent, who were signatory to the 1999–2002 contract, stating that "[w]e have successfully negotiated a new Building Agreement." The Union requested that each contractor sign and return a signature page. When the Respondent did not do so, the Union sent another letter on August 1, 2002, repeating its request. Since August 1, the Respondent has failed and refused to execute the 2002–2005 agreement. In early August 2002, the Respondent, without notice to and bargaining with the Union, held a meeting with its unit employees during which it offered them new wages and other benefits.

Applying *James Luterbach Construction Co*., 315 NLRB 976 (1994), the judge dismissed the complaint. The judge stated that under *Luterbach*, in order to find that an 8(f) employer is bound by the results of multiemployer bargaining, "the employer must be part of the multiemployer unit, and second, the employer must take a distinct affirmative step, recommitting to the union that it will be bound by the upcoming or current multiemployer negotiations." The judge found that the General Counsel failed to satisfy either prong of the *Luterbach* test. He found "no evidence that HCL was a member of a multiemployer bargaining unit or that HCL had given any employer or group of employers authority to negotiate with the Union on its behalf." He further found that the June 14, 2002 Letter of Intent "is not the sort of affirmative step contemplated by *Luterbach*." He therefore concluded that the Respondent was not obligated to sign the 2002–2005 collective-bargaining agreement.

Based on his conclusion that the Respondent was not bound to the 2002–2005 agreement, the judge did not address the direct dealing allegation.

In their exceptions, the General Counsel and the Union argue that the June 14, 2002 Letter of Intent binds the Respondent to the new agreement. They contend that all the conditions of the letter have been met: (1) the new collective-bargaining agreement is effective July 1, 2002;

[1] The case was submitted to the judge on a stipulated record.

(2) the new agreement was reached by and between the Kentucky Laborers District Council for and on behalf of Laborers Local Union No. 576; and (3) the new agreement replaces the 1999–2002 agreement. Because the Respondent's legal obligation to adhere to the letter of intent is not dependent on its membership in a multiemployer group, they argue that *Luterbach* is not controlling. Rather, the applicable precedent is *Cowboy Scaffolding,* 326 NLRB 1050 (1998), a case in which the Board found that an individual employer who signed a "contract stipulation" expressly agreeing to be bound by "all subsequent agreements" between the union and an employer association, was bound to those subsequent agreements after they came into existence.

The General Counsel and the Union further argue that the Respondent violated the Act by bypassing the Union and bargaining directly with the employees regarding their terms and conditions of employment when, in August 2002, at a time when the Union was the limited exclusive bargaining representative of the employees, and the new 2002–2005 collective-bargaining agreement was in place, the Respondent communicated directly with its represented employees concerning changes in their wages and benefits.

Analysis

Section 8(d) of the Act requires the parties to a collective-bargaining relationship, once they have reached agreement on the terms of a collective-bargaining agreement, to execute that agreement at the request of either party. *Sanitation Salvage Corp*., 342 NLRB 449 (2004). The failure to do so is a violation of Section 8(a)(5) of the Act. Id.

By signing the June 14, 2002 Letter of Intent, the Respondent expressly agreed to the terms and conditions of the collective-bargaining agreement that would subsequently be negotiated as the successor to the parties' 1999–2002 agreement. Thus, the parties stipulated that on June 14, 2002, the Respondent signed a "Letter of Intent" "agreeing to be bound by a new collective-bargaining contract being negotiated by the International and its District Council on behalf of the Union to replace the July 1999 through June 30, 2002 contract." The parties further stipulated that "[a]bout July 1, 2002, the Union reached a new agreement on terms and conditions of employment of the Unit to be incorporated in a collective-bargaining contract *which Respondent was obligated to execute based on the [June 14, 2002] 'Letter of Intent.'"* (Emphasis added.) Based on this stipulation, the Respondent has admitted that the 2002–2005 agreement was the new agreement and that it was obligated to execute that agreement by virtue of the Letter of Intent. "It is well settled that stipulations of fact fairly entered into are controlling and conclusive." *Mobil Exploration & Producing U.S., Inc. v. NLRB*, 200 F.3d 230, 234 (5th Cir. 1999).

The parties' stipulation is consistent with Board law. In *Cowboy Scaffolding*, supra, the Board found that an individual employer's agreement to be bound by "all subsequent agreements between the Association and the Union" was sufficient to bind the employer to successor agreements between the Union and the Association. *Luterbach*, relied on by the judge, is inapposite.[2] The issue in *Luterbach* was "whether an 8(f) employer, in a multiemployer unit, is bound, by inaction, to the successor multiemployer contract." 315 NLRB at 979. This is not a case in which the respondent was a member of a multiemployer bargaining unit. Nor is this a case of an employer who did nothing to bind itself to a successor 8(f) agreement. Rather, similar to the employer in *Cowboy Scaffolding*, the Respondent is an individual employer in a single employer unit who had agreed as an individual employer to sign the 1999–2002 agreement and who subsequently signed a letter of intent expressly obligating itself to also be bound by any agreement that would replace the 1999–2002 agreement.[3] The Respondent does not dispute that such a replacement agreement was reached, and that the 2002–2005 agreement is that replacement agreement. By virtue of its signature on the Letter of Intent, the Respondent is obligated to execute and abide by the 2002–2005 agreement until its expiration. Its failure to do so violated Section 8(a)(5) and (1).

As to the direct dealing allegation, the parties stipulated that the Union is the limited exclusive collective-bargaining representative of the unit from late May or early June 2001 to "the expiration of the current [2002–2005] agreement." Because the Respondent was bound to the 2002–2005 collective-bargaining agreement, the Union was the employees' collective-bargaining representative in August 2002, when the Respondent met directly with the employees and offered them new wages and benefits. At that time, the employees' terms and conditions of employment were controlled by the 2002–2005 collective-bargaining agreement. During the term of an 8(f) agreement, an employer is obligated to deal with the Union, and is not free to deal with the employees over their terms and conditions of employment. See *Wilson & Sons Heating*, 302 NLRB 802, 803–804, 814

[2] *Luterbach* held that the rules set forth in *Retail Associates, Inc.*, 120 NLRB 388 (1958), limiting withdrawal from multiemployer bargaining units, do not apply to 8(f) bargaining relationships. However, the instant case does not involve withdrawal from a multiemployer bargaining unit.

[3] Such agreements are sometimes referred to as "me too" agreements.

(1991) (employer violated Section 8(a)(5) by dealing directly with unit employees regarding changes in terms and conditions of employment during the term of an 8(f) agreement), enf. denied on other grounds 971 F.2d 758 (D.C. Cir. 1992)). Accordingly, in August 2002, when the Respondent met with the employees directly and offered them new wages and benefits, the Respondent violated Section 8(a)(5) and (1) of the Act.

## CONCLUSION OF LAW

By refusing to sign the July 1, 2002–June 30, 2005 collective-bargaining agreement with the Union, and by bypassing and dealing directly with its bargaining unit employees concerning their terms and conditions of employment, the Respondent has failed and refused to bargain collectively with the limited exclusive collective-bargaining representative of its employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take 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 failing and refusing to sign the 2002–2005 collective-bargaining agreement, we shall order the Respondent to sign and honor the terms and conditions of that agreement and any automatic renewal or extension of it. In addition, we shall order the Respondent to make whole the unit employees for any loss of earnings and other benefits they may have suffered as a result of the Respondent's failure to execute the 2002–2005 agreement. The Respondent shall also be required to make all contractually required benefit payments or contributions, if any, that have not been made since July 1, 2002, including any additional amounts applicable to such delinquent payments in accordance with *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979). Further, the Respondent shall reimburse unit employees for any expenses ensuing from its failure to make such required payments or contributions, 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. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).[4]

[4] To the extent that an employee has made personal contributions to a fund that are accepted by the fund in lieu of the employer'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.

## ORDER

The National Labor Relations Board orders that the Respondent, HCL, Inc. a/k/a A.B., Inc., Louisville, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to execute the July 1, 2002–June 30, 2005 collective-bargaining agreement, and any automatic renewal or extension of it.

(b) Dealing directly with unit employees rather than with the Union as the limited exclusive collective-bargaining representative of the employees in the following unit, by offering them new wages and benefits. The unit is:

> All employees of Respondent described in article XI of the collective-bargaining agreement effective July 1, 1999.

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

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

(a) Execute the July 1, 2002–June 30, 2005 collective-bargaining agreement that replaced the Respondent's July 1, 1999–June 30, 2002 collective-bargaining agreement with the Union.

(b) Honor the terms of the 2002–2005 collective-bargaining agreement during the term of the agreement and any automatic renewal or extension of it, including by paying contractually required wages and fringe benefits.

(c) Make whole, with interest, the unit employees for any loss of earnings and other benefits they may have suffered as a result of its failure to execute the 2002–2005 agreement, and any automatic renewal or extension of it, as set forth in the remedy section of this decision.

(d) Make all contractually required fringe benefit fund contributions, if any, that have not been made on behalf of unit employees since July 1, 2002, and reimburse unit employees for expenses ensuing from its failure to make the required payments in the manner set forth in the remedy section of this decision.

(e) 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.

(f) Within 14 days after service by the Region, post at its facility in Louisville, Kentucky, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 9, 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 August 1, 2002.

(g) 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.

## 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 a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to execute the July 1, 2002–June 30, 2005 collective-bargaining agreement, and any automatic renewal or extension of it.

WE WILL NOT deal directly with unit employees rather than with the Union, as the limited exclusive collective-bargaining representative of the employees in the following unit, by offering them new wages and benefits. The unit is:

> All our employees described in article XI of the collective-bargaining agreement effective July 1, 1999.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL execute the July 1, 2002–June 30, 2005 collective-bargaining agreement that replaced our July 1, 1999–June 30, 2002 collective-bargaining agreement with the Union.

WE WILL honor the terms of the 2002–2005 collective-bargaining agreement during the term of the agreement and any automatic renewal or extension of it, including by paying contractually required wages and fringe benefits.

WE WILL make whole, with interest, the unit employees for any loss of earnings and other benefits they may have suffered as a result of our failure to execute the 2002–2005 agreement, and any automatic renewal or extension of it.

WE WILL make all contractually required fringe benefit fund contributions, if any, that have not been made on behalf of unit employees since July 1, 2002, and WE WILL reimburse unit employees for expenses ensuing from our failure to make the required payments in the manner set forth in the remedy section of the Board's decision.

### HCL, INC. A/K/A A.B., INC.

*Julius U. Emetu, II, Esq.,* for the General Counsel.
*Dennis Brinley, Shawn Brinley, Pro Se,* of Louisville, Kentucky, for Respondent.
*Irwin H. Cutler, Jr., Esq. (Segal, Stewart, Cutler, Lindsay, Janes & Berry, PLLC),* of Louisville, Kentucky, for the Charging Party.

## DECISION

### STATEMENT OF THE CASE

ARTHUR J. AMCHAN, Administrative Law Judge. On April 9, 2003, this case was submitted to me on a stipulated record. The charge was filed August 16, 2002, and the complaint was issued November 26, 2002. The General Counsel alleges that Respondent, HCL, Inc., violated Section 8(a)(5) and (1) of the Act by refusing to sign a collective-bargaining agreement with the Union, refusing the adhere to the terms of this agreement and dealing directly with its bargaining unit employees, instead of the Union, their collective-bargaining representative. After considering the briefs filed by the General Counsel,[1] Respondent and Charging Party, I make the following

[5] 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] I have considered both the General Counsel's original and substitute brief.

## FINDINGS OF FACT

### I. JURISDICTION

The Respondent, HCL, Inc., a corporation, is engaged in the construction industry as an asbestos abatement contractor in Louisville, Kentucky. At its Louisville facility, Respondent annually purchases and receives goods valued in excess of $50,000 from customers located outside of the Commonwealth of Kentucky. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union, Laborers Local 576, is a labor organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

In May or June 2001, Respondent recognized the Union as the exclusive collective-bargaining representative of its employees pursuant to Section 8(f) of the Act. Thereafter, HCL signed a collective-bargaining agreement with the Union, which expired on June 30, 2002. On March 4, 2002, the Union sent to signatory contractors, including HCL, a letter informing each contractor that it desired to enter negotiations for a new agreement.

On June 14, 2002, Shawn Brinley, on behalf of HCL, and Robert Strahan, business manager of the Union, signed the following document on the Union's letterhead:

*LETTER OF INTENT*

> The Employer signatory below, hereby agrees to become signatory to and be bound by the new Collective Bargaining Agreement effective July 1, 2002, which is reached by and between the Kentucky Laborers' District Council, for and on behalf of Laborer's Local Union # 576, which shall replace the current Collective Bargaining Agreement between the parties mentioned above, and shall make all monetary adjustments back to July 1, 2002.
>
> The Employer will be protected in the continuation of work in progress and any new work to be undertaken during the existence of this Letter of Intent which shall expire at the execution of the new Collective Bargaining Agreement once it is reached.
>
> This June 14 letter does not indicate that HCL was authorizing any other employer, group of employers, employer association or other agent to bargain with the Union on its behalf.

On June 25, 2002, the Union sent a letter to all signatory contractors advising them of changes from the 1999–2002 contract and the agreement that it desired all contractors to sign. This change, which concerned the elimination of the employers' contribution to the Laborers'-Employers Cooperation and Education Trust (LECET), appears to also have been a change to an earlier draft of the 2002–2005 collective-bargaining agreement.

On July 23, the Union sent a letter to all contractors who were signatory to the 1999–2002 agreement informing these employers that, "[w]e have successfully negotiated a new Building Agreement." This letter does not indicate the party or parties with whom the Union negotiated such agreement. Each employer was asked to sign a signature page and fax it to the Union. Respondent did not do so. The Union sent HCL a follow-up letter on August 1, 2002, repeating its request that it sign the signature page of the July 1, 2002–June 30, 2005 collective-bargaining agreement. Shortly thereafter, Respondent held a meeting with its employees, who had been unit members under the prior contract. During this meeting HCL discussed wages, benefits and working conditions with its employees without notifying the Union.

### Analysis

The Board decision controlling the outcome of this case is *James Luterbach Construction Co.,* 315 NLRB 976 (1994), which is not cited in either of the General Counsel's two briefs or in the Charging Party's brief. An employer, such as HCL, which has an 8(f) relationship with a union and signs a collective-bargaining agreement with it, must adhere to that agreement until it expires. However, upon expiration of a collective-bargaining agreement, an 8(f) employer's obligations are different than an employer whose relationship is governed by Section 9 of the Act (i.e., where it has been established that the Union enjoys the majority support of the bargaining unit employees).

A Section 9 employer may be bound to a successor collective-bargaining agreement simply by inaction, *Retail Associates,* 120 NLRB 388 (1958). Thus, where a multiemployer association bargains for a successor contract and a member of that association, whose relationship with the union is governed by Section 9, takes no action, it is bound by the successor agreement. However, the Board held in *Luterbach* that in the 8(f) context, for an employer to be bound by multiemployer bargaining, there must be more than inaction, i.e., the absence of a timely withdrawal from the employer bargaining association.

The Board enunciated a two-part test to be used in deciding whether an 8(f) employer has obligated itself to be bound by the results of multiemployer bargaining. First, the employer must be part of the multiemployer unit, and second, the employer must take a distinct affirmative step, recommitting to the union that it will be bound by the upcoming or current multiemployer negotiations, 315 NLRB 976, 979–980.

The General Counsel has failed to establish that HCL was bound to sign and adhere to the Union's 2002–2005 collective-bargaining agreement. First of all, the General Counsel has failed to satisfy the first step of the *Luterbach* test. There is no evidence that HCL was a member of a multiemployer bargaining unit or that HCL had given any employer or group of employers authority to negotiate with the Union on its behalf.

The General Counsel relies on *Cowboy Scaffolding,* 326 NLRB 1050 (1998), a case in which the Board found an 8(f) employer bound to a successor agreement by its failure to repudiate the contract in a timely fashion. The *Luterbach* decision is not discussed in *Cowboy Scaffolding* and appears to this judge somewhat inconsistent. However, the instant case is distinguishable from *Cowboy Scaffolding* in that the Union notified HCL that it intended to negotiate a new agreement. Thus, under *Luterbach*, I conclude that in order for HCL to be bound by the new agreement it must have taken affirmative

steps to extend its collective-bargaining relationship beyond the expiration date of the 1999–2002 contract.

I find that the June 14, 2002 letter is not the sort of affirmative step contemplated by *Luterbach*. The letter implies that the negotiations involve a party representing interests similar to Respondent's. There is no evidence that any such party took part in negotiations with the Union. Further, HCL took no action after the expiration of the 1999–2002 collective-bargaining agreement to extend its relationship with the Union. Neither the General Counsel nor the Charging Party argues that the June 14, 2002 letter obligated HCL to sign the collective-bargaining agreement pursuant to contract law principles. I therefore decline to address such a theory.

[Recommended Order for dismissal omitted from publication.]